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## letter from the editor

Dear *CPER* Readers:

I probably always say this, but *this* issue of *CPER* really is jam-packed with exciting, in-depth articles that track a broad range of recent developments. In fact, it's our largest issue ever. One of our feature stories, by Ed Eames, Adjunct Professor of Sociology at CSU Fresno, concerns a topic never before covered in our pages — the scope of reasonable accommodation of guide dogs in the workplace. And, our friend Greg Dannis provides us with another of his thoughtful examinations of the bargaining process and his focus on core values.

The ongoing jurisdictional confrontation between PERB and the superior courts in MMBA strike situations is again in the news. I've given you an analysis of the recent Court of Appeal decision in *City of San Jose*, while Jeff Sloan's main article gives management's perspective on the wisdom of the court's opinion. Look forward to hearing the union's perspective on the jurisdictional dispute from Margot Rosenberg of the Leonard Carder law firm in the June issue.

The impact of current economic difficulties is evident in the Local Government, Public Schools, and Higher Education sections. No surprise there. And, in the Discrimination section, there are lots of new developments, including two ground-breaking U.S. Supreme Court cases.

Bargaining updates are front and center in the State section, with CCPOA again taking the offensive. PERB's adoption of fundamental legal principles applicable to the Trial Court Act is noteworthy. Alice Dowdin Calvillo, PERB's most recent board member, is introduced in News from PERB.

Arbitrators' disclosure requirements, recent DOL statistics on union membership, new benefits to military personnel and their families, more on PERB's revocation card decisions. Believe it or not, it's all in this issue.

As I *know* I've said before, no other publication takes care of its public sector readers like *CPER*.

Sincerely,



Carol Vendrillo  
CPER Editor

# The Collision Between Religiously Motivated Anti-Gay Speech and Employer Harassment Policies

*Vicki Laden*

“Speech Police, Riding High in Oakland.” So began George Will’s editorial in the June 24, 2007, *Washington Post*. It continues: “*Marriage* is the foundation of the *natural family* and sustains family values. That sentence is inflammatory, perhaps even a hate crime.”

“At least it is in Oakland, California. That city’s government says those words, italicized here, constitute something akin to hate speech and can be proscribed from the government’s open e-mail system and employee bulletin board.”

Will went on to state that “the ineffable U.S. Court of Appeals for the Ninth Circuit has ratified this abridgement of First Amendment protections.”

*Vicki Laden is the  
Supervising Deputy  
Attorney for the  
City of Oakland.*

What prompted George Will to denounce the “free speech police in Oakland?” A lawsuit filed by the Good News Employee Association (GNEA) against the city and its officials that was resolved in favor of the city by a three-member Ninth Circuit panel which decided the case in favor of the “speech police.”<sup>1</sup>

How did Oakland earn Will’s ire? By enforcing its harassment policy and taking down a homophobic leaflet posted outside the cubicle of a long-time city building inspector who is a lesbian and had complained about it. Although, as public employees, the GNEA plaintiffs asserted First Amendment claims, Title VII of the Civil Rights Act of 1964’s religious accommodation provision has undermined claims filed by private sector employees seeking the right to condemn homosexuality in the workplace.

## ***Job Protections for Lesbian and Gay Employees***

In 33 states, individuals can be fired on the basis of sexual orientation. Despite the absence of statutory job protection, many, if not most, U.S. businesses provide job protections and equal benefits to gay and lesbian employees, and the

number climbs each year. In 2007, 195 Fortune 500 companies earned the top rating from the advocacy group, Human Rights Campaign, up from 138 businesses the preceding year.<sup>2</sup> Ninety-eight percent of the major businesses surveyed provided job protection based on sexual orientation. Strong support for job protections exists in the public sector. Twenty states and the District of Columbia, and at least 171 cities and towns, ban discrimination based on sexual orientation.<sup>3</sup> Oakland, which extends equal benefits to domestic partners and requires its contractors to offer such benefits, is one of them.

California's Fair Employment and Housing Act<sup>4</sup> has expressly prohibited discrimination based on sexual orientation for many years. But California's statutory protection against harassment goes further than most. Of particular significance for this discussion, it imposes a duty on employers to "take all reasonable steps to prevent discrimination and harassment from occurring," a provision that, if violated, supports a separate cause of action. Though narrower than the affirmative defense provided by *Burlington Industries, Inc. v. Ellerth*<sup>5</sup> and *Faragher v. City of Boca Raton*,<sup>6</sup> California courts permit employers to avert liability for a supervisor's harassment if using employer-provided internal remedies to report and rectify harassment would have prevented at least some of the employee's claimed damages from occurring.<sup>7</sup>

Like most California employers, Oakland complies with its obligation to take all reasonable steps to prevent harassment by enforcing a policy that prohibits not only legally cognizable harassment — harassment that is severe and/or pervasive — but conduct that, by itself, is insufficient to constitute actionable harassment but may nonetheless contribute to the creation of a hostile environment. So, for example, Oakland's policy<sup>8</sup> prohibits stereotyping, epithets, slurs, expressions of contempt or hostility, mimicry, denigration, disparagement, jokes, ridicule, and derogatory or demeaning comments (even if not directed at a specific person). It calls for more severe treatment if the

conduct is based on a person's protected characteristic or status (race, gender, sexual orientation, gender identity, etc.). An employee who uses the word "fag" may be disciplined even though a single use of the word may not be actionable.

### ***Events That Led to the Lawsuit***

The conflict that resulted in the lawsuit began on National Coming Out Day, October 11, 2002, when City Councilperson Danny Wan sent out a celebratory message, using the city's internal email to which elected officials have access. Hostile responses to Wan's email prompted gay and

lesbian employees to form a support group. African-American employees and Latino employees had previously formed groups for support.

Just prior to the election in November 2002, Regina Rederford and Robin Christy, two employees at the Community and Economic Development Agency (CEDA), circulated a flyer titled, "Family Values Voter Information," at their agency. The flyer discussed the position of candidates on issues such as domestic partners' benefits, "public schools teaching homosexuality as an acceptable lifestyle," and "marriage [as] only one man and one woman." They gave the flyer to coworkers and placed it in the women's bathroom, where it was discovered by a lesbian building inspector, Judith Jennings. Jennings felt

uncomfortable because the leaflet, in her view, suggested that people should not vote for anyone who believed homosexuality was acceptable. She complained to her supervisor. After her complaint, someone placed an anti-abortion, anti-gay email written in Spanish on her desk. Three weeks later, she discovered a new flyer on the bulletin board just outside her cubicle. That flyer, written by Rederford and Christy, who had founded GNEA in reaction to Councilperson Wan's email and the formation of the gay and lesbian employee support group, gave rise to the lawsuit.

*The conflict began on  
National Coming Out  
Day when a city  
councilperson sent out  
a celebratory message  
using the city's inter-  
nal email system.*

The title of the flyer was, “Preserve Our Workplace with Integrity,” and it invited city employees to contact the two GNEA members if they “would like to be a part of preserving integrity in the Workplace.” The flyer stated:

Good News Employee Association is a forum for people of Faith to express their views on the contemporary issues of the day. With respect for the Natural Family, Marriage and Family Values.

If you would like to be a part of preserving integrity in the Workplace call Regina Rederford @ \_\_\_\_\_, Robin Christy @ \_\_\_\_\_.

The documents and testimony produced in the course of litigation supported the city’s construction of the leaflet. Both employees testified that the meaning of their leaflet was “self-evident.” The “Natural Family,” a term with its own website, “is defined as a man and a woman, and their children by birth or adoption.” Plaintiffs testified that the phrase “Natural Family” was capitalized to exclude lesbian and gay families; “Marriage” meant a “union between a man and a woman.” They explained that the term “Family Values” was used to convey their belief that homosexuality “is wrong.” “Preserve Our Workplace with Integrity” meant “to keep [the workplace] from spoiling, to keep it from rotting, to keep it from deteriorating...The workplace can go down in morality and ethically and in other ways.” Homosexuality can make people sick and this sickness can “spill over” into the workplace, where they “recruit by propagating the idea.” According to Rederford, “Preserving integrity in the workplace” meant that “[i]ntegrity in the workplace could be...avoiding sodomy in the workplace.” When asked what “With respect for the natural family, marriage and family values” meant, she replied that it meant to put the “natural family...on a pedestal. I mean, you honor it. You honor the natural family. I mean, it’s the foundation of civilization.”

*Rederford said that  
Hitler had been  
gay, as were many  
of his cohorts.  
She testified that  
homosexuality was  
part of the Nazi creed.*

She testified that gay and lesbian employees were like “weeds” in the workplace.

The testimony continued:

Q. Does Judith Jennings’ lesbianism affect the workplace at all? Does her being a lesbian have an effect on the workplace?

A. To preserve. The word preserve.

Q. — to preserve the integrity of the workplace. And you want to — you don’t want the weeds to start to get in there and grow. You want to protect the workplace from some of the immoral things going on

out there. The negative impact that those can have in the workplace?

A. Yeah, I was actually talking about individual weeds, but they would manifest and spread to the whole garden.

Open about her sexual orientation, Jennings was upset when she discovered the GNEA flyer posted near her desk, above the copy machine she used. She considered her female partner to be her “family.” Jennings asked Rederford, with whom she worked regularly, about the flyer. Rederford told her that GNEA was a group to support the “natural family.” Jennings, thinking that she might try to persuade GNEA members that homosexuality was normal, told

Rederford that she wanted to go to a GNEA meeting. Rederford responded by telling Jennings that Hitler had been gay, as were many of his cohorts. At her deposition, Rederford testified that homosexuality was part of the Nazi creed. Distressed by the flyer and her conversation with Rederford, Jennings contacted the City Attorney’s Office to file a complaint against what she perceived to be anti-gay harassment.

The city investigated. It discovered that copies of the flyer were posted near Jennings’ workspace, in a coffee room, and in the women’s bathroom. Supervisors felt that the leaflet’s display was having a negative impact on Jennings’ ability to

perform her job. After reviewing the investigation and concluding that the leaflet violated the city's harassment policy, as well as city and state laws, the city asked a supervisor to remove the flyers. Neither employee who posted the flyers was disciplined. Rather, the supervisor explained why the leaflets had been removed and invited the employees to submit a new flyer without discriminatory language.

### ***The Lawsuit***

Assisted by the Pro-Family Law Center and the United States Justice Center, which challenged San Francisco's gay marriage initiative, Rederford and Christy brought suit against the city, a former city manager, and a CEDA manager who had ordered the flyer's removal. The plaintiffs' complaint included ten causes of action, including three alleging violations of First Amendment Clauses: Free Exercise, Assembly, and Free Speech. Because the plaintiffs failed to properly serve the city, it was dismissed from the suit. The two officials who remained defendants asserted qualified immunity.<sup>9</sup>

The defendants sought dismissal of the plaintiffs' Free Exercise Clause claim because the complaint failed to allege that the city's actions actually interfered with plaintiffs' free exercise of religious beliefs: the city had restricted only the posting of the flyer, which contained no discussion of religion. Even if the plaintiffs had alleged actual impairment of their free exercise of religion, the city argued that the claim warranted dismissal for failure to allege a sufficiently substantial impairment that outweighs the city's interest in preventing discrimination and harassment. Moreover, the city's policy undergirding its action was neutral and not based on religious criteria.<sup>10</sup> Judge Vaughn Walker, who formerly had sued the "Gay Olympics" on behalf of the U.S. Olympic Committee during his career as a corporate lawyer, dismissed all but one of the plaintiffs' claims.<sup>11</sup>

As to the plaintiffs' Free Exercise claim, the court reasoned that the plaintiffs had not alleged interference with their religious beliefs. It agreed that the Free Exercise Clause does not relieve individuals of the obligation to comply with valid and neutral laws; the city's policy was "valid and neutral." In refusing to dismiss the free speech claim, however, the court found that the flyer touched on a matter of public concern. While concluding that the city had a strong interest in preventing discrimination against its gay and lesbian employees, the court expressed skepticism that the content of the leaflet would make disruption in the workplace likely.

Following discovery, the defendants sought dismissal of the plaintiffs' free speech claim. A government employee's challenge to the conduct of a government employer is analyzed under the *Pickering* test.<sup>12</sup> Under *Pickering*, the First Amendment is implicated only if the speech touches on a matter of public concern.<sup>13</sup> If it does, courts apply a balancing test: the "employee's interest in expressing herself...must not be outweighed by any injury the speech could cause to the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

The city argued that the flyer was posted in response to the city's decision to allow gay and lesbian employees to

use the city's email to announce meetings, while restricting the plaintiffs' use, and thus was an internal workplace dispute. Even if the plaintiffs' speech was seen to involve a public concern, the city maintained that the plaintiffs had only a minimal interest in posting the flyer: they could disseminate their views outside the workplace, on breaks, or at lunch. They were offered the opportunity to post by email or flyer the name of the organization, and the time and location of the GNEA meeting, without discriminatory comment. Because the city's prohibition had a restricted scope, the employees' interest in speech was concomitantly reduced.

The city asserted that by contrast, its interest in restricting discriminatory speech about its lesbian and gay employees was strong, far outweighing the plaintiffs' interest in post-

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ing the flyer. Under the FEHA, at Gov. Code Sec. 12940(d), it is unlawful “[f]or any employer...to print or circulate or cause to be printed or circulated any publication...that expresses, directly or indirectly, any limitation, specification, or discrimination as to...sexual orientation, or any intent to make any such limitation, specification or discrimination.” Section 12940(j) prohibits discrimination and harassment based on sexual orientation. “Harassment of an employee...by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action.” The Supreme Court recognized in *Harris v. Forklift Systems, Inc.*,<sup>14</sup> that a “discriminatorily abusive work environment...can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.”

The city further argued that it had a strong interest in maintaining a harmonious work environment, avoiding interference with work, and preserving workplace relationships necessary to serve the public. Since “[i]nterference with work, personnel relationships, and the speaker’s job performance can detract from the public employer’s functioning[,] avoiding such interference can be a strong state interest.”<sup>15</sup> For example, in *Greer v. Amesqua*,<sup>16</sup> the Seventh Circuit held that the interest of a firefighter in distributing anti-gay literature and engaging in other speech protesting homosexuality based on his religious beliefs was outweighed by the government’s interest as an employer in government efficiency and workplace morale.

On February 14, 2005, the court granted summary judgment on the plaintiffs’ free speech claim, holding that the individual defendants were shielded by qualified immunity.<sup>17</sup> It described the remaining issue in *Pickering* — “whether defendants have [shown] that their interests as employers outweigh plaintiffs’ interests in making the speech” — as

“close.” The plaintiffs’ interest in speech was “slight,” given that the limitation on speech was “quite limited: plaintiffs were prohibited from posting a particular flyer on an office bulletin board.” Other avenues for dissemination of views remained open. But the court viewed the city’s interest as “modest.” Jennings was, in the court’s view, only “disturbed” by the leaflet, leading it to question whether “the particular sensitivity of a single coworker amounts to cognizable workplace disruption under *Pickering*.” (“...a *Pickering* disruption writ small.”)

The court ultimately applied the *Pickering* test in the city’s favor, concluding that the plaintiffs’ interest in “this particular channel of communication is vanishingly small.” The city’s response to Jennings’ complaint, removal of the flyer without any adverse employment action against the plaintiffs, was a “narrowly tailored and proportionate response to the actual workplace disruption, or, perhaps better described, distraction.” The city had an “administrative interest” in “avoiding situations that distract employees from their jobs,” and that supported removal of the leaflet.

*The city had a ‘more substantial interest in maintaining the efficient operation of their office than the appellants had in their speech.’*

### **The Ninth Circuit Appeal**

A three-judge panel upheld dismissal of the plaintiffs’ free speech claim.<sup>18</sup> It agreed that interference with the plaintiffs’ free speech rights had been “minimal” and the city had a “more substantial interest in maintaining the efficient operation of their office than the appellants had in their speech.” Rejecting the plaintiffs’ challenge to the city’s policy as “unconstitutionally vague and broad,” it found the “entire paragraph of examples” illustrating its reach ensured that employees would have “little difficulty” understanding the scope of its prohibitions. The Supreme Court denied the petitioners’ writ of certiorari.

### ***Proceed with Caution***

Although courts have been largely unsympathetic to claims that laws and policies protecting lesbian and gay employees and clients intolerably burden religious beliefs or warrant accommodation, an employer who receives notice that a conflict exists between an employee's religious beliefs or practices and job requirements must proceed cautiously. In most cases, though not all, employers must engage employees who claim entitlement to reasonable accommodation in a discussion process similar to, though not as expansive as, the interactive process required by the Americans with Disabilities Act. Just as in accommodation of disability, the employee may, but is not required to, propose an accommodation that will resolve the conflict between religious practices and job duties.

When all reasonable accommodations would impose an undue hardship, however, an employer is absolved of responsibility to engage in a futile exercise directed at accommodation. Such a situation occurs when accommodation would conflict with other legal obligations of employers or when it would cause disruption among employees. An employer is not required to permit conduct that demeans or degrades gay or lesbian employees, such as expressions condemning homosexuality.

Nor need an employer exempt employees from training that affirms the equality of lesbian and gay employees in the workplace. First, it is unlikely that "offended" employees would be able to demonstrate that the training conflicts with their bona fide religious belief; its goal is to foster appropriate workplace behavior in conformity with a legally required standard rather than change such employees' views. Second, the FEHA's requirement that an employer "take all reasonable steps to prevent harassment from occurring" strongly supports making such training mandatory for all employees, including non-supervisory employees.

Carefully crafted guidelines for addressing accommodation concerns and requests, and ensuring that they are promptly transmitted to an individual with specialized knowledge in the area of religious accommodation, will help ensure that employers proceed with the necessary caution through the thorny issues that may arise when employees

seek to invoke Title VII in support of exemption from anti-harassment training or protections covering gay and lesbian employees in the workplace. \*

1 *Good News Employee Assn. v. Hicks* (9th Cir. 2007) 223 Fed. Appx. 734.

2 Human Rights Campaign, Corporate Equality Index 2008: A Report Card on Gay, Lesbian, Bisexual and Transgender Equality in Corporate America, September 2007, <http://www.hrc.org/workplace>. The average rating of Fortune 500 companies was 81 percent.

3 American Civil Liberties Union, Working in the Shadows: Ending Employment Discrimination for LGBT Americans, September 2007, <http://www.aclu.org>.

4 Gov. Code Sec. 12940.

5 (1998) 524 U.S. 742, 765, 131 CPER 14.

6 (1998) 524 U.S. 775, 807, 131 CPER 14.

7 *State Department of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1040, 164 CPER 69.

8 Administrative Instruction 71.

9 The two-step analysis for the application of qualified immunity is as follows: (1) whether the plaintiffs have established a constitutional violation, and (2) whether the defendants' actions violated "clearly established statutory or constitutional rights of which a reasonable person would have been aware." *Galvin v. Hay* (9th Cir. 2004) 374 F.3d 739, 745.

10 *Child Evangelism Fellowship of N.J., Inc. v. Stafford Township School Dist.* (D.N.J. 2002) 233 F. Supp. 2d 647.

11 *Good News Employee Assn. v. Hicks* (N.D.Cal. 2004) 2004 U.S. Dist. LEXIS 30371.

12 *Pickering v. Board of Education* (1968) 391 U.S. 563.

13 *Waters v. Churchill* (1994) 511 U.S. 661, 107 CPER 16. (1993) 510 U.S. 17, 22.

14 *Pool v. Vanrheem* (9th Cir. 2002) 297 F.3d 899, 909 (quoting *Rankin v. McPherson* [1987] 483 U.S. 378, 388.)

15 (7th Cir. 2000) 212 F.3d 358, 371.

16 *Good News Employee Assn. v. Hicks* (N.D.Cal. 2005) 2005 U.S. Dist. LEXIS 5270.

17 *Good News Employee Assn. v. Hicks, supra*, 223 Fed. Appx. 734.

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Session 1: Pre-Litigation Counseling and the Interactive Process was held in March. But there's still time to register for Sessions 2-4.

**Session 2: Discovery in a Disability Discrimination Case**

Panelists will discuss issues related to discovery that are unique to disability discrimination cases. Topics will include how to frame the issues of the case, including how to develop evidence to support the various burdens of proof unique to disability discrimination cases. Panelists also will discuss the role of discovery in determining whether a motion for summary judgment will be more or less likely to succeed.

May 28: San Francisco

June 4: Los Angeles

**Session 3: Expert Discovery in a Disability Discrimination Case**

Disability discrimination cases often raise issues for which expert testimony is required. Panelists will discuss aspects of expert discovery unique to disability discrimination cases as well as strategies for using or attacking particular types of experts.

July 16: Los Angeles

July 23: San Francisco

**Session 4: Trial in a Disability Discrimination Case**

Disability discrimination cases bring with them unique and intriguing themes for juries that are different than other employment cases. Panelists will discuss how to best use these themes. They also will discuss the unique concerns disability discrimination cases raise for jury selection.

December 3: San Francisco

December 10: Los Angeles

Readers:

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*City of San Jose v. Operating Engineers Local No. 3:*  
 For Essential Services Strikes, PERB Gets the First Bite,  
 But We Haven't Heard the Last Word

*Jeffrey Sloan*

*Jeffrey Sloan* is a partner in the firm of Renne Sloan Holtzman Sakai LLP. RSHS was founded in 2004 and specializes in legal representation for cities, counties, school districts, special districts, state agencies, non-profit organizations, and individuals. The author would like to thank Emily Prescott, Erich Shiners, and David Cheng for their contributions to this article.

The recent decision in the Sixth District Court of Appeal in *City of San Jose v. Operating Engineers Local No. 3*<sup>1</sup> brought me memories as well as angst. I recalled a day over 20 years ago when I was assistant general counsel at the Public Employment Relations Board. We received in the mail a brief that had been filed in a California Supreme Court case involving the legality of strikes under the Meyers-Milias-Brown Act. The brief was for our information only, as at that time PERB had no authority over the MMBA.<sup>2</sup> It was the last ditch effort of Leo Geffner, attorney for SEIU Local 660, seeking to persuade the court of final resort that a strike the union called against the Los Angeles County Sanitation District was lawful and protected by the MMBA. The brief was a valiant effort by Geffner and many *amici curiae* not just to vindicate the rights of California public sector unions but also to reverse a devastating award of damages imposed against the union by the courts below.

***County Sanitation District***<sup>3</sup>

To the surprise of many, the California Supreme Court embraced the arguments of Geffner and the many *amici curiae* who weighed in on the union's side. The court observed that the MMBA did not prohibit strikes, and that any prior common law prohibition against public employee strikes *generally* was extinguished *with one exception*:<sup>4</sup>

We must immediately caution, however, that the right of public employees to strike is by no means unlimited. Prudence and concern for the general public welfare require certain restrictions....After consideration of the various alternatives before us, we believe the following standard may properly guide courts in the resolution of future disputes in this area:

strikes by public employees *are not unlawful at common law unless or until it is clearly demonstrated that such a strike creates a substantial and imminent threat to the health or safety of the public.* This standard allows exceptions in certain essential areas of public employment (e.g., the prohibition against firefighters and law enforcement personnel) and also requires the courts to determine on a case-by-case basis whether the public interest overrides the basic right to strike.<sup>5</sup>

The union agreed that health and safety strikes would remain illegal.<sup>6</sup>

As a result of this holding, for the last 22 years, cities and counties have ordinarily gone straight to the superior court when faced with a public safety strike presenting a sufficient threat to public health and safety, seeking and often receiving nearly immediate relief of a temporary restraining order ensuring that crucial public services would continue, notwithstanding the labor dispute between the employer and the union.

### ***PERB Preemption Developments***

Starting in 1979 with the Supreme Court's decision in *San Diego Teachers Assn. v. Superior Court*,<sup>7</sup> PERB and the judiciary built a strong foundation of case law holding that PERB generally has preemptive jurisdiction vis-à-vis the courts in connection with matters arguably prohibited or protected by the underlying statutory scheme. A discrete body of case law unfolded under the Educational Employment Relations Act in connection with public school employee strikes. The common fact pattern featured a strike occurring during the course of negotiations, before expiration of impasse procedures. PERB asserted, and the courts found, that most strikes by public school employees in these instances were arguably prohibited as unfair practices, i.e., refusals to negotiate or participate in impasse procedures in good faith.<sup>8</sup> Therefore, adjudication of the legality of such strikes, and the authority to seek interim injunctive relief from the courts

pursuant to Government Code Sec. 3541.3(j), were within PERB's exclusive initial jurisdiction.<sup>9</sup> PERB further expanded the envelope in *Compton Unified School Dist.*,<sup>10</sup> where it found that even a strike occurring after exhaustion of impasse procedures could be deemed an unfair practice if it occasioned a "complete breakdown" in the provision of educational services. In that circumstance, PERB declared, the strike could be viewed as prohibited under EERA and was enjoined pursuant to the board's authority to seek interim remedies from the courts. Indeed, PERB in *San Ramon Valley Unified School Dist.*<sup>11</sup> articulated a 60 hours notice rule, prohibiting surprise strikes in education.

PERB's jurisdiction over EERA strike conduct, however, is not absolute, as an EERA case somewhat parallel to *County Sanitation Dist.* explained. In *Fresno Unified School Dist. v. National Education Assn.*,<sup>12</sup> the Court of Appeal concluded that a teachers strike called in violation of a no-strike contract clause was subject to the concurrent jurisdiction of the courts and PERB, given the jurisdiction of PERB over unfair practices and the right of the parties to litigate their contractual rights under Labor Code Sec. 1126. The court discerned "...an apparent concurrent jurisdiction of the court and the public agency as to the contract count, with statutory priority in PERB;

but judicial relief may even then be necessary and proper 'on the contract.'"<sup>13</sup> The court concluded that as to the contract cause of action the trial court had concurrent jurisdiction pursuant to Labor Code Sec. 1126. Exercising its equitable jurisdiction,<sup>14</sup> the court stayed the contract cause of action to protect the status quo of the contract issues pending resolution of the unfair practice issues before PERB, and subject to review only pursuant to the limits provided in Gov. Code Sec. 3542.<sup>15</sup>

Preemption principles also do not apply to matters of substantial "local concern" which remain subject to court adjudication, notwithstanding the general rule of PERB's preemptive exclusive jurisdiction.<sup>16</sup> Known as the "local concern" exception, this exception is applied when there is a

*The San Jose court broadly stated that any illegal strike 'may run afoul of the MMBA.'*

“significant state interest in protecting the citizen from the challenged conduct, [and when]...exercise of state [court] jurisdiction...entail[s] little risk of interference with the regulatory jurisdiction of [PERB].”<sup>17</sup> The local concern exception has long been applied in federal cases involving violence, libel, infliction of emotional distress, trespass, and obstruction of access.<sup>18</sup>

### ***Did the City of San Jose Court Misapply County Sanitation District and PERB Preemption Principles?***

Given *County Sanitation Dist.* and given further the provisions of Gov. Code Sec. 3509(b),<sup>19</sup> a strike that does not meet the “substantial and imminent risk” standard is potentially protected and prohibited as an unfair practice subject to PERB’s initial exclusive jurisdiction. Therefore, the key question should have been: *do the allegations in the court complaint and accompanying declarations present the probability of success on the cause of action for a tortious strike?* Unfortunately, this was not the question asked by the court in *City of San Jose v. Operating Engineers Local No. 3*, nor is it the question that the court’s analysis even remotely answered.

First, after a lengthy review of the history of PERB and the California Supreme Court’s public employee strike cases, the Court of Appeal examined whether the “MMBA arguably prohibits or arguably protects” the union’s threatened strike and the city’s alleged interference with the strike. The court broadly stated that *any* illegal strike “may run afoul of the MMBA.” The court further found that because the strike may be legal, it is arguably protected by the MMBA. Based on these findings, the court concluded that PERB had exclusive initial jurisdiction over the strike, whether or not the strikers were “essential” public employees whose absence from work may threaten public health and safety.<sup>20</sup>

These findings are contrary to case law as well as legislative direction. *County Sanitation Dist.* makes abundantly clear that strikes meeting the “substantial and imminent risk” standard continue to be unlawful under common law and

unprotected by the MMBA.<sup>21</sup> The notion that tortious, illegal conduct which is not protected under MMBA is not subject to original court jurisdiction and is instead subject to PERB’s jurisdiction is, at best, misplaced.<sup>22</sup> It was not proper for the court to recast allegations of an unlawful health and safety strike to reflect a protected strike that does not present a substantial and imminent risk of health and/or safety; the allegations by the city were certainly sufficient to overcome preemption.

Second, the court dismissed any application of the “local concern” exception to preemption, opining that “this is not a case in which the interests of a particular private citizen are threatened.”<sup>23</sup> This conclusory proclamation misapplied

the local concern exception. Strike situations involving substantial and imminent risk to health and safety do not concern “a private citizen;” they concern the entire populace and its local government. For example, recently, as part of a public employee strike, health care workers and corrections officers in a juvenile detention facility indicated that they would be walking off the job the next day. In that event, their wards would not have the degree of supervision required by state law, and government’s ability to feed, clothe and administer medication to the juvenile wards was imperiled.

In *City of San Jose*, workers responsible for running sewage treatment plants threatened to leave the job as part of their union’s effort to get negotiations back on track. Assuming this threat was actualized, a probability existed that waters of San Francisco Bay would be contaminated absent injunctive relief. In one of my negotiations experiences, a nurses union at a large county hospital threatened to strike with less than 24 hours notice; such a strike would have left the emergency room and operating rooms perilously short of staff and did not allow time for transfer of critical care patients elsewhere. In my view, all of these forms of conduct are matters of acute local concern and not subject to PERB’s jurisdiction. Who can honestly doubt that where an employer presents evidence showing that a looming strike such as any of these would likely present a substantial and

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contrary to case law  
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legislative direction.*

imminent risk to public health and/or safety, the stakes are qualitatively higher than situations involving violence or threats of violence, blocking of ingress and egress, or secondary picketing?

***The Impact of Delays on Delivery of Public Services***

The *City of San Jose* court dismissed the city’s argument that PERB’s remedies are inadequate to address public safety strikes. The city argued that PERB’s procedures for deciding requests for injunctive relief take too long. The court rejected this argument, primarily because by the time the city requested injunctive relief from the court *in this case*, PERB already had filed papers with the court.<sup>24</sup> The court also found the city was not excused from exhausting its administrative remedies before PERB because (1) PERB could provide the same relief as the court, and (2) the strike in this case was not an “unprecedented crisis” where compliance with PERB’s procedures would cause irreparable harm.

In most cases, a union goes on strike without any clear or specific advance notice to the employer. Nonetheless, the *City of San Jose* court’s ruling is not limited to “noticed” strikes but, as a published decision, it could be read to apply equally to “surprise” strikes, even though such a strike was not before the court.

Public health and safety are *necessarily* jeopardized by any delay in response to a surprise essential employee strike. Making PERB the gatekeeper for injunctive relief in such situations results in both unnecessary delay and needless duplication of efforts. If an employer is allowed to go straight to court for injunctive relief, the process involves three simple steps:

- (1) the employer drafts a complaint, points and authorities, and declarations demonstrating the existence of the strike and the resulting harm;

- (2) the employer files papers with the court *ex parte*; and
- (3) the court decides whether to issue injunctive relief.

But if an employer must go to PERB first, the process expands to eight steps:

- (1) the employer drafts a complaint, points and authorities, and declarations demonstrating existence of the strike and the resulting harm;
- (2) the employer files papers with PERB general counsel;
- (3) a PERB regional attorney investigates;
- (4) the general counsel submits recommendation to PERB itself;
- (5) PERB deliberates and decides whether to seek injunctive relief;
- (6) if PERB decides to seek injunctive relief, PERB drafts points and authorities and may require the employer to provide further declarations demonstrating existence of the strike and the resulting harm;
- (7) PERB files papers with the court *ex parte*; and
- (8) the court decides whether to issue injunctive relief.

*Requiring the local government employer to go to PERB rather than to the courts results in needless duplication of effort.*

Under these procedures, the additional five steps in the PERB process will take no less than two days, and sometimes as much as a week or more. While the *City of San Jose* court placed great weight on the fact that PERB was in court arguing against the city’s injunction request on pre-emption grounds within three days, this was possible only because the union gave the city three days’ notice of the strike. In most cases, PERB would not be able to get to court as quickly as the employer. The anomalous factual situation presented in *City of San Jose* may well have led the court to overestimate PERB’s ability to act quickly to seek an injunction of an essential employee strike.

Furthermore, requiring a local government employer to go to PERB rather than to the courts results in needless duplication of effort. PERB itself does not have the authority to grant injunctive relief. As a result, PERB must go to the



same superior court judges in the same localities where public employers could seek strike injunctions independently from PERB. Requiring this extra layer of bureaucracy just to arrive at the same destination serves no purpose except delay.

### ***Is the Public Fair Game?***

We have come a long way since the union in *County Sanitation Dist.* conceded the illegality of strikes presenting a substantial and imminent risk to public health and safety.

Now, the confluence of many factors in *City of San Jose* has led to a decision that, unwittingly, will support and foment surprise strikes against essential public operations and functions.

The recognition that certain forms of strikes are not fair game is well established, particularly when public health and safety are involved. For example, under section 8(g) of the National Labor Relations Act, strikes against health care providers must be preceded by 10 days written notice in order to give the health care employer the ability to assure the health and safety of patients. A prior incarnation of PERB recognized a similar principle for teachers' strikes. In *Compton Unified School Dist.*,<sup>25</sup> PERB recognized that a teachers strike after exhaustion of impasse procedures could potentially be lawful. However, PERB determined that an otherwise lawful strike that caused a "complete breakdown" in the educational process could be enjoined as an unfair practice. The board has also determined that a post-impasse strike under EERA was unlawful because it was not preceded by 60 hours notice to the employer.<sup>26</sup> An in the public transit sector, the governor has the authority to require a "cooling off" period from transit workers because of the high potential for serious disruption.<sup>27</sup>

### ***Modest Proposals***

Since PERB's earliest days, PERB and the judiciary, when faced with potential conflicts between statutory schemes, have recognized the importance of attempting to "harmonize" potentially conflicting jurisdictional and statutory schemes.<sup>28</sup>

In my view, people of good intentions have entirely missed the boat in connection with public sector strike policy. Strikes are now part of the public sector labor relations landscape. But public safety strikes that have the magnitude and potential to fundamentally disrupt public health and safety are tortuous.

It is clear that PERB has jurisdiction over strikes that do not meet the *County Sanitation District* standard. Hence, a jurisdictional overlap, and the demonstrated potential for conflict, always exists in connection with strikes under MMBA. For example, the risk always exists that a court will disagree with an employer's assertion that a strike presents such a substantial risk to health and safety that immediate court relief is the only option. In that event, an employer confronted with an evident health and safety strike is proceeding at its peril if it goes straight to court. The mere potential of this scenario augurs in favor of an approach that relies on cooperation rather than risk-taking.

Here is a modest proposal:

- (1) PERB should adopt regulations requiring seven days notice before the occurrence of any strike under MMBA and further prohibiting strikes occurring prior to exhaustion of impasse procedures under MMBA. Such regulations should require PERB to adhere to strict timelines for Board decision on requests for injunctive relief, or alternatively should emulate NLRB policy and practice, whereby the NLRB General Counsel decides whether to seek injunctive relief independently of the NLRB.<sup>29</sup>

*Many factors have led  
to a decision that,  
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tions and functions.*

- (2) When a local agency is confronted with a strike that, based on the facts and circumstances, (a) is likely to jeopardize public health and safety, and (b) is either called to occur or is reasonably anticipated to occur within seven days of notice, the employer may seek a temporary restraining order (TRO) from the court directly. A TRO is normally effective for two weeks or less and a further hearing on a motion for a preliminary injunction must occur in order for an injunction to remain in effect.
- (3) PERB would have the opportunity to seek to intervene at the preliminary injunction stage.
- (4) When a local agency is confronted with a strike threat that does not threaten public health and safety and is not likely to occur within seven days, the employer should file with PERB to give PERB the opportunity to assess whether the strike potentially violates MMBA without regard to the health and safety issue.

In sum, authorizing the employer to go straight to court in emergency situations will help assure that a public safety strike announced precipitously will not impede local government's ability to provide essential public services. Assuring PERB's ability to intervene at the preliminary injunction stage would enable it to weigh in on the jurisdiction issue without impeding essential services.

***An Intriguing Twist***

Last year, the governor vetoed legislation that would have given PERB exclusive jurisdiction over health and safety strikes. In returning A.B. 553 to the legislature without his signature, Governor Schwarzenegger commented that the bill would:

...add an unnecessary layer of bureaucracy and potentially place the public at risk. Cities and counties have common law and statutory authority over mat-

ters of public health and safety. When local governments seek injunctive relief from a strike, they are doing so because of a potential threat to the public health and safety of citizens. It is therefore imperative that local governments have access to immediate injunctive relief from superior courts during strike situations. As the courts are sufficiently suited to address matters of public health and safety, there is no reason to force decisions on injunctive relief into the slower PERB process.<sup>30</sup>

Interestingly, PERB, whose board members and general counsel are all Schwarzenegger appointees, has so far supported litigation seeking a result that is contrary to the governor's official view on essential employee strikes. Hopefully, a compromise that fully protects the public and government's duty to provide essential public services, yet recognizes PERB's jurisdictional interests, will foster harmony all around.

***Stay Tuned!***

*City of San Jose* is far from the final word on this topic. As of this writing, that decision is not yet final; it may be reviewed or depublished. In addition, two other cases on the same issue are pending in the California Courts of Appeal for the First and Third Districts.<sup>31</sup> If either or both of these courts rules differently than the Sixth District, the California Supreme Court will likely step in to settle the issue. \*

City of San Jose  
*is far from the  
 final word on  
 this topic.*

1 *City of San Jose v. Operating Engineers Local No. 3* (3-4-08)  
No. H030272, \_\_\_ Cal.Rptr.3d \_\_\_, 2008 WL 568260

2 Senate Bill No. 739, placing the MMBA under PERB's  
jurisdiction, was enacted in 2000.

3 *County Sanitation Dist. No. 2 v. Los Angeles County Employees  
Assn.* (1985) 38 Cal.3d 564.

4 *Id.* at 585-586. (Italics added.)

5 *Id.* at 586.

6 "In fact," observed the court, even the "defendant union  
itself concede[d] that the law should still act to render illegal any  
strikes in truly essential services which would constitute a genuine  
threat to the public welfare." *Id.* at 580-581.

7 *San Diego Teachers Assn. v. Superior Court* 24 Cal.3d 1; *El  
Rancho Unified School Dist. v. National Education Assn.* (1983) 33  
Cal.3d 946.

8 Gov. Code Secs. 3543.6(c), (d).

9 See, e.g., *Public Employment Relations Bd. v. Modesto City Schools  
Dist.* (1982) 136 Cal.App.3d 881.

10 (1987) PERB Order No. IR-50 [11 PERC par. 18067].

11 (1984) PERB Order No. IR-46 [18 PERC par. 15187].

12 (1981) 125 Cal.App.3d 259, 274.

13 *Id.* at 273.

14 See *Vargas v. Municipal Court* (1978) 22 Cal.3d 902, 916.

15 125 Cal.App.3d at 274.

16 See *Pittsburg Unified School Dist. v. California School Employees  
Assn.* (1985) 166 Cal.App.3d 875, 886; see also *Kaplan's Fruit &  
Produce Co. v. Superior Court* (1979) 26 Cal.3d 60, 75 (allowing  
exception to preemption doctrine concerning mass labor  
picketing).

17 *Pittsburg Unified School Dist., supra*, 166 Cal.App.3d at 886.

18 See *United A.A. & A.I.W. v. Wisconsin Employment Relations  
Bd.* (1956) 351 U.S. 266, 272 (violence); *Linn v. Plant Guard  
Workers* (1966) 383 U.S. 53, 55 (libel); *Farmer v. Carpenters* (1977)  
430 U.S. 290, 292-295 (infliction of emotional distress); *Sears,  
Roebuck & Co. v. Carpenters* (1978) 436 U.S. 180 (trespass);  
*Youngdahl v. Rainfair* (1957) 355 U.S. 131, 132-139 (obstruction  
to access).

19 Gov. Code Sec. 3509(b) provides in pertinent part: "The  
Board shall apply and interpret unfair labor practices consistent  
with existing judicial interpretations of this chapter."

20 The court relied in part on unfair practice charges brought  
by the union against the city, alleging that the city's application to  
stop the strike was itself an interference with workers' protected  
rights. 2008 WL 568260 at \*10.

21 The legislature effectively wrote *County Sanitation Dist.* into  
the MMBA when it included Gov. Code Sec. 3509(b), in S.B. 739.

22 The mere fact that an employee is deemed "essential," of  
course, does not meet the standard. As noted by the *County  
Sanitation Dist.* court, "The 11-day strike did not involve public  
employees, such as firefighters or law enforcement personnel,  
whose absence from their duties would clearly endanger the public  
health and safety. Moreover, there was no showing by the district  
that the health and safety of the public was at any time imminently  
threatened. That is not to say that had the strike continued  
indefinitely, or had the availability of replacement personnel been  
insufficient to maintain a reasonable sanitation system, there could  
not have been at some point a clear showing of a substantial threat  
to the public health and welfare. However, such was not the case  
here, and the legality of the strike would have been upheld under  
our newly adopted standard. [Footnotes omitted]." 8 Cal.3d at  
586-587.

23 2008 WL 568260 at \*15.

24 Admittedly, the *City of San Jose* case was extraordinarily odd  
from the standpoint of timing. Here, the union gave three days  
notice of its intended strike, sufficient time to put PERB on notice  
about the matter. 2008 WL 568260 at \*1. Moreover, at the hearing  
before the superior court, the union further pledged not to strike,  
later extending that promise to cover the entire time period of  
the appellate writ. *Id.* at \*2. Taken together, these oddities could  
suggest that by the time of the injunction hearing there was no  
substantial and imminent threat to public health and/or safety.  
They also suggest that the case is a matter *sui generis*, and therefore  
did not warrant publication.

25 PERB Order No. IR-50.

26 *San Ramon Valley Unified School Dist., supra*, PERB Order  
No. IR-46.

27 Labor Code Sec. 1137.4.

28 See *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168;  
*San Mateo City School Dist. v. Public Employment Relations Bd.*  
(1983) 33 Cal.3d 850.

29 Indeed, it could be argued that PERB's claimed process  
assuring the prospect of prompt injunctive relief in strike situations  
would only be viable if PERB promulgated regulations pursuant to  
the Administrative Procedures Act. *Armstead v. State Personnel  
Board* (1978) 22 Cal.3d 198, 204 at fn. 30.

30 Governor's veto message to Assembly on Assembly Bill No.  
553 (2007-08 Reg. Sess.) (Sept. 26, 2007).

31 *County of Contra Costa v. Public Employees Union Local One, et  
al./County of Contra Costa v. California Nurses Assn. et al.*, Case  
Nos. A115095, A115118 (argued and submitted February 6, 2008);  
*County of Sacramento v. AFSCME Local 146 et al.*, Case Nos.  
C054060, C054233 (fully briefed, no oral argument date set).

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# Reasonable Accommodation and Assistance Dogs in the Workplace

*Ed Eames*

Federal and state laws use the term “service animal” to refer to the variety of species trained to perform tasks to help mitigate a qualified individual’s disabling condition. In addition to dogs, miniature horses and Capuchin monkeys are examples of non-canine service animals trained to perform tasks. However, the vast majority of service animals are dogs, collectively referred to as “assistance dogs,” the focus of this article.

Guide dogs are trained to help their blind and visually impaired partners safely negotiate the unseen environment. Hearing dogs alert their deaf and hard-of-hearing partners to sounds such as the telephone ring, door knock, smoke alarm, or the person’s name being called. Service dogs work with people with disabilities other than blindness or deafness and provide a diversity of disability mitigating tasks. These tasks can include bracing to help an individual get in and out of chairs, support in walking or retrieving dropped or requested objects, helping to pull a wheelchair, alerting to a medical crisis, and reminding the partner to take medications.

As president of the International Association of Assistance Dog Partners, a consumer advocacy organization that represents over 2,000 people with disabilities working with guide, hearing, and service dogs, I am consulted on a wide range of access denial issues. Most are readily solved when those who initially declare, “No dogs in my restaurant...or taxi...or hospital,” become aware of existing laws. However, the most difficult cases to resolve within a reasonable time frame are those that involve employment of disabled individuals partnered with guide, hearing, and service dogs.

## ***The Employment Issue***

Employment-related issues are addressed by a number of laws, including state statutes, the Rehabilitation Act, and Title I of the Americans with Disabilities

**Ed Eames, Ph.D.**, is Adjunct Professor of Sociology at California State University, Fresno, and Professor Emeritus at Baruch College (CUNY). He is president and a founding member of the International Association of Assistance Dog Partners, <http://www.iaadp.org>. The author would like to acknowledge the assistance of Elizabeth Shea, J.D., partnered with service dog Remy.

Act. While Title III of the ADA mandates access, the Title I requirement is less stringent. It provides only for reasonable accommodation to permit an employee to be accompanied by an assistance dog/service animal. As a result of this distinction, instances where access to the workplace has been denied because of the presence of an assistance dog has been a recurring problem. As the following four cases show, there is little consistency in the ways in which the laws have been applied.

### ***The Chris Branson Case<sup>1</sup>***

Dr. Chris Branson, a graduate of Northwestern University medical school, began working at the Lakeside Veterans Administration Health Care Center in Chicago in 1981. Four years later, she was paralyzed. Following rehabilitation for her spinal cord injury, Branson returned to work as a staff physician at the Lakeside Hospital in February 1986. Like many other paraplegics, she preferred using a manual wheelchair in order to maintain her upper body strength and independent mobility.

Facing increased fatigue in her upper extremities, and recognizing the added benefits to be derived from working with a canine assistant, Branson trained with a service dog in 1995. She was impressed with the skills of her new canine partner, Nolan, in picking up dropped or requested items, opening and shutting doors, and pulling her manual wheelchair. Prior to training with Nolan, Branson sought permission to bring Nolan into her workplace because, according to Paws With A Cause, the program that trained Nolan, training in the job setting is essential.

Unfortunately, the hospital administration failed to recognize Nolan's ability to improve Branson's quality of life. Despite numerous memos from Branson and the Rehabilitation Institute of Chicago doctors, the hospital director remained adamant he would not allow a dog in the hospital. Repeated attempts to obtain an explanation went unanswered. The administration continued to ask Branson

and her rehab doctors for more information about her medical condition, and to ask them to specify how a service dog could aid her on the job. After training with Nolan was completed, Branson was officially notified that Nolan was barred from accompanying her to work.

Following mandated procedures, Branson filed a discrimination complaint with the Veterans Administration's Equal Employment Opportunity investigation team. This internal review committee rubber-stamped the administration's denial of access, finding that Branson had not proven she was denied reasonable accommodation, and that the decision to train with a service dog was a life-style choice and not work related.

Branson hired an attorney and filed a complaint against the V.A. hospital in federal court.

Four years later, when the case was heard, the V.A. sought dismissal. In opposition, Branson's lawyers asked the judge to permit the case to go to trial and enjoin the hospital from barring Nolan from the workplace.

The hospital's position was that Branson's disability already had been accommodated, enabling her to continue working. It argued that the law does not require an employer to provide every accommodation requested by a disabled employee. In effect, the

hospital was asserting the exclusive right to determine the nature of reasonable accommodation.

The case was heard by Judge Nan Nolan of the Northern District of Illinois, Eastern Division. On May 17, 1999, Judge Nolan decided that the V.A. had violated Section 504 of the Rehabilitation Act by denying Branson the right to be accompanied at work by her service dog. The judge found the V.A.'s view of reasonable accommodation was too narrow, and that its unwillingness to engage in a meaningful dialog with Branson about the potential negative impact Nolan's presence would have on the hospital was improper.

Judge Nolan's decision focused on the efforts Lakeside had made to accommodate Branson's handicap, noting that Lakeside bore the burden of proving that an accommodation

*There is little  
consistency in the  
ways in which the  
laws are applied.*

would impose undue hardship. Judge Nolan concluded that the only question was whether Branson’s requested accommodation was reasonable.

Judge Nolan found that, “Lakeside V.A.’s minimal effort in cooperation falls short of its responsibilities under the [Rehabilitation] Act. [It] never explained its objection, if any, to the service dog, never suggested any alternative accommodation, never claimed undue hardship, yet it continues to deny Dr. Branson the ability to use her service dog in the workplace.”

When Branson went to trial in July 1999, Mike Sapp, CEO of Paws With A Cause, and the local trainer who worked with Branson, testified about Nolan’s training and ability to perform tasks in the workplace. Branson’s rehabilitation institute physicians testified about her deteriorating physical condition and the benefits of having Nolan on the job.

While the jury deliberated, Judge Nolan heard the V.A.’s appeal of her May 17 ruling that allowed the case to go to trial. As the chief of the hospital’s staff testified about the potentially disruptive effect Nolan’s presence would have in the hospital, the judge pointed to Nolan and asked counsel if he was referring to the dog that had been lying quietly next to Branson’s wheelchair for the last three hours. The hospital’s head of engineering brought in detailed diagrams of the hospital’s elevators and patients’ rooms to demonstrate that a dog of Nolan’s size would have difficulty maneuvering. Judge Nolan suggested that if gurneys fit into the hospital elevators and patients’ rooms, a Retriever should have no problem. Judge Nolan ordered the two sides to work out a procedure to permit Branson to bring her dog to work.

Meanwhile, after deliberating for two hours, the jury awarded Branson \$400,000 and payment for all legal costs.

Despite Judge Nolan’s order requiring access, it was not until December 2, 1999, that an injunction was signed barring the V.A. from denying access to Nolan. Ten days later, Nolan went to work with Branson without incident, permitting Chris Branson and Nolan to finally become a working team in the V.A. Lakeside Hospital.

Because this case was brought under the Rehabilitation Act rather than the ADA and never exhausted the federal appeal process, we continue to see similar denials of access.

### AN EMPLOYER’S BASIS FOR DENIAL

When an employee requests permission to bring his or her assistance dog to work as a reasonable accommodation for a disability, the employer should recognize that the only basis for denial of this request is:

- (1) the employee is not a qualified person with a disability as defined by the ADA, the Rehabilitation Act, or state law;
- (2) the assistance dog/service animal does not meet the definition of a service animal in the ADA or other relevant law;
- (3) the presence of the service animal would place an undue burden on the employer; or,
- (4) the presence of the service animal would interfere with the employer’s ability to conduct business.

In these instances, the burden of proof is on the employer, not the employee.

### DEFINITION OF ‘SERVICE ANIMAL’

Following is the definition of “Service Animal” from Federal Register, Feb. 22, 1991:

Service animal means any guide dog, signal dog or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.

### ***The Laura Otis Case***

Laura Otis is an elementary school teacher in Orange County who began to feel the debilitating effects of a neuromuscular disease. She eventually needed a cane to aid in walking, and encountered difficulty picking up objects from the floor. To help retrieve dropped or needed items, such as her cane, a chalk holder, or board eraser, Otis hired a trainer to task train her dog, Zoe, and prepare her for public access.

On June 9, 2003, the district gave permission for Otis, a teacher with more than 25 years experience, to bring Zoe to her classroom on a limited basis. Zoe could be brought to school no more than three times a week provided 24-hour's notice was given to the principal. Without adequate legal representation, she agreed to this plan.

One year later, the acting district superintendent informed Otis that Zoe would not be permitted at school for the 2004-05 school year. This decision was based on the school principal's stated belief that Zoe was not a bona fide service dog, but merely a pet.

The union provided Otis with legal counsel. However, because both the district superintendent and the principal have left the Irvine Unified School District, the case drags on. The case was initially scheduled for trial in 2007, but Otis' legal team elected to try mediation. The school district, dissatisfied with the recommended mediated settlement, asked for a second round of mediation. Otis' counsel agreed. As of March 2008, that legal process under state law continues. Otis has not been able to bring Zoe to class and, as a result, she continues to struggle with her disability.

### ***The Sandy Stefan Case***

Sandy Stefan, a single mother, graduated from paralegal school in January 2007. In August, she obtained a job in McComb County, Michigan, working in a traffic court where she processed ticket fines.

At the time she was hired, because she feared she would not be offered the job if the traffic court magistrate knew, Stefan did not mention she was disabled and partnered with a canine assistant. The reality is that the presence of a canine assistant usually means no job will be offered.

After she had worked for a few weeks, she mentioned her Paws With A Cause-trained hearing dog, Ice, and said she would like to bring him to work. The magistrate told her not to bring him in until the matter had been resolved by the city attorney.

Stefan worked at the counter where traffic tickets were paid, and she explained that Ice would help alert her to her name being called and to the ring of her cell phone. The magistrate maintained that staff members could alert her to sounds and that the dog was not needed. Once again, management sought to dictate what accommodations were required.

Stefan explained the dog was fully trained and she needed Ice to get to and from work since Ice alerts her to sirens and the cell phone. The magistrate responded that getting to and from work was not the court's concern.

A meeting was convened with the magistrate, chief judge, and city attorney. Stefan did not have legal representation. The city attorney repeatedly asked Stefan about the degree of her hearing loss. They were concerned about liability if Ice bit someone or if a member of the public were allergic to dogs. Stefan's efforts to counter these arguments were unsuccessful.

The magistrate then suggested that Ice be placed in a carrying case or kennel located in the library in the back room of the office. She suggested that Stefan put a sign on the kennel indicating a dog was inside. Stefan consulted with Paws With A Cause and informed the court that the proposal was not a reasonable accommodation. It would have denied Stefan Ice's alerting services and jeopardized his training and their partnership.

After seven weeks on the job, with good evaluations, Stefan was fired. She filed a discrimination claim with the

*The magistrate's suggestions would have denied the dog's alerting services and jeopardized his training.*



Equal Employment Opportunity Commission in November 2007. The federal agency said that her claim appeared meritorious and should proceed to mediation. Five months later, that mediation has not taken place.

### ***The Sheryll Craven Case***

Sheryll Craven lives in Auburndale, Florida, and has been employed by Winter Haven Hospital for 30 years. She works in the basement, where she handles calls dealing with a wide range of issues.

As a result of a degenerative neuromuscular disease, Craven's mobility has become limited. She decided to train her own dog, Chelsea, and to have the dog certified by New Horizons Service Dogs, a Florida-based training program. Although such certification is not legally required, she felt this would give Chelsea greater credibility.

For two weeks, she brought Chelsea to work without incident. However, on one occasion while she was on an upper floor of the hospital, a hospital vice president questioned her right to be there with her dog. Immediately thereafter, Craven was told by her supervisor that her service dog was no longer welcome in the office.

As an alternative to Chelsea, Craven was asked to undergo occupational therapy and be fitted with orthopedic equipment. This accommodation, however, did not mitigate the need for the dog. Without her service dog's balancing and bracing tasks, Craven has been forced to walk using a support cane, which places her at risk of falling.

Facing a situation that she felt was discriminatory, Craven filed a complaint with the EEOC, and mediation

took place on March 5, 2008. In order to keep her job and pension, Craven has agreed not to bring Chelsea to work. She felt forced to accept several other accommodations, which, once again, were not determined by her and her doctors, but by management.

### ***Conclusions***

In each of these cases, the employer believed it was entitled to determine the nature of a reasonable accommodation. That view was successfully challenged in *Branson*, where the court determined that Branson's employer violated the law by not engaging in an interactive process to determine the nature of a reasonable accommodation. Employers must conform to the law and recognize they are not the sole arbiters of reasonable accommodation.

Not doing so can take a financial and emotional toll. Litigation can be extremely costly. While Branson was awarded \$300,000, the maximum permitted by federal law, the case cost the V.A. more than \$1 million. And even after an employer makes large financial expenditures, it may turn out that the disability-related needs of the employee still have not been adequately accommodated. In contrast, permitting a dog in the workplace has little if any monetary cost. And the benefits can be enormous. \*

1 *Branson v. West* (N.D. Ill 1999) USDC 97C 3538, 1999 U.S. Dist. LEXUS 19173.

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# Collaboration, Communication and Core Values Versus Contradiction, Cacophony and Chaos

*Gregory J. Dannis*

Speakers at conferences usually offer their theories and prescriptions on how best to negotiate. They preach on how to “get to yes,” “how to get past no,” “how to reclaim management rights,” “how to do interest based bargaining,” “Principled Ethical Negotiations,” “Core Values bargaining,” “win-win bargaining,” “reality-based bargaining,” and “I’m OK, you’re so-so” bargaining. I know these ideas have been discussed before because I’m one of the people you’ve had to listen to talk about them.

Even I wonder sometimes whether these concepts are mainly theoretical, with little or no basis in reality. How many times have you heard someone say, “Just do it this way and you’ll create a labor relations Camelot”? In the meantime, you’re thinking “Yeah right! Try that in my district and you’ll be eaten alive!” You question the practical application of these recipes for success and whether any of them are of any use to you in the real world.

In that vein, I would like to ask the following questions:

Collaboration....Can it really occur, or is the whole concept a contradiction?  
Communication....Can it really take place amidst the cacophony of negotiations?  
And Core Values....Can they really inform our decisions and guide our actions even in times of crisis?

## ***Collaboration: A One-Word Contradiction***

I participated in interest-based bargaining training for the first time 16 years ago. I received a phone call from a California Teachers Association representative inviting me to the first CTA/Management training program introducing a new form of bargaining — one that would minimize, if not eliminate, the adversarial trappings of traditional negotiations. I was immediately suspicious. In fact, I asked

*Greg Dannis is a shareholder of Miller Brown & Dannis, a law firm with offices in San Francisco, Long Beach, and San Diego. In addition to his employment, labor, and public entity law practice, he negotiates at 20 to 30 tables annually for public school and community college districts. A version of this article was first presented as the keynote speech at the 2008 Association of California School Administrators Symposium for Negotiators.*

my partners whether I should attend, and our discussion was intense. They asked: Would I be brainwashed? Would I soon be humming Woody Guthrie songs? Would a giant green pod sprout in the firm's conference room? Would I change my name to Norman Rae?

We decided I should go, if only to discover what the union was up to. So, I entered the belly of the beast—CTA's headquarters building—and immediately felt I had walked into a trap. There were at least 100 CTA representatives there and more than 10 management negotiators—we were outnumbered ten to one! And then came the ultimate indignity—my first “icebreaker” experience. In front of 100 union advocates, I had to introduce myself using a poster and was told to draw pictures that would reveal where I was born, my favorite hobby, and something about me no one would suspect. I thought I was going to die.

Eventually, I realized that the management representatives were co-trainers along with CTA staff. I began to listen critically to the presentation and found the general premise to be very appealing: Break down the barriers of traditional bargaining by sharing interests instead of demands, and by creating options together instead of writing proposals separately. I found myself agreeing with the trainer's remark that “we should aspire to negotiate within a framework of collaboration rather than confrontation.”

The statement drew an immediate response from a veteran CTA representative who stood and yelled, “I don't want to collaborate with anyone from management! Where I come from, a collaborator is a traitor!” He sat down and the room was silent for nearly five minutes, whereupon the CTA trainer took a breath and said, “Well, that was interesting, but now let's move on and talk about brainstorming.” The training continued.

This incident has replayed in my mind over the years I have negotiated, and perfectly explains why true “collaboration” is difficult to attain: because the concept is a contradiction. The dictionary provides two definitions of

the word “collaboration,” and they are contradictory. One involves working together and cooperating in a joint intellectual effort; the other refers to willingly cooperating with the enemy. The same word expresses something very positive and very negative. A similar dichotomy exists when one speaks of collaboration in labor relations.

When unions demand to negotiate over educational policy matters, curriculum, and the student instructional day, management often reacts negatively to protect against erosion of its rights.

The union may say that it only wants to *collaborate* with management over educational decisions, but its fear that the

number of negotiable subjects is diminishing emboldens the union to be more strident in its demands to formally bargain, and not just consult over educational matters.

The employer fears the union wants *veto power* over these decisions rather than true collaboration, so it resists the union's overtures. The fear of losing control drives the employer's behavior.

As a result, both parties focus on preserving their respective rights, rather than engaging in productive dialog. Instead of collaborating in a joint intellectual effort, both sides fear

they are collaborators consorting with the enemy. Falling victim to the contradiction that is collaboration, they forego the dialog that might improve the employer-employee relationship which will benefit the students.

We must escape this contradiction. For true collaboration, we must revisit and promote several key factors:

- *Traditional notions of allegiance, power, and hierarchy.* True collaboration occurs when power is shared or irrelevant, and when both sides accept their roles in an egalitarian structure, at least while they are jointly addressing an issue.
- *Need for control.* The parties must be open to a new kind of partnership where both surrender some legal entitlements, such as labor's right to negotiate over a specific matter, or the employer's right to sometimes unilaterally act.

*The dictionary provides  
two definitions  
of the word  
'collaboration,' and they  
are contradictory.*

- *A common goal and definition of success.* If labor asserts a fiscal crisis can have no impact on its members, and management insists that drastic cutbacks must be imposed as determined by management alone, there can be no collaboration. Instead, the parties should work toward the common goals of preserving jobs and educating students.

The current fiscal emergency could present golden opportunities for collaboration by acknowledging a common goal rather than reverting to traditional notions of power, control, and allegiance.

For collaboration to occur, both sides must want it, and participate voluntarily. It cannot be forced by fiat or law, including the Educational Employment Relations Act.

### ***Communication Amidst Cacophony***

Collaboration encourages introspection and the communication of ideas that result from this inward inquiry. On to communication.

Consider the following:

- Most negotiation team members are trained in how to bargain.
- Most teams hire professionals who are experts in the art of negotiations.
- Most teams include members who have been on the team for many years.
- Negotiations involve the spoken word, as well as written proposals that explain what each side wants.
- Negotiations include time to caucus and prepare what you are going to say. After you say it, you caucus to review what you said and, if necessary, get more time at the table to clarify what you said.

You may ask yourself, “Why does some of the most mind-boggling, ineffective, and dysfunctional communication between two parties occur at the bargaining table?” Do any of these interchanges sound familiar?

- “That’s not what you said.” “Yes it is; you just weren’t listening.”

- “That’s not what we heard.” “That’s because you only hear what you want to.”
- “That’s not what I meant.” “I don’t care what you meant; that’s what you said.”
- “You’re changing our agreement.” “No I’m not, you are.”
- “That’s regressive bargaining.” “No it isn’t; it’s better than our last proposal.”
- “We’ve increased our offer and you should sign it; in fact we’ve added signature lines on the proposal.”
- “This new offer is an insult and not worthy of a response.”
- “Why are you proposing this?” “Because our members deserve it, and if you reject it, you don’t respect them.”
- “Why are you opposing this?” “Because our superintendent believes it is necessary to improve educational programs, and if you reject it, it means you don’t care about the students.”
- [And my personal favorite] “We’re filing an unfair.” “Go ahead — make my day.”

As these examples illustrate, negotiations can deteriorate into just so much noise — a cacophony of sound without substance or meaningful content. Why? Bill Cosby has explained, “Men and women belong to different species, and communication between them is a science still in its infancy.”

Are management and labor different species? Is management from Mars and labor from Venus? I think not. Communication breaks down at the bargaining table due to: (1) the inartful use of words; (2) the purpose for which words are used; and (3) the mistaken belief that a negotiator must be a good talker rather than a good listener.

***Inartful or careless use of words.*** The prevalence of cacophony over communication primarily comes from the inattention to the way we use words. Lack of precision is especially harmful in negotiations because it is axiomatic that *what* you say is not nearly as important as *how* you say it. During negotiations, we are discussing issues that affect individuals’ professional lives as workers and managers, but also their personal lives. Careless use of the language can therefore impinge on their dignity, respect, security, and trust. Once this happens, the discussion is based on emotion, not substance. The parties then must work their way back to the real issues.

One reason why our words have become less precise than in the past is the advent of communication through technology. While letter writing encourages deliberation and time to *see* the words and gauge their impact, the same is not true with email, texting, and other forms of instantaneous communication. Words are tapped out, the button is pushed, and the message is gone. And, once a beep, buzz, or vibration indicates that “you’ve got mail,” the process is repeated.

We cannot negotiate this way. The potential for sending mixed messages and harming the people, the relationship, and the institution is too great. Effective, precise, and sensitive communication is critical, especially now, in a time of fiscal crisis. Anxiety levels are high. People are searching for clues, both imaginary and real. Fear of the unknown is stressing out the workplace. The wrong word, phrase, or even inflection can cause needless harm and confusion. The concise and carefully crafted message can contain, if not ease, apprehension.

A recent example makes the point. When the governor recently unveiled his budget, many outstanding management proposals became unaffordable. My biggest fear was that the union would knock on our door and say, “We accept your proposal.” I needed to convey the message that the proposal was no longer viable, but without prompting the union to go into a defensive battle mode. I figured I could withdraw the proposal, revise it to a zero offer, reduce it, or rescind it.

All of these options sounded too drastic and final. I needed to say we were not quite sure what we could now afford due to the fluidity of the state economy. After several tries, I settled on the following:

In light of the great uncertainty that now exists following introduction of the Governor’s proposed State Budget, the District is compelled to *suspend* all District economic proposals currently the subject of negotiations until such time as the impact of the proposed Budget on the 2007-2008 and 2008-2009 school years is determined.

While it may seem trivial or sound like a meaningless nuance, the deliberate use of the word “suspend” precisely captured the message and helped to limit the anxiety on the other side of the table.

***The purpose for which words are used.*** Communication is the purpose for which words are used. This one should be self-evident. As author Phillip Roth said: “Conversation isn’t just crossfire where you shoot and get shot at! Where you’ve got to duck for your life and aim to kill! Words aren’t only bombs and bullets — no, they’re little gifts, containing meanings!”

If we feel a need to duck and cover because we’re getting verbally shot at from across the table, our charge remains to refrain from using words as weapons, even if we are tempted to fire back.

During negotiations, the purposes of our words must be:

- To seek to educate and not obfuscate.
- To avoid reducing complex issues to catchy sound bites.
- To remember that words can harm as well as persuade people.
- [And above all else] To engage in clear, open, and honest dialogue, even

if our counterparts do not respond in kind.

A recent union flyer attacked the district’s motives and integrity with the words, “Once again, they lie, they lie, they lie!” This is classic “words are weapons” mentality. The district did not strike back. However, the flyer did not encourage management to reach out in partnership to address the fiscal crisis. Bombs and bullets are more likely to trigger self-preservation, rather than openness and listening.

### ***Core Values and Chaos***

Knowing the prerequisites to true collaboration is useful. Distinguishing the elements of effective communication is helpful. But when all is said and done, we have failed as negotiators if, in the end, more was said than done. What are we trying to communicate and accomplish? How do we

*Effective, precise and sensitive communication is critical, especially now, in a time of fiscal crisis.*

determine what to propose, to accept, or to reject? Most importantly, how do we protect the interests of students in a process designed to serve the interests of adults?

One answer is Core Values.

I began forming the Core Values approach to negotiations several years ago. I began to realize something very basic that I should have understood long before. These revelations were:

- Labor comes to the bargaining table with a sense of purpose (right or wrong) and a “mission from God” attitude that allows them to negotiate from a position of unity, strength, and righteousness.
- By contrast, management comes to the table in a defensive and reactive mode. Its defining purpose is preventing collective bargaining from becoming “we bargain and they collect.”
- As public school employers, we are proud to prepare young people to be responsible members of society, and we provide a caring workplace, fair salaries and benefits, and good working conditions.
- Our ability to focus on our educational mission is challenged by forces such as politics, the economy, and our relationship with the unions.
- Contrary to its original purpose, the scope of bargaining under EERA no longer reflects the uniqueness of the public education sector. Decisions of the courts and the Public Employment Relations Board have inappropriately adapted to the educational environment an expansive scope of bargaining that is more applicable to the private sector.

To address the challenge posed by the last epiphany, my answer was surprisingly simple. Public school employers must adopt a set of Core Values to be used in negotiations. They must be proactive rather than defensive, articulate a unifying sense of purpose, focus on our core mission of education, and limit negotiations over fundamental educational policy decisions.

Core Values help determine what we propose in negotiations and what proposals we will accept or oppose from the union. Core Values move us beyond the “We want,” “We deserve,” and “We don’t like” lexicon, and even past “We propose.” Instead, they imbue each of our proposals with the power of “We believe.”

At the same time, they are not commandments to excuse rigidity and inflexibility. They are philosophical benchmarks that keep us centered in the chaos that is negotiations. When the chaos — the politics, the people, and the pressures — overwhelm us, returning to our Core Values lets us regain clarity of purpose. Core Values define and articulate the direction in which to move, rather than moving in search of a direction.

Just last week, in negotiations, we presented our initial proposal by reviewing our Core Values. They included:

- Enhancing the ability of the district and its employees to deliver quality education that improves student achievement and development in a positive and challenging learning environment.
- Encouraging the cooperative relationship between the district and each employee organization based on shared responsibility for the success of all students.
- Containing costs in ways that do not threaten the Core Values of the district, employee associations, or employees.
- Treating all stakeholders equitably by recognizing the common and diverse needs of all employees.

After we presented our Core Values, the labor representative commented, “Those are very nice, but from our perspective it’s *not* all about the kids. It’s also about our unit members making a fair wage and maintaining employer-paid benefits.”

A few moments of silence ensued while our team absorbed this statement. My initial thoughts were:

*Core Values define  
and articulate the  
direction in which  
to move, rather than  
moving in search of  
a direction.*

- We do not presently have a spirit of collaboration.
- How do I effectively and sensitively communicate my reaction to this statement without raising my voice or using colorful words?
- “OK, if these Core Values of yours are supposed to guide you in moments like this, why am I speechless?”

After a few seconds, I revisited our Core Values. Instead of descending into a shouting match or drawing a line in the sand, I pointed out that our Core Values were interdependent. After all, employees deliver the education program and our Core Values rightly speak to employee interests. But, the district would not elevate employee interests above the core mission of educating students and we would not make or accept proposals at the expense of this mission.

Based on the union’s response, collaboration still seems possible. Our reaction was clearly stated and accepted at face value, fostering a better understanding of what the district’s Core Values mean in negotiations.

### ***Conclusion***

Collaboration, Communication, and Core Values are not a fool-proof formula for negotiations nirvana, but without them, the seas will not be calm. The contradictions, cacophony, and chaos of negotiations will continue to persist. But, by understanding what true collaboration is, by knowing how to communicate and listen, and by utilizing Core Values, we negotiators can expect to exercise sound judgment, display good character, and always bring something good to the table. \*



## Recent Developments

# Local Government

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### PERB Takes First Round in Jurisdictional Dispute With Superior Courts

The Sixth District Court of Appeal became the first appellate court to weigh in on the controversy that pits the Public Employment Relations Board against the superior courts in a battle for jurisdiction over strikes by local government employees. The issue is whether the Meyers-Milias-Brown Act

parties reached a tentative agreement during negotiations, but the deal was rejected by union members and the union refused to extend the old contract. On May 30, 2006, the union gave the city 72 hours notice that a work stoppage would occur some time after June 2.

The city filed a complaint and asked the superior court for a temporary restraining order prohibiting 67 employees it identified as “essential” to its operations from participating in the strike. The city argued that PERB did not have exclusive jurisdiction over strikes that threaten the public health and safety and do not involve a pending unfair practice.

The union opposed the city’s application for the TRO, arguing that the court’s jurisdiction was preempted by PERB under the theory that the underlying conduct — the strike — was conduct which was arguably prohibited or protected by the MMBA. And, the union argued, PERB has effective procedures to address the work stoppage, including the ability to seek an injunction when appropriate. The union advised the court that it had filed with PERB an unfair practice charge against the city alleging violations of the MMBA.

PERB opposed the city’s injunctive relief request as well. It informed the court that it had exclusive initial jurisdiction over strikes and that the city was required to exhaust its administrative remedies.

Following a hearing, the superior court determined that the parties’ dispute fell within the exclusive jurisdiction of the board, and it declined to take any action on the city’s application for the TRO. The city appealed.

The case was argued on October 6 in San Jose. It was consolidated with *County of Santa Clara v. SEIU Local 535*, in which a different superior court

*The city argued that PERB did not have exclusive jurisdiction over strikes that threaten the public health and safety.*

*The scope of PERB’s jurisdiction and the need to exhaust administrative remedies presented a legal question of continuing public importance.*

conveys to PERB the authority to seek injunctive relief on behalf of public agencies when they face a strike by their employees or whether the agency can proceed on its own to the local superior court to seek an injunction.

The case decided by the Court of Appeal involved the City of San Jose and the Operating Engineers, Local 3, and stems from a breakdown in the bargaining process that occurred in 2006. The

judge reached the contrary result and concluded that the county was free to go to court to obtain an injunction barring essential employees from participating in that job action. (For a recap of the oral argument in those cases, see *CPER* No. 187, pp. 28- 32.)

The Court of Appeal began its analysis by addressing the question of mootness because the city and the union had reached an agreement for a new contract while the case was on appeal. While the court agreed that the case was “technically moot,” it determined that the central issue in the case — the scope of PERB’s jurisdiction and the need to exhaust administrative remedies — presented an important legal question of continuing public importance. It therefore proceeded to decide the case on the merits. Interestingly, in a separate and unpublished decision, the Court of Appeal dismissed the *County of Santa Clara* case based on mootness.

The Court of Appeal examined the jurisdictional issue by providing an overview of labor relations in public employment. It reviewed the enactment

of the MMBA in 1968, and then pointed to the legislation that gave PERB jurisdiction over the act effective July 2001. The court completed its historical review of the state’s collective bargaining statutes, detailing the enactment of the Educational Employment Relations Act, the Dills Act, the Higher Education Employer-Employee Relations Act, the Trial Court Act, the Court Interpreters’ Act, and the Transit Act.

The court then shifted its focus to the history of PERB, the “expert, quasi-judicial administrative agency modeled after the National Labor Relations Board.” PERB is authorized to resolve disputes and enforce these statutes, including the MMBA, by investigating and adjudicating unfair practices, the court continued.

The court next reviewed three “particularly relevant” California Supreme Court cases that involve public employee strikes. In the first, *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 41 CPER 2, the court determined that a strike could be an unfair practice under EERA, that the school district was required to exhaust its administrative remedies before PERB because the board could provide relief on par with the courts, and that PERB has exclusive initial jurisdiction over teachers strikes.

The Court of Appeal also examined the high court’s ruling in *El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d 946, 58 CPER 15, where the court, confronting an action for tort damages arising

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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.

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out of a strike, applied the federal preemption doctrine. It concluded that since the strike activity was both arguably protected and arguably prohibited conduct under EERA, the superior court had no jurisdiction.

Finally, the court turned to *County Sanitation District No. 2 v. Los Angeles County Employees Assn.* (1985) 38 Cal.3d

*‘A party may not, through artful pleading, evade PERB’s exclusive jurisdiction.’*

564, 65 CPER 2, which involved a strike by sanitation workers governed by the MMBA. There, the court rejected a long line of cases that had deemed public employee strikes illegal, and concluded that “the common law prohibition against all public employee strikes is no longer supportable.” But, acknowledging that strikes by public employees often pose a threat to the public interest, the court announced that “strikes by public employees are not unlawful at common law unless or until it is clearly demonstrated that such a strike creates a substantial and imminent threat to the health and safety of the public.”

Turning to the facts in *San Jose*, the court first noted that, to warrant PERB jurisdiction, the conduct at issue must

implicate the MMBA. To make this assessment, the court cautioned, “a party may not, through artful pleading, evade PERB’s exclusive jurisdiction.” “In other words,” said the court, “what matters is whether the underlying conduct on which the suit is based — however described in the complaint — may fall within PERB’s exclusive jurisdiction.” Therefore, the court concluded, “neither the City’s selection of the superior court as the forum for its complaint nor the Union’s choice to file a charge with PERB influences the analysis.”

The union’s unfair practice charge asserted that the city interfered with the workers’ right to participate in strikes. The city, on the other hand, contended that the planned strike would interfere with its ability to provide essential services. With these claims in mind, the court concluded that the challenged conduct implicated the MMBA. It found that, in alliance with the city’s position, the threatened strike was arguably prohibited conduct. The court likewise found that the strike was arguably protected conduct, suggesting that, if called in response to an employer’s unfair practice, the strike would be protected activity.

The court turned aside the city’s contention that its legal complaint was premised on the common law prohibition against strikes by safety-sensitive employees. “Absent an explicit statutory prohibition against strikes by particular employees, the question of the legality of such strikes is entrusted to PERB in the first instance.” Citing

*County Sanitation*, the court added that this determination must be assessed on a case-by-case basis. The court also underscored the importance of PERB’s acquisition of jurisdiction over the MMBA in 2001. Relying on *Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Board* (2005) 35 Cal.4th 1072, 172

*The activity that the city would exempt from agency jurisdiction — the right to strike — goes to the very fabric of the statute.’*

CPER 46, the court instructed that when the legislature vested PERB rather than the courts with initial jurisdiction over MMBA charges, “the Legislature entrusted PERB with determining the permissibility of strikes by essential public employees that implicate the MMBA.”

The court also dismissed the city’s contention that policy considerations should divest PERB of jurisdiction. The activity that the city would exempt from agency jurisdiction — the right to strike — “goes to the very fabric of the statute.”

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The board's expertise also weighed in the court's analysis. PERB "brings an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces so as to further the common good." By contrast, said the court, "the courts are not well suited to the task" because a court's injunction of a strike

*'It does not serve public policy to have superior courts interpreting statewide labor policy with conflicting results.'*

cannot "tailor its remedy to implement the broader objectives entrusted to PERB." Nor did the court accept the argument that PERB lacks the expertise to determine what are essential municipal tasks. The city's focus on job function, said the court, "is only one factor in assessing the risk of public harm." "PERB's statewide perspective offers an obvious advantage."

More fundamentally, added the court, "it does not serve public policy to have numerous superior courts throughout the state interpreting and implementing statewide labor policy inevitably with conflicting results."

The court also rejected the city's contention that the board's administrative remedies were not up to the task. The board has broad remedial powers, including the right to seek injunctive relief on an agency's request. And, the court took note, PERB already had filed its papers with the superior court by the time the city went in seeking injunctive relief.

Further, said the court, PERB has the same interest in public safety as the city, rejecting the notion that there is a disparity between the public's interest and PERB's interest. The agency has the same responsibility to the public with respect to municipal services, while the superior court lacks the expertise to tailor its remedy to implement the broader labor relations objectives entrusted to PERB.

Finally, the court rejected the city's contention that the strike is a matter of local concern and observed that the city's complaint in this case "goes to the essence of labor law and thus to the very heart of the agency's jurisdiction."

The court found no basis to excuse the city's obligation to exhaust its ad-

ministrative remedies. It found no potential for irreparable injury and again credited the board's expertise.

With that thorough analysis, the court concluded that PERB has exclusive initial jurisdiction to determine whether particular public employees covered by the MMBA have the right to strike. (*City of San Jose v. Operating Engineers Local Union 3* [3-4-08] H030272 [6th Dist.] \_\_\_ Cal.App.4th \_\_\_, 2008 DJDAR 3202.)

At the time *CPER* went to press, the case was not a final appellate court decision. In addition, there are two other cases pending that involve the same issue. One involves the California Nurses Association and Contra Costa County. That case was argued on February 6. Since the *City of San Jose* case was issued, the parties have been asked to submit supplemental briefs addressing the application of that decision to their case. In addition, a case pending in Sacramento County has yet to be decided. No date for oral argument has been set in the Sacramento case. \*

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## City's Interim Deal With Unions Avoids Bankruptcy — For Now

Vallejo, a city of 117,000 people just north of San Francisco, used to be a prosperous Navy town, home to the Mare Island Naval Shipyard. However, since that facility closed in the mid-

1990s, the city's economic fortunes have dwindled. So much so that last month the city was pressed to work out a last-minute deal with its fire and police unions in order to avoid bankruptcy.

The interim agreement includes modifications to the existing contracts and may have bought the city a few months' reprieve. But, all agree that it is not a long-term solution to the fiscal crisis.

The highly visible budget battle has brought attention to that portion of city coffers that is devoted to the pay and benefits of its safety personnel. Much of the publicity has focused on the International Association of Firefighters, Local 1186, which represents Vallejo's 78 firefighters, and on their current collective bargaining agreement, which includes significant wage increases.

*The budget battle has brought attention to the pay and benefits of safety personnel.*

The current crisis surfaced in mid-February, when the city council first mentioned the possibility of filing a bankruptcy petition. City Manager Joseph Tanner advised the council that the city would be \$6 million in the red by the end of June. By mid-April, Tanner warned, the city would be unable to pay its employees. Some of the economic problems are the result of shrinking tax revenues and a weak housing market. But, city officials pointed to the lucrative contracts the city had negotiated with its fire and police unions. Council members assert that Vallejo spends 80 per-

cent of its \$80 million budget on public safety, said to be 30 percent more than the national average. In addition to proposals for staff layoffs and a hiring freeze, emergency talks with the unions were underway, with the city pressing for concessions. Meanwhile, town hall meetings staged by citizens critical of the union pacts drew widespread media attention.

Intense negotiating sessions took place over the weekend of February 23 and 24, but when Monday rolled around, the agreement had fallen apart and each side blamed the other for nixing the deal. As the city and the unions tried to work out the details of an interim agreement, the crisis was exacerbated by the retirement of 14 firefighters who saw the looming possibility of bankruptcy as a threat to existing contract terms. The tab for their buyouts of sick leave and vacation pay added \$5.3 million to the city's problems.

When the city council met on February 26, the city manager recommended that the city seek bankruptcy protection. Many of those who crowded the council chambers blamed the city's financial problems on what they saw as lucrative contracts with the police and fire unions. Newspaper accounts that over 10 firefighters earned more than \$200,000 fanned the flames of discontent with the city's labor negotiators. Union leaders explained that salaries were high because of demands for overtime. Since 2001, 30 firefighters had retired. These staff shortages propelled the need for overtime.

With the city council scheduling the bankruptcy vote for February 28, negotiators were hard at work, and, just before the council convened, Mayor Osby Davis announced that the parties had forged a tentative deal.

Attorney Alan Davis said that the temporary settlement runs to the end of the fiscal year and contains major economic concessions. He told *CPER* that police and firefighters agreed to a 6.5 percent rollback in the contractually promised salary increase. Plus, the two unions agreed to a reduction in staffing. The firefighters agreed to a shutdown of two fire engine companies,

*Union leaders explained that salaries were high because of demands for overtime.*

effectively closing two fire stations. The police union agreed to a departmentwide staff reduction from 145 to 137 until 2010.

The deal also includes resolution of all outstanding lawsuits, PERB charges, and grievance arbitrations. This includes a court order that will enforce an arbitrator's award which affirmed a contract requirement that staffing within the fire department be set at 28 employees per shift. Davis ex-

plained that the supplemental agreement temporarily reduces this number to 22 per shift, which provides substantial savings to the city.

The retirees will get one-half of their buyout, with the remainder deferred until the next fiscal year.

The parties are currently meeting with the assistance of a mediator. They are trying to hammer out a temporary agreement by April 22 that will allow the city to avoid bankruptcy by providing cost reductions as well as revenue enhancements.

*Some were not convinced that the short-term fix was better than the bankruptcy option.*

IBEW, which represents the city's non-safety employees, was not part of the interim agreement. It is funded by an independent water fund, which is not in the same situation as the city's general fund.

While union members approved the stop-gap agreement, some members of the city council and the public were not convinced that the short-term fix sealed with the unions was better than the bankruptcy option. The council gave its approval to the plan by a 5 to 2 vote at 1 a.m. on March 5, after a six-hour meeting.

Two members of the council have spoken in favor of the bankruptcy option, hoping that this will permit the city to dissolve its collective bargaining agreements with its safety employees. But, whether a bankruptcy judge would — or could — repudiate the contracts is unclear. In 1995, when the Orange County board of supervisors invalidated its MOUs with unions representing county employees, a legal challenge to that move brought by a union coalition was successful. A bankruptcy judge issued a temporary

restraining order ruling that the county lacked the authority to repudiate the county contracts. (For a detailed discussion of this conflict, see *CPER* No. 110, pp. 16-20.)

While reasonable minds may differ over the wisdom of the city's decision to sidestep bankruptcy for now and work on a negotiated solution with the unions, there is no doubt that the problem is not fixed. According to the general manager, the city's general fund will be down to zero on June 30, and the city has depleted its reserve account. \*

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### **San Francisco Voters Enact Deferred Retirement Option**

The voters of the City and County of San Francisco gave their approval in February to a charter amendment that allows police officers to earn a pension while collecting their regular salary and benefits. The measure is designed to entice more officers to stay on the force and delay their retirement. About 600 police officers are eligible for retirement in the next five years. That prospect exacerbates the city's problem recruiting new officers to the department. The city is operating with about 250 to 300 fewer officers than mandated by voters.

The newly enacted measure, Proposition B, permits full-duty officers who are at least 50 years old, and who have at least 25 years as a sworn member of the police department, to

join a "deferred retirement program" that lets them earn a pension and collect a salary while they are on the job. At the end of their extended service,

*The measure is designed to entice officers to delay their retirement.*

which cannot be longer than three years, they receive the accrued pension funds in a lump sum.

This deferred retirement optional program, known as DROP, allows an eligible police officer to continue work-

ing for a specified period of time while continuing to receive their regular compensation and benefits. In addition, the officer begins to accumulate retirement payments in a tax-deferred DROP account that is maintained by the city retirement system. The officer's retirement benefits earned during the DROP period are calculated and frozen at the level that the officer had earned at the time he entered the

*The amendment  
requires no net  
increase in the  
city's costs.*

DROP. At the end of the DROP period, the officer receives the retirement allowance as well as the money that accumulated in the DROP account.

In addition to the age and service requirements, an eligible officer must be a full-duty sworn officer and agree to retire at the conclusion of the DROP. Officers can participate in the DROP for three years; sergeants and inspectors are eligible to participate for two years; and lieutenants and captains are restricted to a one-year DROP.

The charter amendment requires that the DROP not result in any net increase in the city's costs and sets up periodic reviews of the program by the board of supervisors. In the third year of the DROP, the city's controller and

the retirement system must prepare a joint report documenting any net costs to the city. The BOS then will review the report to determine whether the DROP should continue. The board can continue the DROP for an additional period of time, not to exceed three

years. Further extensions are subject to similar restrictions.

The San Francisco Police Officers Association supported the new program. But critics argued that it will not solve the city's recruitment problem. Approximately 65 percent of the voters gave their approval to the DROP. \*

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### **Bill of Rights' Notice Must Include Contemplated Disciplinary Action**

The Public Safety Officers Procedural Bill of Rights Act is clear. In the event a public agency determines that discipline will be taken against a police officer, it must complete its investigation and notify the officer of its proposed disciplinary action within one year. That requirement, ruled the Second Appellate District in *Quihuis v. City of Los Angeles*, means that the personnel complaint issued by the agency must provide notice of the disciplinary action it is proposing. Informing the officer of the city's power to recommend termination does not satisfy the statute's notice requirement.

The case began when Officer Robert Quihuis found an unmarked police car parked in front of his garage on November 18, 2003. Detectives from the San Bernardino Sheriff's Department had been called to investigate a report of domestic violence. Quihuis asked Detective Robert Emmerson, who was conducting interviews at the

time, to move his car. Emmerson told Quihuis he was engaged in police business and would move the vehicle as soon as possible. After Quihuis asked Emmerson to move the car two more times, Emmerson cursed at Quihuis and, when learning that Quihuis was a police officer, said that Quihuis should know better than to interfere with an investigation.

Quihuis contacted the San Bernardino Sheriff's Department to complain about Emmerson and, on December 4, 2003, detectives there faxed a report of the incident to the Los Angeles Police Department.

The city served a personnel complaint on Quihuis on October 7, 2004, giving him notice of a future hearing before a board of rights, and charging him with interfering with an official police investigation. The board subsequently found Quihuis guilty and recommended to Chief of Police William Bratton that Quihuis be discharged from



his position. Chief Bratton followed the board's recommendation and imposed termination on March 11, 2005.

Quihuis challenged the termination, arguing that the disciplinary action was barred by the statute of limitations contained in Sec. 3304(d) because he did not receive proper notice of the

*'The personnel complaint did not identify any proposed disciplinary action at all.'*

proposed disciplinary action within one year of the city's discovery of the alleged misconduct. The trial court disagreed and found that the personnel complaint gave him "sufficient notice that he might be discharged." Quihuis appealed that ruling.

In defense of the trial court ruling, the city argued that it had complied with the notice provision of the Bill of Rights Act because the personnel complaint referred to the section of the city charter that authorizes a board of rights to recommend various penalties, including termination.

The court first made clear that the parties did not dispute that the city served Quihuis with the personnel complaint within the one-year deadline. The issue was the adequacy of the

notice he received. Focusing on the language of Sec. 3304(d), the court concluded that the personnel complaint did not give Quihuis timely notice of the "proposed disciplinary action." "The personnel complaint did not identify any proposed disciplinary action at all," said the court, "so it did not satisfy the statutory requirement." Even assuming the city's reference to the charter provision put Quihuis on notice that he *could receive* any punishment authorized by the charter, the court found that Sec. 3304(d) requires the city to notify the officer of the specific disciplinary action that is being proposed. Relying on *Sanchez v. City of Los Angeles* (2006) 140 Cal.App.4th 1069, 179 CPER 37, the court reiterated that merely advising the officer that *some* disciplinary action is being contemplated is not enough.

The court also addressed the city's argument that Quihuis was barred from raising the statute of limitations defense in a writ proceeding under Code of Civil Procedure Sec. 1094.5 because he failed to first exhaust his administrative remedies. However, the court explained, the administrative exhaustion requirement does not apply if Quihuis were to proceed under Sec. 3309.5 of the act. That section makes it unlawful for any public safety department to deny or refuse any public safety officer the rights and protections guaranteed by the act. In *Moore v. City of Los Angeles* (2007) 156 Cal.App.4th 373, 187 CPER 32, the Court of Appeal first announced that, since Sec. 3309.5(c) vests the superior court with initial ju-

risdiction to render appropriate injunctive relief to remedy a violation of the act, a public safety officer is not required to raise a violation of the act at the administrative hearing.

*Moore* was decided after briefing in the *Quihuis* case was completed, and no previous appellate decision had held that a public safety officer must bring a claim under Sec. 3309.5 in order to raise a statute of limitations defense that was not presented at the administrative hearing. So, when Quihuis filed his writ petition under Code of Civil Procedure Sec. 1094.5, he had no reason to believe that he would be barred from presenting his statute of limitations defense if he failed to bring an action under Sec. 3309.5 as well. Therefore, the court directed that, because of the unsettled nature of the law, Quihuis should be permitted on remand to amend his pleadings to include a Sec. 3309.5 claim. (*Quihuis v. City of Los Angeles* (2008) 159 Cal.App.4th 443; modified (2-26-08) 2008 DJDAR 2803.) \*

# Public Schools

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## Brunt of Threatened Budget Cuts Lands on Teachers

Governor Schwarzenegger's plan to cut \$4.8 billion from California's K-12 schools and community colleges this year and next will, if implemented, mean the loss of thousands of teachers. The impact of the governor's plan became clearer with the arrival of the March 15 deadline for school districts to notify employees of possible layoffs.

*The magnitude of the proposed cuts is stunning.*

Nearly 20,000 employees received preliminary notices, according to the California Department of Education. The California Teachers Association estimates that about 14,000 of those notices were sent to teachers. If the terminations go through, roughly 4 percent of California's 340,000 teachers will be laid off. In addition, districts can lay off probationary teachers without early notices and can decide not to replace retiring teachers for the upcoming year.

The magnitude of the proposed cuts is stunning. Senate President Pro

Tem Don Perata (D-Oakland) said that they could mean delaying the start of the school year by one month or adding five students to each classroom to offset the loss of teachers. CTA President David Sanchez warned that the cuts would be equal to the loss of 107,000 teachers, one-third of all the teachers in the state, or an increase in the number of students in every classroom by up to 35 percent. According to the Legislative Analyst's Office, per-student spending, after adjusting for inflation, would drop to its lowest level in at least 10 years. Right now, before the cuts, California spends \$2,000 less per student than the national average and ranks 46th in the nation in per-pupil spending, according to *Education Week's* annual "Quality Counts" report. Schwarzenegger's plan would reduce that amount by another \$300 per pupil.

Because school districts must pass their budgets for the 2008-09 school year by June 30, they cannot wait to see if the legislature will implement the governor's proposals. Many districts are moving forward with plans to cut costs. In addition to issuing layoff notices to teachers, administrators, counselors, coaches, specialists, and other staff, districts have authorized cuts to

sports, art, and music programs, and to libraries. Some administrators plan to close schools, and many are considering increased class size. But, because 80 percent or more of a district's budget is spent on salaries, the only effective way to slash costs is to reduce staff.

However, there are many who are not taking the situation lying down. Senator Perata has vowed to hold up the budget past the July 1 deadline and into the fall to delay the cuts. Superintendent of Public Instruction Jack O'Connell is touring the state speaking out against the governor's plan. Teachers and staff have been holding rallies throughout California. By one

*Per-student spending would drop to its lowest level in at least 10 years.*

estimate, 1,000 educators and other district employees staged a two-hour demonstration in San Francisco on March 12. Students have walked out of their classrooms in protest. For example, hundreds of students from Alameda's two high schools left class and marched straight to the district superintendent's office to protest \$2.56 million in budget cuts approved by the school board.

A broad spectrum of groups from every area of state funding, including

education, labor, public safety, environment, health care, and social services, have joined together to press lawmakers to raise taxes and plug tax loopholes. The coalition, as yet unnamed, has set up committees to focus on lobbying efforts in Sacramento.

So far, legislative efforts to close the budget gap have failed. A proposal by Speaker of the Assembly Fabian Nunez (D-Los Angeles) would have taxed oil companies and applied the revenues to schools. The measure would have imposed a 6 percent tax on oil drilling, and a 2 percent tax on oil income and profits that exceed \$10 million a

### *Legislative efforts to close the budget gap have failed.*

year. Proponents estimated the plan would have generated \$1.2 billion annually, all of which would have gone to the schools. The bill, which required a two-thirds vote to pass, failed along a party-line vote of 45 Democrats to 30 Republicans. Assembly Republicans also blocked a bill that would have closed a tax loophole which allows Californians who buy yachts, airplanes, and luxury recreational vehicles to avoid paying sales tax by keeping these items out of state for the first 90 days after purchase. The bill, which had passed in the Senate, would have raised \$26 million.

Although it is possible that those who oppose the governor's proposed budget cuts will prevail, and the number of teachers actually laid off will be much less than the number of notices issued, the impact on morale could be devastating. In 2003, 20,000 layoff notices were sent out on March 15, but by the time school started in the fall, only 3,000 teachers and other staff members were laid off. While that was a good result for the 17,000 who kept their jobs,

the long-term impact was less positive. During the following two years, the number of students who entered teacher education programs declined by about 13 percent. "Not only are we discouraging the folks in the profession, but we're discouraging the people considering the profession," said Harvey Hunt, senior policy analyst at the Center for the Future of Teaching and Learning. "This whole thing doesn't end on March 15." \*

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## **District May Terminate Substitute Teacher Who Was Not Permanent Employee**

A school district may terminate a substitute teacher who was not reelected for a permanent position after having served two years as a probationary teacher, determined the Third District Court of Appeal in *Vasquez v. Happy Valley USD*. The court was not persuaded by the teacher's inventive interpretation of the Education Code's classification system. The court's opinion includes a clear and comprehensive summary of the statutory system, reference to which would be helpful to anyone attempting to demystify the workings of the complicated teacher classification system

### **Factual Background**

Patricia Vasquez was hired by the district on October 8, 2003, as a substitute to teach a new class for 2.5 hours a

day. On November 6, 2003, the district notified Vasquez by letter that she was employed as a temporary teacher on a month-to-month basis to teach the same class.

The district timely informed Vasquez of its intent not to retain her for the 2004-05 school year. But, on October 1, 2004, the district again retained her as a substitute teacher. On October 6, 2004, the district reclassified her as a temporary teacher.

The district timely informed Vasquez that it would not reelect her for the 2005-06 school year. However, after the school year started, a regular teacher took a leave of absence and the district hired Vasquez to fill the position as a day-to-day substitute. On December 16, 2005, the district asked Vasquez to sign a letter dated December 13, 2005, ac-

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Pocket Guide to

**K-12 Certificated**

**Employee**

**Classification**

**and Dismissal**

Certificated K-12 employees and representatives, and public school employers — including governing board members, human resources personnel, administrators, and their legal representatives — are navigated through the often-convoluted web of laws, cases, and regulations that govern or affect classification and job security rights of public school employees.

The guide covers such important topics as dismissal, suspension, leaves of absence, layoffs, pre-hearing and hearing procedures, the Commission on Professional Competence, the Commission on Teacher Credentialing, the credential revocation process, and more.

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knowledging that she was “currently being employed by the district as a temporary teacher” until the regular teacher returned. Vasquez refused to sign the letter and was terminated.

Vasquez sued the district, alleging that it had terminated her in violation of her statutory due process rights. The trial court denied her request that she be reinstated as a permanent employee, and she appealed.

#### **Court of Appeal Decision**

**Review of statutory classification system.** The appellate court began with an overview of the Education Code’s system of classification for public school teachers. It explained that teachers are classified into four different categories: permanent, probationary, substitute, and temporary.

“Permanent teachers are those who a school district has employed for two complete consecutive school years as probationary teachers and who have been ‘reelected’ (retained) for the next

succeeding school year,” it instructed. “A school district may terminate a permanent teacher only for misconduct or due to a reduction in the overall number of teachers,” it continued.

*Teachers are classified into four different categories: permanent, probationary, substitute, and temporary.*

“The classification of ‘probationary’ is the default classification,” explained the court. These are teachers who are not otherwise required by statute to be classified as permanent, temporary, or substitute. They may be dismissed during the school year only for cause or unsatisfactory performance.

However, they may be terminated at the end of the teacher’s yearly contract without cause if the district gives the teacher timely notice of its decision. The district may give this notice at any time during the teacher’s first year of employment. However, if the district decides not to reemploy the teacher for the year following the second year of employment, notice must be given by March 15 of that year. “If the district fails to give the second-year probationary teacher timely notice, the teacher is deemed to be reemployed for the next succeeding school year and by law becomes a permanent employee,” explained the court, referencing Sec. 44929.21(b).

A substitute teacher is “employed from day to day to serve at the option of the school district in the absence of the regular teacher,” said the court. School districts are required to classify as substitutes teachers who are employed “to fill positions of regularly employed persons absent from service,” according

to Sec. 44917. A district may dismiss a substitute teacher at any time without cause.

“The classification of ‘temporary’ covers a variety of scenarios,” instructed the court. “A temporary teacher is, among other definitions, a teacher hired by the district for a semester or a complete school year to replace a regular teacher who has been granted leave for that time or is experiencing long-term illness.” A teacher working on a categorically funded project may also be classified as temporary, according to the code.

“Temporary teachers have slightly more employment rights than substitute teachers,” observed the court. They may be dismissed without cause at any time prior to serving 75 percent of the school year. After that, the district must notify the teacher by the end of the school year if it does not plan to rehire her for the following year. If it fails to do so, the teacher must be rehired if the district has a vacant position. In that event, or in the event the district voluntarily hires the teacher for a second year, the teacher is considered a probationary employee for the second year, and the prior year is reclassified as a year of probationary service for purposes of acquiring permanent status, according to Secs. 44909 and 44918(a).

The code provides that school districts must place employees into one of these four classifications at the time they are hired and provide each new employee a written notification of that classification no later than the first day of employment.

“If the district hires a teacher as a temporary employee, the statement must clearly indicate the temporary nature of the employment and the length of the employment term,” said the court. “If the statement does not indicate the temporary nature of the employment, or if the statement is untimely, the employee is deemed to be a probationary employee.”

*The district’s conduct caused her to be deemed a probationary employee for two consecutive school years, she argued.*

**Vasquez’ position.** Vasquez presented two alternative arguments in support of her claim that she should be reinstated as a permanent employee. First, she argued, the district’s conduct caused her to be deemed a probationary employee for two consecutive school years, thereby entitling her to be hired as a permanent employee for the 2005-06 school year when the district failed to classify her, on her first day of work, as a temporary employee. In support of this position, Vasquez contended that the district erroneously classified her as a substitute teacher for the first few days of the 2004-05 school year because she was not hired to fill in

for a regular teacher but, rather, to teach a new class created due to categorically funded class-size reduction rules. Therefore, she reasoned, she was entitled to be classified as a probationary employee. And, because she was not notified of her probationary classification on the first day of her employment that year, she was deemed a probationary employee for the entire year. This meant that her employment as a temporary employee for at least 75 percent of the 2003-04 school year must be considered a completed year of probationary employment. Because the district did not notify Vasquez of her classification as a temporary teacher as of December 13, 2005, the first day of her employment in that classification, and because her prior two years of service were deemed to be probationary, she was entitled by law to be a permanent teacher, and the district could not legally terminate her without cause.

Alternatively, Vasquez argued, even if she had been lawfully classified as a temporary employee for 2004-05, she would be classified as a probationary employee for 2005-06 because the district failed to provide her with notice of her classification as a temporary employee by her first day of work that year, rendering her classification for 2004-05 as probationary by law. Therefore, as a second-year probationary employee during 2005-06, the district could not dismiss her during the year without cause, and, because the district did not give her notice of non-reelection by March 15, 2006, she is deemed

a permanent employee for the 2006-07 school year.

**The ruling.** The appellate court analyzed Vasquez' two arguments and found them unpersuasive. However, the court agreed with Vasquez that the district misclassified her as a substitute in October 2004, and it addressed the issue in depth in order "to disabuse the District of its argument that it has discretion to classify any teacher as a sub-

*However, this original misclassification did not lead to the conclusion asserted by Vasquez, reasoned the court.*

stitute when the Education Code does not expressly direct otherwise." The California Supreme Court, in *Balen v. Peralta Junior College Dist.* (1974) 11 Cal.3d 821, provided a strict interpretation of the relevant sections of the Education Code that apply to substitute and temporary classifications, noted the appellate court. "Because the substitute and temporary classifications are not guaranteed procedural due process by statute, they are narrowly defined by the Legislature and should be strictly interpreted," said the Supreme Court.

"Since *Balen*, appellate courts have interpreted the temporary classifications narrowly," said the Court of Appeal. "So much so that if a teacher does not satisfy the statutory grounds for a temporary classification, the default or catch-all provision of section 44915 mandates the district classify the teacher as a probationary employee," it continued. "In other words, it is no longer the case that a school district and a teacher are free to negotiate a teacher's classification in cases of a statutory gap."

The court noted that the code provides only one ground for classifying a teacher as a substitute, and that is where she is employed "to fill positions of regularly employed persons absent from service," under Sec. 44917. Because Vasquez was not hired in October 2004 to fill in for a teacher that was absent, "it is obvious" that the district misclassified her, said the court.

However, this original misclassification did not lead to the conclusion asserted by Vasquez, reasoned the court. Even assuming that Vasquez must be considered a probationary employee for 2004-05, and thus for 2003-04 as well, the evidence did not support the conclusion that she became a permanent employee for 2005-06. First, the court noted, Vasquez' time cards showed that she worked as a substitute on December 13, 14, and 15, 2005. Therefore, the "currently employed" language in the December 13 letter would have been effective only on December 16, when it was presented to Vasquez. Second,

"working for two consecutive years as a probationary employee is not the only requirement for obtaining tenure." To become a permanent employee, the teacher must also be reelected for the next succeeding school year, according to Sec. 44929.21(b). "The District here gave plaintiff timely notice in the spring of 2005 that it was not reelecting her to work in the 2005-06 school year," said the court. "As a result of this, plaintiff was serving only as a substitute teacher at the time she was dismissed," and "substitutes may be dismissed at any time and without cause."

Vasquez' alternative argument, that she was a probationary employee for the 2005-06 school year because the district failed to give her notice of her temporary classification, also fails, said the court. "The District gave plaintiff notice of her classification as a substitute teacher when she was first hired in November 2005, and then attempted to give her notice of her new temporary classification on December 16, which would have been the last day of her employment as a substitute, but plaintiff refused to accept it," the court said. "Thus, at no time did plaintiff become a probationary employee during the 2005-06 school year due to the failure to receive timely notice of her appropriate classification." Therefore, the district was free to terminate her without cause or a hearing, concluded the court. (*Vasquez v. Happy Valley Union School Dist.* [2008] 159 Cal.App.4th 969.) \*

## Governor Releases Committee Report on Education: No Money to Implement

On March 15, Governor Schwarzenegger finally released the report prepared by his own Committee on Education Excellence, more than five months after it was submitted to him. The governor appointed the committee two years ago “to analyze current impediments to excellence, explore ideas and best practices relevant to California, and recommend changes and reforms.” The group was charged to focus on four interrelated topics: governance, finance, teacher recruitment and retention, and administrator preparation and retention. The 20-member committee included local school officials, education experts, a former state

legislator, and the past CEO of Paramount Pictures. It was headed by Ted Mitchell, former president of Occidental College.

An earlier report, also commissioned by Schwarzenegger along with a bipartisan group of lawmakers and educators, had already addressed similar issues. That report was a collection of 22 studies conducted by the Institute for Research on Education Policy and Practice at Stanford University, entitled *Getting Down to Facts*. (For a summary of the findings of the Stanford report, see *CPER* No. 183, pp. 39-43.)

The committee report released last month, entitled *Students First: Re-*

*newing Hope for California's Future*, comes to the same general conclusion as the Stanford study: California's public education system is performing poorly and needs a top-to-bottom overhaul.

“California's current system is best characterized as irrational: it does not support the things we know will improve student achievement, and at times even impedes them,” the committee informed the governor in its cover letter. “California's current system turns common sense on its head,” says the report. “Too often, students are an afterthought.”

It proposes that the state spend another \$10.5 billion a year on schools, which equals about a 20 percent increase in state and local school spending. But, it cautions, “additional funds

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### Pocket Guide to the Educational Employment Relations Act

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.

Here in one concise Pocket Guide are all the major decisions of the Public Employment Relations Board and the courts that interpret and apply the law. Plus, the Guide includes the history and complete text of the act, and a summary of PERB regulations. Arranged by topic, the EERA Pocket Guide covers arbitration of grievances, discrimination, scope of bargaining, protected activity, strikes and job actions, unilateral action, and more.

By Bonnie Bogue, Carol Vendrillo, Dave Bowen, and Eric Borgerson  
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will significantly benefit students only if they are accompanied by extensive and systematic reforms in other strategic areas.”

The committee advises that teachers be given advanced career opportunities without leaving the classroom, including mentoring and site leadership roles. It suggests that “peers and leaders use professional standards and performance outcomes to evaluate teachers and principals,” and that pro-

*The committee promotes the adoption of performance-based pay.*

fessional priorities be targeted to school priorities and student needs. The committee also promotes the adoption of performance-based pay for teachers and administrators, measured by “student-performance gains, skills, and responsibilities.” Additional incentive pay would go to teachers and principals “who demonstrate effectiveness and teach and lead in schools that serve high concentrations of low-income and minority students.” The committee urges deregulation of professional preparation, “so that more entities can train and certify teachers.”

Other recommendations include eliminating the existing “categorical” system of funding that funnels money to districts to finance over 100 individual programs. Instead, the report points to a system that pays on a per-student basis. It urges that more resources be invested in students, “particularly those in the lowest end of the achievement gap who have been least well-served by the system in the past.” It proposes the expansion of local control to increase efficiency and empower county superintendents to enforce district accountability and facilitate state intervention when necessary. The report also suggests that the education secretary be given control over the Department of Education, and that the Superintendent of Public Instruction be designated “the independent guarantor of success.” It also recommends “full equalization of funding between district and charter schools and full disclosure of opportunities available to make real choices available to parents.”

The committee suggests that the state move toward universal preschool for low income three- and four-year-olds and expand access to full-day kindergarten. It contemplates moving up the age for entering kindergarten by three months, from December to September.

Included in the committee’s report are some ideas about how to raise the funds necessary to implement its reforms, including increasing sales, income, or property taxes. Since the report makes the latter tax seem prefer-

able, this would mean making some changes to the limitations imposed by Proposition 13.

The reforms must be considered as a “coherent, comprehensive package,” the committee emphasized. It warned that “singling out and implementing individual recommendations on their own could make the current, intolerable situation even worse.”

*The reforms must be considered as a ‘coherent, comprehensive package.’*

Schwarzenegger praised the committee’s proposals and its work, describing the report as “an outstanding blueprint.” He even seemed to agree with the idea of spending more money, stating, “I realize that providing a first-rate education system means having adequate resources.”

However, in reality, the committee’s findings are likely to be shelved for the near future, given the fact that the report was released in the midst of the state’s current fiscal crisis. It is unlikely that fundamental changes in the state’s system of public education carrying a price tag of \$10.5 billion will be implemented in a year



where the governor is calling for a \$4.8 billion cut in education funds.

A detailed summary of the committee's report can be found at

<http://www.everychildprepared.org/docs/summary.pdf>. \*

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## Signs of Progress in Schools in Spite of Big Challenges

A new report published by Policy Analysis for California Education finds significant progress in the state's schools in the face of increasing difficulties. The report, entitled *Meeting the Challenge: Performance Trends in California Schools*, was authored by Jennifer Imazeki, an associate professor of eco-

*All students are doing better, or at least holding steady.*

nomics at San Diego State University. PACE, a nonpartisan research institute jointly based at U.C. Berkeley, Stanford, and the University of Southern California, contracted with Imazeki to research California schools' performance trends.

Imazeki found that "trends across multiple measures of student performance are fairly consistent: all students are doing better, or at least holding steady, during a time when the system is serving a larger and more diverse population of children." Imazeki noted

that these achievements have taken place in spite of the fact that "the job of educating California students is substantially more difficult than it was even a decade ago."

Imazeki referred to the problems detailed in the compilation of studies released by the Governor's Committee on Education Excellence, called "Getting Down to Facts." She makes the point that the improvements she found have happened notwithstanding the dismal state of California's entire system of school finance and governance. (For a discussion of the committee report, see CPER No. 183, pp. 39-43.) Those problems include the fact that in 2003-04, California fell behind the nation in student-teacher ratios as well as student-administrator ratios. California's ratio of 476 students per administrator is more than three times as high as Texas and 50 percent higher than the average in the rest of the country. The public schools serve over a million more students than they did 10 years ago. They also serve the most diverse group of students in the country. Over 70 percent of K-12 students are non-white, and almost one-half qualify for the free-lunch program.

Almost 25 percent of the students are English-learners, compared with only 6 percent nationwide.

She noted that, whereas the demands on our schools have grown, "there has not been a commensurate growth in resources." Pupil-teacher ratios are only marginally lower today than they were in 1990, and that is because of the class-size reduction policy adopted in 1996. And, although teacher salaries in California are high relative to the rest of the nation, beginning teacher salaries are actually less competitive today than they were in the early 1990s, when compared to salaries outside of teaching. Teachers have also

*Whereas the demands have grown, 'there has not been a commensurate growth in resources.'*

come under greater scrutiny with the increase in standards-based accountability and reporting.

By examining the trends in student outcome within California the report highlights how the state's schools have responded to environmental changes. Imazeki relied on a range of indicators.

Her findings show, for example, that the percentage of third-graders

who are proficient in math and reading has increased. Improvement is reflected in each subgroup of students, although white and Asian students are still out-performing African-American and Hispanic students by wide margins. The trends in all other grades are similar.

She also discovered that, while California's drop-out rate remains high, it is one of the few states that saw an improvement in graduation rates between 1992 and 2002. The *number* of graduates who have completed

*Imazeki called these improvements a 'testament to the dedication of California educators.'*

coursework necessary to enter the University of California or California State University systems has also grown, while the *percentage* of all graduates has remained relatively level.

Both the number and the percentage of students taking the eighth-grade algebra test rose between 2003 and 2006, but the percentage of test-takers who are proficient has declined. The number and percent of high school students enrolled in advanced math and science courses has increased from

1998 to 2006, although the proficiency levels for all subgroups, except for Asians, has fallen slightly. The author cautions, however, that state-level statistics mask huge variations across schools.

Imazeki called these improvements "a testament to the dedication of California educators." "Public school teachers, principals and staff are under increasing pressure to produce measurable improvements in student outcomes, and they have responded to the challenge," she wrote.

Imazeki concluded by stating:

Unfortunately...the achievements documented in this [policy] brief have happened in spite of many state policies, not because of them. For policymakers, the need for reform should be clear. How much better might our schools have done, and how much more might they do in the future, if California's school finance and governance systems actually supported student performance and accountability? If we are going to ask our schools for continued improvements, we must also ensure that they have the resources and support that they need to do this vital work.

The PACE policy brief can be accessed online at [http://pace.berkeley.edu/pace\\_publications.html](http://pace.berkeley.edu/pace_publications.html). \*

# Higher Education

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## Parking Case Sent Back to PERB for Full Scope Analysis

The third district Court of Appeal concluded, in *California Faculty Assn. v. Public Employment Relations Board*, that the terms and conditions on which the university provides its employees with parking — including location — do involve the employment relationship between the university and its employees. The court found PERB's decision to the contrary was "clearly erroneous," but sent the case back to the board with orders to first apply the remaining parts of the scope test it overlooked, and then decide whether California State University's action was a unilateral change.

### Factual Background

During the 2000-01 school year, administrators at the Northridge and Sacramento CSU campuses determined additional parking was needed and that a fee increase was necessary to pay for construction of new parking structures. CSU requested that CFA reopen their collective bargaining agreement to negotiate the issue, but CFA refused.

At the Northridge campus, the university negotiated with employees in other bargaining units not represented by CFA and obtained agreement on a

parking fee increase. As a result, in September 2001, the university raised the fees for students and those employees whose unions had agreed to the increase. Meanwhile, at the Sacramento campus, the university raised student parking fees for the fall 2002 semester, but left employee fees unchanged. However, the university designated the new structure at the Sacramento campus as parking for students only.

In response to the new parking designations at the Sacramento campus, CFA filed an unfair practice charge against CSU in October 2002. The complaint alleged that by precluding employees from parking in the new facility, CSU had effectively changed the fee structure by devaluing faculty parking permits sold at the contractually permissible rate and by limiting the use of their permits in conflict with practices on campus. According to CFA, this violated Government Code Sec. 3517(c), which bars higher education employers from refusing to meet and confer with an exclusive representative on matters within the scope of representation. PERB issued a complaint on CFA's charge in December 2002.

Meanwhile, CSU informed CFA that its members at the Northridge

campus would not be allowed to use the new parking structure when it was completed in the fall. In response, CFA amended the unfair practice charge it filed with PERB to include the recent activity; the board issued an amended complaint.

An administrative law judge issued a proposed decision which concluded that parking location is a matter within the scope of representation, and that CSU violated the Higher Education Employer-Employee Relations Act when it unilaterally prohibited employees from parking in the new structures. PERB rejected the ALJ's decision and determined that parking location is not a matter within the scope of representation, and, therefore, the university did not have a duty to bargain with CFA regarding the issue. At the union's request, the court reviewed PERB's ruling.

### Court of Appeal Decision

Referring to PERB's own precedent, the court explained that a matter is within the scope of representation if it is a term or condition of employment. Whether a specific subject is a term or condition of employment requires a showing that the matter involves the employment relationship, is of such concern to management and labor that conflict will likely arise and collective bargaining is an appropriate means of resolving it, and that the employer's obligation to negotiate would not unduly abridge its freedom to exercise those managerial prerogatives essen-

tial to achieve its mission. If an issue can be shown to be within the scope of representation, the analysis continues to determine whether action taken on that issue constitutes a unilateral change. According to the court, PERB “put all its eggs in one basket” when it found one element to be dispositive — that employer-provided parking does not involve the employment relationship. The court limited its review to that element and did not elaborate as to the other elements of the three-part test used to determine whether a matter is within scope.

*PERB reasoned that employees are not required to drive to work.*

Recognizing that it must follow the board’s determination unless it is clearly erroneous, the court examined the reasoning behind PERB’s decision that the employees’ exclusion from certain parking structures did not involve the employment relationship. For its part, PERB had concluded that parking is not a condition of employment because employees are not required to drive to work, and, in the event that they do choose to drive, employees are not limited to certain spaces. The board explained that employees, like students and members of the public, may park

in “daily spaces,” rather than permitted spaces, or park off campus. Further, PERB noted, CSU employees at both campuses still could park in the same locations as before the new structures opened. The board noted that when the new structures opened, the number of spaces available to employees actually increased.

However, CFA argued that PERB’s decision was contrary to its own precedent. According to the union, the board previously rejected the “captive consumer-no reasonable alternative” test involving employee parking in *Statewide University Police Assn. v. U.C. Regents* (1983) PERB Dec. No. 356-H, 60 CPER 85. Before the court addressed the *SUPA* decision, it first examined the underlying decision of the U.S. Supreme Court in *Ford Motor Co. v. NLRB* (1979) 441 U.S. 488. At issue in *Ford* was whether prices for in-plant cafeteria and vending machine food and beverages were terms and conditions of employment subject to mandatory collective bargaining under the National Labor Relations Act. The National Labor Relations Board and the Supreme Court agreed that they were. The high court found that where the employer has chosen to make food available to its workers, the price and other aspects of the service may reasonably be considered among those subjects about which management and the union must bargain.

In the *SUPA* decision, which relied on *Ford*, PERB found that the amount of fees charged to employees for employer-provided parking was a

matter within the scope of representation under HEERA. In reaching that conclusion, the board rejected U.C.’s arguments that parking fees were not conditions of employment because, unlike the food made available to employees in *Ford*, U.C. employees had alternative modes of transportation. In *SUPA*, PERB noted that while the Supreme Court had found that the *Ford* employees had no reasonable alternatives to the company cafeteria, it did not base its conclusion on that factor. The Supreme Court cited a line of NLRB

*Under well-established precedent, parking involves the employment relationship.*

decisions where the “captive consumer-no reasonable alternative” situation did not exist.

The board in the *CSU* case did not offer an explanation for its deviation from the position it took in *SUPA*. Rather, it underscored the transportation and parking alternatives that are available to CSU employees and reasoned that those factual differences rendered *Ford* inapplicable.

The Court of Appeal rejected the distinction, stating, “the ‘captive consumer-reasonable alternative’ issue is a red

herring, and the board's attempt to distinguish the *Ford* case from this case on that basis fails." Likewise, the court was not persuaded by PERB's analysis that distinguished parking from food because parking is not required to "sustain life" and, therefore, is not an "integral part" of the employee's relationship with the employer. As the court observed, PERB cited "no authority for the proposition that a subject must be *integral* to the employment relationship to be deemed to *involve* that relationship."

The court called it a "common sense conclusion" that because employee parking fees are expressly dealt with as a benefit of employment in the collective bargaining agreement, employer-provided parking is a sub-

ject that involves the employment relationship. Thus, the court said, "under well-established precedent, the terms and conditions on which an employer makes parking available to its employees 'involves the employment relationship.'"

The court sent the case back to PERB so the board could revisit the multi-step analysis and assess whether CSU violated Gov. Code Sec. 3571(c) when it excluded employees from the new parking structures at the Sacramento and Northridge campuses without giving CFA an opportunity to bargain over the issue. (*California Faculty Assn. v. Public Employment Relations Board* (2-28-08) C054725 [3d Dist.], \_\_\_ Cal.App.4th \_\_\_ 2008 DJDAR 2943.) \*

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## Legislative Analyst Proposes Alternative Budget: No Cost-of-Living Adjustments for U.C., CSU Employees

In early January, when Governor Schwarzenegger presented his 2008-09 budget to the State Senate and Assembly, his figures showed a \$3.3 billion deficit in the current fiscal year and a projected \$14.5 billion gap next year. In an effort to improve California's financial predicament, the governor recommended across-the-board reductions in spending that will affect every public department, including a \$261 million reduction in general fund support for higher education. The University of California and California State University sys-

tems reacted with deference for the current financial crises, but also with apprehension over potential budget cuts. In February, the Legislative Analyst's Office presented its assessment, which can shape the way the governor's budget is received by the state legislators. Unfortunately, the LAO report echoed the governor's underlying theme — cuts must be made in order to stop the state's financial downturn. The final budget is set to go into effect on the first day of the next fiscal year, July 1, 2008.

## Legislative Analyst's Office Alternative Budget

Not surprisingly, the LAO had numerous disagreements with the governor over the best ways to close the deficit gap. With respect to higher education spending, the LAO made several recommendations, most of which further reduced the funding that California's higher

*The LAO suggested funding for the anticipated growth in enrollment.*

education systems would receive. Additionally, the alternative budget suggested a 10 percent hike in student fees, higher than the 7 percent increase envisioned by the governor.

Regarding U.C. and CSU, the LAO's proposed budget focused on three main concerns: accommodation of growth in enrollment, adjustments to their base budgets, and maintenance of affordability for students.

## Accommodating Enrollment Growth

The LAO recommended the state legislature fund enrollment growth based on its estimated 1.8 percent enrollment increase at U.C. and 1.6 percent increase at CSU. Currently, U.C. and CSU are exceeding their budgeted enrollment numbers by 3,200 and 10,000

of full-time students respectively. While the governor's budget includes funding for 2.5 percent enrollment growth at each system, it allows the universities to use all or some of the funding to backfill unallocated general fund reductions. In fact, the LAO analysis noted, the budget requires only that the universities enroll as many students in 2008-09 as they were budgeted to serve in 2007-08. This would effectively allow U.C. and CSU to reduce enrollment from actual current-year levels and use the leftover growth funds in other areas.

The LAO suggested the legislature provide funding for the anticipated growth in enrollment and amend language in the budget bill to ensure that this funding only is used to support new growth above the actual level in the

current year. The LAO acknowledged that the current means of accommodating students beyond the budgeted enrollment numbers — increased class size and the redirection of funds from

other areas of the universities' budgets — are not desirable long-term goals. But allowing the universities to use funds to backfill unallocated general fund reductions would only increase the gap between funding for full-time stu-

dents and the financial resources available to serve them. For this reason, given the state's fiscal situation, the LAO recommended that any new growth funding be used exclusively to enroll additional students above the current-year level.

### **Adjustments to Base Budget**

While the LAO suggested providing \$49.5 million to U.C. and \$45 million to CSU for nondiscretionary cost increases, it could not recommend funding salary increases at the universities. The LAO stood by the proposal it made for most employees at state agencies, urging the legislature not to fund cost-of-living-adjustments for U.C. and CSU employees. The LAO cited recent studies that found faculty benefit packages at both universities

*The LAO could not recommend funding salary increases at the university.*

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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>

were well above the average of their public and private comparison institutions. According to the LAO, \$105.3 million would be saved at U.C. and \$101.2 million at CSU if COLA increases were eliminated.

Next, the LAO turned to cutting administrative costs, which includes

*It was recommended that both systems increase student fees by 10 percent.*

executive compensation. The analysis supported the governor's proposed 10 percent reduction to the workload segments of the U.C. and CSU institutional support budgets. This amounts to a \$332 million reduction in institutional support. In the wake of several high-profile reports and extensive media coverage, U.C. and CSU have already begun to take steps to alter their executive compensation practices. (For further reading on executive compensation, see *CPER* No. 186, pp. 54-56, and No. 183, pp. 55-56.) In addition, U.C. is in the process of a major reorganization of the Office of the President. The LAO noted that, in light of these efforts, both universities should be able to achieve the level of savings proposed by the governor.

### **Maintaining Affordability for Students**

Touching on what is already in dispute among the U.C. regents and CSU board of trustees, the LAO recommended that both systems increase student fees by 10 percent. When U.C. and CSU presented their 2008-09 budget proposals last fall, they reflected student fee increases of 7.4 percent and 10 percent respectively. However, the universities delayed any final decisions on fee increases pending the governor's budget and response from the legislature. The LAO's fee increase recommendations would boost the share of costs students pay for their education from 31 percent to 34 percent at U.C., and from 25 percent to 27 percent at CSU. The LAO expressed its belief that higher fees would give students a financial stake in their education and pointed out that the current fee levels are modest by national standards. Further, the LAO noted that students who cannot afford their fees are supported by the Cal Grant program, and the universities' funding for that purpose should be increased to reflect the higher student fees.

### **Budget Gaps**

CSU faces a \$312.9 million gap between the budget its board of trustees approved and the governor's budget. Meanwhile, if the governor's proposed budget is accepted, U.C. would be forced to close a \$417.4 million gap. In January, U.C. Executive Vice President Katie Lapp presented the regents with potential options for narrowing

the gap. Highlighted were the elimination of compensation and non-salary cost increases. According to the presentation, doing away with such items as 5 percent faculty and staff compensation increases, the accelerated faculty salary plan, and non-salary cost increases would avoid the expenditure of

*Unions have joined forces with their employers against reductions that will affect compensation.*

\$153.9 million. Also included among the options were the elimination of new initiatives, such as student mental health services, estimated to save U.C. \$8 million, and the increase of student fees to 7 percent as anticipated in the regent's November budget. This would provide \$70.3 million dollars in revenue.

Altogether, the LAO's budget would provide \$289 million less to U.C. than the governor's proposed budget. For CSU, the alternative budget reduced the governor's proposed funding by \$246.5 million. For each system, the sole increase from the governor's budget was institutional financial aid to offset higher student fees.

Legislative hearings are underway in an effort to reach a final budget by the beginning of the next fiscal year. The governor will present a revised budget in May. Meanwhile, U.C. regents and CSU board of trustee members are meeting to discuss the impact that cuts will have on their universities and the options available to them. Many unions have joined forces with their employers to create a unified defense against funding reductions that will af-

fect their compensation and the whole of higher education.

In the midst of the budget crisis, the state is losing an established expert. After 22 years of service as the legislature's chief budget analyst, Elizabeth Hill announced that the assessment of the 2008-09 budget will be her last. Hill will retire this summer with one major regret: "The budget remains unbalanced." \*

Ahmadi-Kashani filed eight grievances, including sexual harassment and improper layoff. With the formal filing, she began the four-step grievance procedure. The university rejected the grievances within the allotted 15 days, and Ahmadi-Kashani appealed the rejection, which triggered the second step of the process.

*The dean said  
he did not want  
to get involved.*

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## Employee May Abandon Internal Grievance Process to Pursue FEHA Claim

An employee of the University of California, Irvine School of Medicine, who filed an internal grievance pursuant to the collective bargaining agreement between the university and the University Professional and Technical Employees, CWA, Local 9119, could abandon it to pursue a lawsuit under the Fair Employment and Housing Act. According to the Fourth District Court of Appeal in *Ahmadi-Kashani v. Regents of the University of California*, because the plaintiff could have forgone the administrative proceedings altogether and had not obtained a quasi-judicial decision on her grievance, she could abandon the grievance process and was not required to judicially seek to overturn any adverse administrative decision.

### Factual Background

Mastench Ahmadi-Kashani began working as a research assistant in the cardiology department at U.C. Irvine's School of Medicine in 1997. In 2003, the university hired a new department chief who began sexually harassing Ahmadi-Kashani. She reported the harassment to another doctor in the department and then to the department's office manager, who suggested she find a new position. Ahmadi-Kashani then reported the matter to the dean of the School of Medicine, who told her he did not want to get involved and instructed that she take her complaint to human resources. Soon after, Ahmadi-Kashani was laid off due to inadequate funding, according to the university.

Step two consisted of a meeting between a university official and Ahmadi-Kashani with her representative. That meeting was required to take place within 15 days of the written appeal of the step-one decision. However, Ahmadi-Kashani waited eight months to hear from the university and eventually consulted an attorney. On February 15, 2005, Ahmadi-Kashani filed a claim with the Department of Fair Employment and Housing, and, two days later, the department issued a right-to-sue letter. The next day, the university informed Ahmadi-Kashani that her step-two meeting was scheduled for February 23, 2005 — five days later.

Ahmadi-Kashani attended the meeting with counsel, but she was not placed under oath, no documents were permitted to be introduced, no third-party wit-



*cper*

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Basics of  
Labor Relations**

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

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

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

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nesses were present, and her counsel was not permitted to question the harassing supervisor. While a decision was rendered as a result of the step-two meeting, it was not issued by the meeting's hearing officer. Rather, it was issued by an associate vice chancellor, despite no record to indicate his presence.

Because Ahmadi-Kashani neglected to file a sexual harassment complaint with the Office of Equal Opportunity and Diversity, there was no formal investigation of the complaint. Thus, according to the vice chancellor, his decision could be based only on the evidence presented at the step-two meeting, which consisted solely of the grievant's verbal account of the events. As a result, said the vice chancellor, Ahmadi-Kashani failed to present a prima facie case of sexual harassment.

Under the collective bargaining agreement, a sexual harassment grievance ordinarily ends after step two of the process. However, when such a claim is made in connection with another article in the agreement, it is grievable beyond step two. Because Ahmadi-Kashani's sexual harassment claim was brought in tandem with her improper layoff, she had the option of appealing to the next step.

Step three of the grievance process is an appeal to the director of labor relations in the Office of the President. It does not involve any meetings or the mutual exchange of information. The fourth and final step of the process is binding arbitration. Only the union, and not the employee, has the right to invoke arbitration.

Rather than appealing to step three of the grievance procedure, Ahmadi-Kashani opted to file her sexual harassment and wrongful termination complaints in superior court. The regents responded with a motion for summary judgment, arguing Ahmadi-Kashani's complaint was barred because she failed to exhaust her administrative and judicial remedies. The lower court agreed with the regents, and Ahmadi-Kashani appealed.

#### **Appellate Court Decision**

The court rejected the regents' and lower court's reading of two central public sector exhaustion cases. The first, *Page v. Los Angeles County Probation Dept.* (2004) 123 Cal.App.4th 1135, 169 CPER 23, bars a public employee from walking away from an internal

grievance procedure under certain circumstances. The second, *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 144 CPER 33, binds a public employee to an adverse internal grievance decision in a subsequent FEHA claim unless judicial remedies are sought.

The Court of Appeal found the facts in *Page* significantly different from those in the present case. First, the court pointed out, *Page*'s administrative rem-

*Ahmadi-Kashani was  
afforded no hearing  
at all, let alone a  
'quasi-judicial' one.*

edy was governed by the Los Angeles County Civil Service Rules, and conveyed the right to a full adversarial hearing before a civil service commission hearing officer. Additionally, *Page* filed her FEHA claim only after receiving the adverse hearing decision. Citing the reasoning in *Page*, the Court of Appeal noted that the plaintiff was prevented from abandoning the grievance process because she waited until after the hearing and issuance of the hearing officer's comprehensive decision. The hearing in *Page* constituted a sufficient quasi-judicial process to preclude her FEHA claim. Thus, the court continued, "its result could not simply be ignored." Declaring the facts in *Page* to

be "a time zone or two from our facts," the court commented, "Analogizing from those facts requires an investment of considerably more imagination than stare decisis allows."

Equally inapplicable, according to the court, is *Johnson v. City of Loma Linda* (2000) 24 Cal. 4th 61, 144 CPER 33. There, the court held that an employee who avails himself of the administrative remedy afforded by a local statute, and receives an adverse "quasi-judicial" finding, is bound by that finding in a subsequent FEHA discrimination claim unless the first ruling is set aside through a judicial petition.

Together, the court concluded, *Page* and *Johnson* are based on the rationale that "a plaintiff is entitled to only one opportunity to try her claim" and if that opportunity is in the context of an administrative process, she cannot ignore the adverse result and ask the court for a "do-over."

The court contrasted those cases with *Ahmadi-Kashani*, "who was afforded no hearing at all, let alone a 'quasi-judicial' one, prior to abandoning her grievance process." The court found no indication that the step-two meeting was intended to afford *Ahmadi-Kashani* an opportunity to *prove* her case. And while the meeting is described as an opportunity for the parties to convene and discuss information and contentions related to the grievance, the court considered this "an expansive description of what actually happened."

The court recounted the inadequacies of the step-two meeting, including the lack of sworn testimony, cross-examination, or the admission or consideration of other evidence. The court emphasized that while there was a hearing officer at the meeting, she did not issue the university's decision and it is unknown what, if any, communication she had with the individual who ultimately issued the ruling. The court continued:

And of course, the "decision" ultimately issued by the University following the step 2 meeting does nothing but demonstrate how wholly inadequate this proceeding was for resolving *Ahmadi-Kashani*'s claim of harassment. The conclusion reached was that *because* *Ahmadi-Kashani* presented only her version of the facts, she could not prevail. In other words, the process allowed for nothing but her verbal description of events and then dismissed the dispute on the basis that a mere verbal description could not suffice to make a case. This is justice a la Lewis Carroll.

Because *Ahmadi-Kashani* did not participate in a quasi-judicial hearing, there was no decision rendered that would be entitled to preclusive effect in a subsequent court proceeding. Thus, the court could perceive no reason why she should be obligated to continue with a process the court viewed as "wholly unsatisfactory, and in which she was not required to participate in the first place." The court explained that it was loath to discourage the internal grievance process because it is often an effective way to reach a resolu-

tion. But, the court went on, if it interpreted the process as the U.C. Regents suggested, “no one intelligent enough to get a job would even enter into the grievance process.”

The court went one step further and explained the anomaly of a rule that would require Ahmadi-Kashani to continue her internal grievance process through to arbitration when she would have been free to ignore the arbitrator’s decision and pursue her claim in court.

*The grievance process was insufficient to preclude her from vindicating her rights in court.*

The court invoked the recent ruling in *Marcario v. County of Orange* (2007) 155 Cal.App. 4th 397, 399, 187 CPER 36. Under *Marcario*, in order for an arbitration of a negotiated labor grievance to be given binding effect as against the employee’s claims for a statutory violation, the collective bargaining agreement must state explicitly that it is intended to apply to such claims and provide a fair procedure for resolving them. According to the court, the absence of the required explicit terms — and the fact that Ahmadi-Kashani might not have been able to arbitrate her claim had it not been com-

bined with other grievances and invoked by her union — renders the grievance process insufficient to preclude her from vindicating her rights in court.

The court also faulted the trial court’s finding that Ahmadi-Kashani failed to exhaust her judicial remedy. Because the grievance process failed to

provide any type of quasi-judicial decision, Ahmadi-Kashani was not obligated to take steps to overturn the result of the administrative process. (*Ahmadi-Kashani v. Regents of the University of California et al.* [2008] 159 Cal.App.4th 449.)\*

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## U.C. Regents’ Untimely Grievance Rejection Permits Employee’s Suit for Damages

The Fourth District Court of Appeal permitted an employee’s lawsuit for damages against the University of California to proceed despite an adverse administrative decision on his grievances. In *Brand v. Regents of the University of California*, the court said the university’s failure to reach a decision on the employee’s internal complaints within the established time limits permits the employee to file a suit for damages.

### Factual Background

Larry Brand worked as a senior licensing officer at U.C. San Diego when he alerted management that, beginning in March 2001, his supervisor was committing fraud and misappropriating funds. According to Brand, when his supervisor and others at UCSD became aware of these assertions, he was retaliated against. Brand claimed that he was denied salary increases, received unjustified negative performance reviews, was subjected to a hostile envi-

ronment, had work taken away from him, was threatened with humiliation and termination, and, ultimately, was terminated in June 2003.

In response to the perceived retaliation, Brand filed several internal grievances under the university’s whistleblower protection policy, alleging that he had been retaliated against in violation of the California Whistleblower Protection Act, set out in Government Code Secs. 8547 et seq.

Brand’s initial grievances, filed on September 18 and September 22, 2002, were addressed through a two-step internal process. Factfinding commenced, and a decision to deny Brand’s claims was reached in a timely fashion.

While the first set of grievances was being evaluated, Brand filed another set on October 11, 2002, alleging retaliation occurring in late September. According to Brand, these grievances were denied at step one, and, on November 25, 2002, Brand requested a step-two review. There is no

official record of any step-two factfinding for the October 2002 grievances, nor any official factfinding report.

Brand was terminated in June 2003. After his termination, but before resolution of the October 2002 grievances, Brand filed a third set of grievances on June 19 and 30, 2003, alleging retaliatory termination for being a

*More than seven months after the factfinding meeting, the factfinder issued her report.*

whistleblower. These grievances were also denied at step one, and Brand filed a written appeal for a factfinding proceeding. On September 29, 2003, a factfinding meeting was held. Both sides presented their oral arguments and documentary evidence. In addition, the factfinder communicated with relevant witnesses outside of the meetings and considered information received from those witnesses in her report.

On May 11, 2004, more than seven months after the September factfinding meeting, the factfinder issued her report. It expressly addressed the June 2003 grievances, but not the October 2002 grievances, although the report did discuss the facts at issue in those complaints. On July 6, 2004, the assistant vice chancellor for human re-

sources issued a final decision denying the October 2002 and June 2003 grievances in reliance on the May 2004 factfinding report.

### **Trial Court Level**

Brand filed suit in June 2005 against the U.C. regents and several individuals, including his supervisor. He alleged that all defendants engaged in unlawful retaliation in violation of Gov. Code Sec. 8547.10, which prohibits retaliation against a U.C. employee who makes protected disclosures. He also asserted violations of Labor Code Sec. 1102.5, which also bars retaliation against whistleblowers, and, as to the individual defendants, violations of Gov. Code Sec. 8547.11, which prohibits interference with an employee's attempt to make a protected disclosure.

Brand sought damages under Gov. Code Sec. 8547.10(c), which permits a U.C. employee who has been retaliated against to seek punitive damages against the offending party where retaliation is malicious. But, first the employee must meet two requirements set forth in subsection (c):

[A]ny action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the [designated university officer], and the university has failed to reach a decision regarding that complaint within the time limits established for that purpose by the regents.

The trial court accepted that the first requirement had been met. How-

ever, it rejected Brand's assertion that the university had failed to reach a decision within the time limits.

The trial court also rejected Brand's assertions for his failure to exhaust administrative and judicial remedies. Brand appealed the ruling.

### **Court of Appeal Decision**

In a methodical opinion, the Court of Appeal first turned to Brand's claims for punitive damages under Gov. Code Sec. 8547.10(c). The court examined

*The factfinding report is due within 120 days from its assignment.*

whether the university's decision on Brand's complaints was untimely and, if so, whether Brand's suit was barred in spite of the university's untimely decision.

For purposes of its analysis, the Court of Appeal relied on the deadline set forth in the U.C. Whistleblower Protection policy, which all parties agreed applied. According to the policy, a claim such as Brand's requires a retaliation complaint officer (RCO) to "present findings of fact based on evidence and factual conclusions to the Chancellor within 120 days from the date on which the complaint was assigned to the RCO unless an extension is granted by the [Locally Designated Official]."

Using the established 120-day deadline, the court went on to examine whether the regents' decision was timely. The court looked to the June 2003 grievances regarding Brand's termination. Those grievances were addressed in a factfinding meeting on September 29, 2003, for which the RCO did not present her report to the chancellor until May 11, 2004 — 225 days after the factfinding meeting. Plainly, the 120-day limit was exceeded. Thus, the court found, Brand had a viable claim that the regents failed to reach a decision on the June 2003 grievances — and on the October 2002 grievances which were never officially addressed in any factfinding report — within the applicable time limits.

Next, the court looked to the trial court's assertion that even if the regents' decision came after the 120-day limit, Brand was barred from bringing a suit for damages under Gov. Code Sec. 8547.10(c). The regents urged, and the lower court agreed, that because the university arrived at its decision before Brand filed his lawsuit, his request for punitive damages should be barred. In reaching this conclusion, the lower court relied on a specific sentence in the California Supreme Court's opinion in *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 327, 173 CPER 51. Referring to Gov. Code Sec. 8547.10(c) in dictum, the California Supreme Court wrote:

[T]he statute permits aggrieved university employees to file a damages action provided they have followed

the administrative procedures and filed an administrative complaint before filing their lawsuit....Of note here, the employee may not proceed with a court action against the university unless that institution has failed to reach an administrative decision on the action within specified time limits....In such a case, the employee may file a lawsuit for damages even though the administrative complaint is pending. *If, by contrast, the university has reached a decision on the administrative action, the statute does not authorize any statutory damages action.*

The Court of Appeal considered the language in Gov. Code Sec. 8547.10(c) together with the opinion in *Campbell* and, in doing so, rejected the regents' assertion. The Court of Appeal explained:

In light of the accurate description of section 8547.10, subsection (c) earlier in the paragraph, which unambiguously *includes* the concept of timeliness, we do not read *Campbell* to be communicating, through dictum, an intention to rewrite clear language of the statute to state that a plaintiff may not bring a damages suit following the university's decision on an internal complaint, even when that decision was *not timely*.

Therefore, said the court, because Brand had filed an internal complaint and the university's decision on the complaint came after the established deadline, Brand could seek punitive damages as part of his retaliation claim.

The Court of Appeal also took issue with the trial court's dismissal of Brand's claims arising out of Gov. Code Sec. 8547.11 — which prohibits indi-

vidual U.C. employees from impairing whistleblower activities — based on failure to exhaust administrative remedies. The court noted that because Brand had exhausted his administrative remedies as to some of the complaints within the claim, the entire claim could not be dismissed. However, the court advised, on remand, those individual complaints for which Brand did not exhaust his administrative remedies should be stricken. According to the court, the rule is well established that when an administrative remedy is provided by statute, relief must be sought from the administrative body before the court will intervene. While the Court of Appeal acknowledged that Gov. Code Sec. 8547.11 does not specifically require exhaustion of administrative remedies, it warned that its silence should not be taken as an exemption from the basic rule. Thus, the court suggested, those complaints for which Brand did not exhaust his administrative remedies should be stricken.

The Court of Appeal also rejected the lower court's finding that Brand failed to exhaust his judicial remedies. Because the administrative procedure lacked sufficient judicial character, Brand was not required to challenge the final decision through a judicial petition and was free to file a suit for damages despite the internal administrative ruling against him. (*Brand v. Regents of the University of California et. al.* (2008) 159 Cal.App.4th 1349.) \*

## U.C. and Nurses Reach Tentative Agreement on Wages, Paid Time-Off

The California Nurses Association, which represents 10,000 nurses at five independent U.C. medical centers and six campus and laboratory sites, and the University of California announced that a successor to their 2005-07 agreement has been reached. The announcement of a tentative agreement came one week after a factfinding panel made its report public. The two sides reached impasse in October 2007, and, after several unfruitful mediation sessions, proceeded to factfinding in January 2008. The new agreement is subject to union ratification, which is expected to take place immediately. If accepted by the members, the contract will run through September 2010, with reopeners on wages, health insurance, and pensioner and retiree health benefits in 2008 and 2009.

### Pension and Retiree Benefits

CNA entered negotiations with a number of key demands. Topping the list of its bargaining priorities was protecting pension and retiree health benefits. The 2005 agreement between the union and U.C. contained provisions that restricted U.C. from changing the health benefits and their costs for pensioners and retirees during the duration of the contract. The union considered the continuation of these protections a top priority in its latest negotia-

tions. However, U.C. pointed to anticipated underfunding of the University of California Retirement Plan in the next several years as support for its proposal requiring that nurses begin to contribute to the plan.

The tentative agreement extends the provisions of the 2005 agreement with respect to UCRP contributions. CNA members will not be required to contribute to the retirement system through September 2008. However, the issue will be revisited in the fall.

### Paid Time Off

A major area of contention between the university and the nurses union was the institution of a paid-time-off program. The PTO concept proposed by U.C. would combine the nurses' vacation time with half of their sick leave. This PTO bank then could be used in whichever way a nurse sees fit, including extending vacation time, time off for illness or injury, or personal time off. However, time off taken from this "bank" would require departmental approval. The remaining time off would be put into a long-term sick leave bank. The hours saved in this LTS bank could be used for illnesses lasting longer than the first 24 consecutive working hours and any FMLA-related leave and bereavement leaves. In other words, nurses who take time off work

for what U.C. calls an "unscheduled illness" that lasts less than 24 hours would take time out of their PTO bank and not their LTS bank. After the initial period of "unscheduled illness," employees then would begin to access their LTS bank.

The university insisted that the purpose of the program was to control replacement costs of nurses who take unscheduled time off using sick leave.

*The union insisted the program would encourage nurses to come to work sick.*

According to U.C., this unscheduled leave accounts for increased workloads for nurses and higher costs to the university. In light of the union's opposition, U.C. suggested the program be voluntary for currently employed nurses and mandatory for future hires. The university maintained that because PTO programs have become prevalent and expected in the industry, it acts as a recruiting tool for future hires.

The union, which has been fighting against PTO provisions nationwide, insisted that the program would encourage nurses to come to work sick because they would be reluctant to withdraw time from a bank that includes their vacation time. Further, the union argued that making PTO mandatory for new hires would be

a “back door” way of forcing PTO on everyone during the next round of contract bargaining.

The factfinder found that the union’s contention that the PTO program would encourage nurses to come to work sick lacked empirical evidence. However, the factfinder recognized the validity in the union’s principal objection to the program being mandatory for new hires. In addition, CNA argued

*The union argued that making PTO mandatory for new hires would be a ‘back door’ strategy.*

that the PTO plan is a take-away, potentially restricting use of half of the current allocation of sick leave.

In the end, the factfinder suggested a compromise that allows the program to be voluntary across the board. This, according to the factfinder, would permit nurses to choose, over a period of time, whether the program worked for them. This would also give the university the ability to offer the program as a recruitment incentive.

Ultimately, however, the PTO program was omitted from the contract. CNA declared this a “huge victory for nurses and safe patient care.”

### Salary Increases

When negotiations began in April 2007, the nurses union requested wage increases at U.C. facilities of 10 percent in 2007 and again in 2008. The university initiated a five-month study to determine competitive market rates in the industry, relying on surveys conducted by the Hospital Association of Southern California. The union conducted its own study, relying on information from union-represented hospitals. Finally, in August 2007, the university offered its findings and salary proposal to the union. Throughout mediation, and until the tentative agreement was reached in March 2008, the union declared the salary increases inadequate. The union countered U.C.’s proposal with a request for 9 percent across-the-board increases, new longevity steps, and improvements in on-call pay and other ancillary compensation.

The factfinder gave more weight to the study conducted by the union than that conducted by the university because there was no way to verify the underlying information contained in the HASC surveys relied on by U.C. The union’s information, on the other hand, came directly from collective bargaining agreements, which are verifiable from their content. The factfinder noted wage recommendations necessarily include considerations of cost of living and ability to recruit and maintain nurses.

To that end, because they maintain their own budgets and do not share revenues, several of the U.C. facilities have

offered to increase wages. However, the factfinder pointed out that the Irvine facility has failed to do so. According to the facility, revenues are low due to a large mix of Medi-Cal and Medicare patients. But the Irvine facility made no claim that it was unable to pay wage increases. Thus, the factfinder proposed eliminating the disparity between U.C. Irvine, which has failed to provide the universal 2 percent wage increases in most longevity steps, and all other medical centers.

*The factfinder proposed eliminating the disparity between U.C. Irvine and all other medical centers.*

According to the factfinder, the record indicated that the upper end of the current range of market conditions for nurses at each of the U.C. facilities has increased 6 percent from October 1, 2007, the date of the last wage increase, to September 30, 2008. Therefore, the factfinder recommended a 6 percent increase in funding for each medical center to increase wages in all classifications. Recommendations also included using some of the funding to move step increases at U.C. Irvine toward the 2 percent level.

The tentative agreement between the university and CNA incorporates

these recommendations. It includes a 6 percent wage increase at all medical centers. The raises will be retroactive to October 2007, and may take the form of either a lump sum, full retroactive pay, or an increase in lieu of retroactive pay. The raises will be effective the first pay period after ratification of the contract. Additionally, the agreement includes equity increases for medical centers at U.C. Irvine and U.C. San Diego. Other wage provisions include increases in on-call rates, shift differentials, and new steps at several locations. Meanwhile, at free-standing student health centers, wages will be increased between 2 and 8 percent. The tentative agreement includes provisions for reopening wage negotiations in the second and third years of the contract.

### **Additional Provisions**

CNA and U.C. came to agreement on shift rotation, which CNA sought to ban at facilities where it was not currently in place. A shift rotation could require a nurse who has worked a full-day shift to rotate into a full-night shift. The new agreement dictates that, effective September 1, nurses with more than 10 years of seniority will not be required to rotate unless there is reasonable written notice.

All nurses will be guaranteed access to compensatory time. U.C. Irvine and several U.C. Davis departments eliminated compensatory time in recent years, opting instead to have nurses receive overtime pay. The new agreement

will discontinue the practice at Irvine and Davis, and include a provision preventing its practice throughout the university.

Also, the union achieved protection of educational leave for nurses attending classes on days off, as well as full-shift educational leave if work is missed to attend class. \*



# State Employment

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## State Is Liable Under FEHA for Sexual Harassment of Registry Employee

A social worker hired by the California Department of Corrections and Rehabilitation under a contract with National Medical Registry was an employee for purposes of sexual harassment protection under the Fair Employment and Housing Act, the Court of Appeal has decided, using the common law definition of “employee” for guidance. Although the bulk of the harassment took place away from work, the court upheld the jury’s verdict that a hostile work environment existed. The court also found that the department’s use of a lengthy and bureaucratic investigation process did not constitute adequate remedial action under the act.

### Stalked by Chaplain

Sallie Mae Bradley is a licensed clinical social worker who was placed at Corcoran State Prison under the department’s contract with National Medical Registry after CDCR reviewed her qualifications. During her temporary employment at the prison, she worked under the direction of the chief psychologist and the chief psychiatrist, who set her hours and duties. She recorded the hours she worked on time sheets that were certified by her supervisors and forwarded to the regis-

try. The registry paid Bradley and billed her compensation to the department. She did not receive state employee benefits.

When Bradley first saw prison chaplain Omar Shakir at the facility, they recognized each other from an encounter at the Department of Motor

*Shakir again  
showed up at her  
apartment in the  
middle of the night.*

Vehicles. He commented to her that he had begged God to send her back to him. He offered to help her move into her apartment. They had several conversations about spiritual and personal matters, during which Bradley told him that she was not interested in sexual relationships.

Shakir’s conduct and comments over the next two weeks frightened Bradley. On September 2, he suggested she might enjoy it if he raped her. He began coming to her apartment in the middle of the night, pounding on her door. He

waited for her at the entrance to the prison on the morning of September 6. He told her he only wanted to have sex with her and walked so close to her that his elbow hit her breast. She told him to stay away, but he came to her work station and stared at her. When she asked him to leave, he told her she looked good enough to eat. His conduct persisted over the next several days and nights. Although she varied her arrival times, he continued to wait for her at the prison.

On September 12, Bradley called the police when Shakir again showed up at her apartment in the middle of the night. After talking to him, the police suggested she obtain a restraining order. The next morning, Shakir was waiting for her in the prison parking lot.

### Interviewed Repeatedly

That morning, Bradley told the chief psychiatrist about Shakir’s behavior. He sent her to the employee relations officer. The employee relations officer referred her to Sergeant Rocha and Captain Wan. Rocha and Wan interviewed Bradley, corroborated her story with the police and her landlady, and wrote a report that eventually was delivered to the prison warden on September 15.

After Bradley left Rocha and Wan’s office, Shakir walked up behind her, making her scream. He told her she might as well get used to the idea that he was going to “have” her. He also said he could not believe that she would report him, but that the prison would not

do anything to him. No one answered when Bradley called to report this conversation to Wan. She called the police, whom she met in the parking lot. After they gave her the TRO paperwork, she noticed that Shakir had followed her and was staring at her from his car.

On September 14, Bradley was referred to the equal employment opportunities counselor by Associate Warden Sanchez, who headed the EEO program. The EEO counselor interviewed Bradley again and gave her a formal sexual harassment complaint form. That evening as she left the facility, Shakir again showed up and told her that he could not believe she had reported him to the police; he said he just wanted to take care of her and have sex with her.

Bradley turned in the formal complaint on September 15. When she met with Associate Warden Sanchez again, he told her he had given Shakir a letter on the previous day telling him to stay away from her, but that he could not assure her that would happen. Sanchez told Shakir's supervisor that a complaint had been filed but did not explain that it was a sexual harassment complaint or that Shakir's movements should be restricted.

After September 15, Shakir continued to visit Bradley at work and to stare at her. He twice tried to touch her. He approached her as she walked between buildings and as she left work. Even after he left work for a lengthy medical leave, she ran into him twice at the facility.

On October 4, the chief psychiatrist terminated Bradley, claiming that the inmate census was down, although it was not. She was unable to tolerate working at another prison and was diagnosed with post-traumatic stress disorder a few months later. In the meantime, her private practice suffered from her emotional state.

*The psychiatrist terminated Bradley, claiming that the inmate census was down, although it was not.*

Shakir continued to harass her. Her complaint had been forwarded to the CDCR office in Sacramento for investigation, but no one there ever interviewed anyone but Bradley. In March 2001, the complaint process was terminated, in part because Shakir was discharged for threatening prison officials, but only after he had been given a merit increase.

In her lawsuit against the department, Bradley claimed she had been subjected to sexual harassment and a hostile work environment, and that the department had discharged her in retaliation for her complaint. Other

claims were dismissed prior to trial. In 2005, she won a jury verdict of \$439,000. However, the judge overturned the verdict on the retaliation claim. The department appealed the jury verdict on the sexual harassment claim, and Bradley appealed the grant of judgment notwithstanding the verdict on the retaliation claim.

### **A Special Employee**

The court first considered whether Bradley was protected by the sexual harassment provisions of the FEHA. The act protects employees, applicants, and persons "providing services pursuant to a contract." The department contended that Bradley was neither an employee nor a person providing services under a contract.

The court agreed that Bradley did not meet the statutory criteria for a person providing services pursuant to a contract. It found that the department exercised complete control over Bradley's work duties and hours. She was not compensated for producing a specific result, but instead for her time working at the facility. Her work failed to meet either the FEHA criteria or the common law definition of an independent contractor.

To determine whether Bradley was an employee, the court looked at the regulations of the Fair Employment and Housing Commission. The regulations define an employee as "an individual under the direction and control of an employer under any appointment or contract of hire or apprenticeship."

*cper*

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

This 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>.

Nothing in the definition requires a direct contractual relationship or hiring pursuant to a civil service system for public employees, the court observed. In fact, the regulations also provide that “an individual compensated by a temporary service agency for work performed for an employer contracting with the temporary service agency may be considered an employee of that employer for such terms, conditions and privileges of employment under the control of that employer.” This language defeats CDCR’s claim that Bradley was not an employee unless she was paid by the department, the court instructed.

The court found in the regulations no “magic formula” for determining whether an employment relationship exists, however. In light of the absence of a definition of “employee” in the

FEHA itself, the court used the common law definition “for guidance, focusing on the amount of control the employer exercises over the employee.” It relied heavily on the Supreme Court’s reasoning in *Metropolitan Water Dist. v. Superior Court* (2004) 32 Cal.4th 491, where employees of a labor contractor providing work for the MWD were found to be eligible for retirement benefits under the Public Employees Retirement Law, which does not define “employee.”

The court decided that Bradley was a special employee of CDCR for FEHA purposes. The court observed that CDCR regularly hires registry employees. Denying FEHA coverage on the basis of Bradley’s lack of civil service status, the court said, would be inconsistent with the legislative intent to expand protection to “the largest number

of individuals possible, including those who traditionally would be excluded from the employment relationship because they exercise complete control of the services provided.” The court buttressed its decision by pointing out that the FEHA defines the state as an employer.

The contract between CDCR and National Medical Registry did not convince the court otherwise. While the contract stated that Bradley was not an employee of the state, it also granted all control of the employment relationship to the department, not the registry. That provision also undermined a term in Bradley’s contract with the registry that purported to make her an independent contractor, the court reasoned.

The court also turned aside CDCR’s contentions that the registry was an indispensable party that was par-

tially liable for the hostile work environment. The court found no evidence in the record that the registry even knew about the harassment, and none of the allegations of harassment was related to any terms or conditions of employment that the registry controlled.

### **'Bureaucratic Morass'**

CDCR contended that there was insufficient evidence to support the jury's finding that the department had failed to take immediate corrective action designed to end the harassment. The court agreed with CDCR that the department was not liable for Shakir's conduct until Bradley reported it, and that promptly beginning an investigation is a key step in the employer's response. However, continued the court:

[I]nitiating an investigation, especially one as removed and bureaucratic as the one here, cannot be the only step taken. An employer is required to take remedial action designed to stop the harassment, even where a complaint is uncorroborated or where the coworker denies the harassment.

No part of CDCR's investigation was designed to protect Bradley from harassment, the court emphasized. No one who talked to Bradley determined fault, ensured she was safe from harassment, or assessed whether the department needed to take steps to stop the harassment. Most of the people she talked to did nothing other than refer her to someone else. Other than the associate warden's instructions to Shakir

to stay away from Bradley, no one interviewed him. There was no evidence that anyone warned Shakir of disciplinary consequences or tried to ensure he would comply with the order.

The court criticized the "bureaucratic morass" Bradley's complaint faced in Sacramento. Because it appeared that the situation posed a safety threat, an employee in the Sacramento EEO programs office determined that it could not be resolved at the local level

*'We recognize that things move slowly in state government.'*

and referred it to yet another office for a formal investigation. Despite recognition of the safety concern, no one in the department acted to protect Bradley, the court emphasized. "While we recognize that things move slowly in state government, the lack of action in this case is startling," the court remarked. Nothing happened to protect Bradley, even though Shakir was known for breaking rules and ignoring supervisors' directions. The department merely warned Bradley to protect herself and started an investigation. It did not inform her of the status of her complaint or respond to her request for assistance with obtaining a restraining order. The court concluded that ample

evidence supported the jury's finding that CDCR failed to take adequate action.

### **Off-Site Harassment Relevant**

In unpublished sections of the opinion, the court addressed CDCR's claim that the worksite harassment of Bradley was not sufficiently severe or pervasive to make the department liable for a hostile work environment. The court agreed that CDCR was not liable for Shakir's off-site behavior. However, the off-site harassment was relevant in evaluating whether CDCR was required to respond, the court explained. While the rape threat and nightly visits occurred outside of work, the court said, they were the backdrop for what occurred at the worksite. Shakir's "typical stalking behavior" created an atmosphere of fear and intimidation, observed the court, "especially when considered in the context of his off-site behavior." It continued, "Once the stage was set, it was easy for Shakir to intimidate Bradley, given his easy access to her at the facility."

The court also overturned the judge's reversal of the retaliation verdict. It found no authority for the trial court's conclusion that Bradley could be protected by the FEHA from sexual harassment but not from retaliation. The court dismissed CDCR's contentions that separate damages for retaliation were duplicative and punitive. It found substantial evidence to support the retaliation verdict in the timing of her termination and her supervisor's complaints about the time she took off

for interviews about the harassment. The court affirmed the sexual harassment verdict in Bradley's favor and re-

instated the retaliation verdict. (*Bradley v. California Department of Corrections and Rehabilitation* [2008] 158 Cal.App.4th 1612.) \*

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## CCPOA Fighting Several Fronts

The California Correctional Peace Officers Association, already in battle with the governor's administration over imposition of the state's last, best, and final collective bargaining offer, is facing new threats to the 30,000 correctional officers and parole agents it represents. Governor Schwarzenegger wants to cut 6,000 positions as the state reduces its prison population. The Department of Personnel Administration asked the legislature to approve a 5 percent raise for 2007-08, an element of the last, best, and final offer that it is imposing after mediation failed last September. (See story in *CPEP* No. 186, pp. 43-46.) But the Legislative Analyst's Office unexpectedly recommended against any wage increase and, as of mid-March, no legislator had agreed to sponsor a bill to approve the raise. On top of these developments, negotiations for a future contract are at a standstill as the parties trade accusations of misrepresentations. As *CPEP* went to press, PERB denied the union's request for injunctive relief.

### 'Sybil' Schwarzenegger

Late last fall, facing a projected \$14.5 billion deficit, the governor

asked every department to trim its budget by 10 percent for the 2008-09 year. Then, in January, he made a dramatic announcement when he released his proposed budget: With legislative approval, he intends to release to unsupervised parole non-violent, non-serious, non-sex offenders who have fewer than 20 months of their prison sentence remaining. If implemented, approximately 22,000 prison beds would be emptied, and the California Department of Corrections and Rehabilitation would need to employ about 5,900 fewer staff. CDCR Secretary James Tilton explained that reducing the inmate population and staff is the only way to achieve a 10 percent budget reduction since more than 70 percent of the department's budget goes to employee compensation. Most of those employees are officers and parole agents who supervise inmates and parolees.

About 4,250 correctional officer positions, as well as 1,800 parole agent jobs, are targeted for elimination beginning this spring. But since there are now about 1,250 correctional officer vacancies and attrition of about 1,460 per year, the department foresees fewer

than 2,000 guard layoffs.

The governor's budget accounts for an increase in correctional officer compensation of 5 percent, which DPA intends to impose, with legislative approval, based on its decision to implement its last, best, and final offer after mediation failed last September. The 5 percent pay increase initially was calculated to cost \$260 million annually, but the governor's budget noted that the state would save \$30.2 million in compensation increases for the correctional officers unit through a decrease in guard positions.

*The department is considering a new training academy in Southern California.*

Curiously, the budget calls for a \$19.9 million increase in funding for officer and parole agent training academies at the same time as it proposes layoffs. The governor would expand the parole academy and run a one-time extra academy for an institution that has difficulty recruiting staff. It would also add funding to contract out services for background checks and pre-employment medical clearances for new hires. In addition, the department is considering asking for more funding this spring for a new training academy in Southern California.

CCPOA reacted to the budget by comparing the governor to Sybil, a 1976 movie character who had multiple personalities. In its March 2008 issue of *Peacekeeper* magazine, the union compared his early release proposal to statements the governor made just nine months ago, when he said early release was “unacceptable” and would “endanger people.” The union also asks why the state would build a new training academy if the department is going to lay off correctional officers.

The LAO also noted the inconsistency in the governor’s budget, as well as the department’s failure to account for the impact of staff reduction on several other aspects of the budget, such as the governor’s proposal to send more inmates to private prisons. The officer reduction plan added ammunition to a

bombshell the legislative analyst dropped in February.

### Raise Unnecessary

CCPOA was already agitated about DPA’s decision to retract two years of salary increases after the Public Employment Relations Board agreed with the union that implementation of a three-year last, best, and final offer was bargaining in bad faith. (See story in *CPER* No. 188, at pp. 46-48.) Now, the LAO has questioned even the first 5 percent increase.

In a report leading up to release of its “alternative budget proposal,” the LAO recommended that the legislature reject the 5 percent increase. The legislative analyst does not believe the raise is necessary to recruit new officers, as there are 130,000 applications

for the position of correctional officer each year. The compensation of prison guards rose substantially between 2001 and 2006, as they reached near parity with California highway patrol officers, she pointed out. While the salaries of most other state employees rose less than 15 percent over that time, correctional officers received general raises of about 34 percent, not including merit salary increases and other forms of compensation. In addition, the LAO observed, an applicant needs only a high school diploma or equivalent to be eligible for employment as a correctional officer, which pays between \$45,000 and \$73,000 annually, excluding overtime pay, numerous pay differentials, and benefits. “The job of state correctional officer may now be the

*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>

most sought after in the California economy,” the report exclaims.

Unions often argue that higher salaries are necessary for recruitment and retention of employees when vacancy rates are high. But the LAO rejects that explanation for the current vacancies. Instead, it blames an “anachronistic,” complex, and lengthy hiring process for current vacancy rates in CDCR. It takes six months for an applicant to be accepted or rejected for the training academy, when they begin receiving apprentice pay. CDCR and the State Personnel Board explain that the delay is due to the background checks and pre-employment medical examinations which are required. Even with this process, the LAO reported, CDCR has made progress in filling vacancies. In 2007, the department estimates it filled about 1,000 positions, after accounting for officer attrition.

The LAO also questioned a second justification for raises — overtime costs. The LAO itself has pointed out the correlation of high vacancy rates and high overtime expenses, as current employees are required to work extra hours to provide adequate supervision of inmates. Overtime has been a major source of the perpetual cost overruns in the corrections department. (See story in *CPER* No. 156, pp. 54-57.) As vacancies have been filled, however, overtime expenditures have not diminished. In fact, the LAO reported, they increased from \$402 million in 2005-06, to \$471 million in 2006-07. The LAO acknowledged the rise in costs is

due in part to the rise in guard’s base pay, which also increases their overtime pay. But the spike in expenses was also attributed to requirements for medical guarding and other costs imposed by the receiver for the prison medical system. As a result, the LAO pointed out, if a reduction in vacancies does not result in less overtime usage, each hour

*As vacancies have been filled, however, overtime expenditures have not diminished.*

of overtime worked will cost more if the 5 percent raise is approved.

The legislative analyst generally backed other aspects of the last, best, and final offer, such as regaining personnel assignment control and streamlining grievance and arbitration procedures. “Strong managerial authority will be necessary to implement prison and parole system reforms, address orders of the Receiver and the courts, contain overtime expenses, reduce any sick leave abuse that may persist in the department, and operate CDCR in a cost-efficient manner,” the report advised.

The LAO did caution the legislature to analyze the administration’s proposals very carefully to ensure that they do not conflict with state and federal labor laws. CCPOA has reached agree-

ments in the past that have waived employee rights to meal breaks and to overtime pay after an eight-hour day. The union contends that, in the absence of an agreement, the schedules of officers require overtime pay, and it has filed a claim with the state Labor Workforce and Development Agency for overtime pay and penalties.

The LAO commented on the “completely dysfunctional relationship” between the administration and the CCPOA. “Union leaders regularly question administration officials’ honesty and competence,” it observed. Not only have the parties failed to reach a collective bargaining agreement, grievances and arbitrations have proliferated. Beyond using their powers of persuasion, the LAO had only one suggestion for improving the relationship. It recommended that the legislature require CDCR to post regular updates on its website which disclose vacancy rates, hiring, and overtime usage at each institution. The updates would be useful to the legislature, in addition to satisfying the union’s demand for accurate data, the LAO observed.

### **Job Action Squabble**

Meanwhile, CCPOA and DPA have continued to display their dysfunctional relationship. In late January, the union requested to return to the bargaining table, citing changed circumstances, but conditioned further negotiations on reinstatement of the expired memorandum of understanding. After the state declined to return to pre-

implementation terms and conditions of employment and begin bargaining, the union threatened a job action. DPA Director David Gilb asserted in his response that any strike would be unlawful, since it would create an “imminent and serious threat to the health and safety of the public at large, non-custody staff at the institutions, your own members and the inmates.” Gilb com-

*‘A job action appears to be one of the few options still available.’*

plained that CCPOA President Mike Jimenez continues to “mischaracterize and distort the status of Labor Management Relations.”

CCPOA fired back a response asking “under what terms, if any, the State is prepared to return to the bargaining table.” When it received no reply within a week, CCPOA proposed that DPA join in requesting legislative review of the parties’ negotiation process back through 2006.

Jimenez’ February website message charged that Gilb’s letters seem to show he “simply has no concept of words like truth, honesty, or good faith negotiations.” He pointed out that there is no statute prohibiting correctional officer strikes, although he acknowledged that case law favors DPA’s view. Since PERB moves so slowly and consists only of board members appointed

by the governor, he griped, “a job action appears to be one of the few options still available” to fight the state’s attempt to take away members’ rights. Another option, he asserted, is to have Gilb and DPA submit to questions “under oath, in a forum that is immune to the influence of [Gilb] or this administration.” So far, however, the legislature has not followed even the LAO’s suggestion to hold hearings on the governor’s last, best, and final offer.

As *CPER* went to press, PERB denied the union’s request for injunctive relief. CCPOA had argued the state should return to bargaining because impasse had been broken by changed circumstances — the failure to find a legislative sponsor for DPA’s final offer, the fiscal state of emergency, and PERB’s issuance of a complaint on the duration of the imposed offer.\*

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## Unchallenged SPB Findings Cannot Be Relitigated in Whistleblower Suit

The State Personnel Board’s findings on a whistleblower claim are binding in a later lawsuit unless overturned by a writ of mandate, even though the whistleblower statute does not say so, the Court of Appeal held. The opinion explains that the doctrine of judicial exhaustion of remedies is really an application of the principle of collateral estoppel. Although overturning administrative findings is not a prerequisite to a lawsuit, findings that are not vacated are binding in a later court action. The court came to the same conclusion as the Court of Appeal did in *State Board of Chiropractic Examiners v. Superior Court (Arbuckle)*, 183 CPER 67, which was vacated when the Supreme Court granted review of that decision. As of press time, oral arguments in *Arbuckle* had not yet been scheduled.

### SPB Complaint Required

Claiming that his supervisor had retaliated against him for whistleblowing, Gary Trobee resigned from his position with the California Public Employees’ Retirement System and filed a whistleblower complaint with the SPB. The SPB’s executive officer recommended dismissal of the complaint and advised Trobee that he had the right to file a petition for a full evidentiary hearing within 30 days. Trobee’s request for a hearing was denied, and the SPB findings became final.

Trobee did not file a petition asking a court to overturn the findings. Instead, he filed a lawsuit alleging retaliation in violation of Government Code Sec. 8547.8, the California Whistleblower Protection Act. CalPERS moved for dismissal of



Trobee's court complaint on the ground that he had failed to exhaust judicial remedies. When the trial court disagreed with CalPERS, the agency asked the Court of Appeal to overturn the trial court's ruling.

The act authorizes fines and other penalties for a state employee who retaliates against another employee for reporting wrongdoing. It also provides that the whistleblower may obtain remedies in court, but only after filing a complaint with the SPB. It states,

*Trobee's request for a hearing was denied.*

"[A]ny action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the [SPB]...and the board has issued, or failed to issue, findings pursuant to Sec. 19683." Section 19683 requires the board to initiate an investigation or hearing on a whistleblower's claim within 10 days and "complete findings of the hearing or investigation" within another 60 working days.

The trial court found that the plain language of the statute required only that Trobee file his SPB complaint and receive the findings before filing suit. The appellate court rejected this analysis, however, based on the Supreme Court's rejection of a similar argument from a university whistleblower in *Campbell v. University of California* (2005) 35 Cal.4th 311, 171 CPER 57.

The Supreme Court in *Campbell* advised, "[C]ourts should not presume the Legislature in the enactment of statutes intends to overthrow long-established principles of law unless that intention is made clearly to appear either by express declaration or by necessary implication."

The long-established principle that prevailed, according to the appellate court, is collateral estoppel. The doctrine bars relitigation of issues that the same parties have previously litigated in another forum. Collateral estoppel is the fundamental principle at the core of the doctrine many courts have called exhaustion of judicial remedies, the court explained. Linking of the two concepts occurred in *Westlake Community Hospital v. Superior Court* (1976) 17 Cal.3d 465, where the Supreme Court explained that, as long as a court had not set aside a hospital board's quasi-judicial decision upholding revocation of a doctor's staff privileges, the board's decision established the propriety of the revocation. The Supreme Court advised that the doctor must "first" succeed in overturning the findings of the hospital board before filing a court claim for damages.

The phrase "failure to exhaust judicial remedies" became the shortcut reference to the collateral estoppel effect of quasi-judicial decisions that are not overturned, but it can be misleading, the court warned. In fact, explained the court, "An aggrieved employee is not necessarily compelled to petition for a writ of mandamus as a prerequi-

site to filing a civil action, but he or she must abide by the collateral estoppel effect of the unchallenged administrative findings." As explained in *Knickerbocker v. City of Stockton* (1988) 199 Cal.App.3d 235, 77 CPER 29, a "plaintiff is bound by the [quasi-judicial] determination and to the extent that his causes of action are inconsistent with that determination, they are fatally flawed."

*The SPB declined to determine whether collateral estoppel would apply to its findings.*

**SPB Regulations Err**

Trobee argued that the court should endorse the SPB's statutory interpretation that is expressed in its regulations. They require that a notice of adverse findings inform a whistleblower that administrative remedies are exhausted and that he or she may file a civil complaint in court. CalPERS countered that the regulations do not address the preclusive effect of unchallenged administrative findings. In fact, CalPERS told the court, the SPB itself declined to determine whether collateral estoppel would apply to its findings if a whistleblower filed an action for damages in court.

The court agreed with CalPERS. If the doctrine of collateral estoppel was not implicated, the court said, it would side with Trobee based on the plain language of the statute and the SPB regulation. “We are not, however, at liberty to pretend the thorny problems posed by collateral estoppel do not exist,” it said. The court concluded that the language of the statute did not resolve “the more difficult dilemma” presented by collateral estoppel.

*Findings can be challenged by writ of mandate, even if the evidence is through documents.*

The court found no way for Trobee to avoid the statutory requirement that he file an SPB complaint. Exhaustion of SPB remedies is not excused since the agency is empowered to grant “appropriate relief,” the court pointed out. The findings were subject to writ review because the investigation of Trobee’s complaint “became a contested proceeding based on opposing evidentiary submissions.” Case law has established that, as long as the law requires the agency to accept and consider evidence before making its decision, its findings can be challenged by

writ of mandate, even if the evidence is through documents rather than testimony. Since Trobee did not have the SPB’s findings set aside, they could not be relitigated.

**FEHA Not Analogous**

Trobee also argued by analogy to the Fair Employment and Housing Act that the Whistleblower Act should be construed as providing an alternate remedy which does not require exhaustion of other administrative processes. “The analogy fails,” the court responded, “because of what the Legislature expressly stated in FEHA and did not state in the Whistleblower Act.”

The court reviewed case law that has established the legislature’s intent was “to supplement, not supplant” other antidiscrimination remedies. It found that the legislative intent of providing administrative remedies in the Whistleblower Act is murky. The act does not mimic the FEHA, which plainly gives employees alternative remedies, the court observed. Nothing in the act exempts employees from the effects of collateral estoppel, it concluded.

The court sympathized with the burdens placed on a whistleblower. The SPB has only a short time to decide whether to investigate or conduct a hearing on the complaint and to issue findings. As a result, a complainant may not have time to adequately prepare and present his or her case, which affects the chance of success. The standards used by the courts to review an agency’s

decision give deference to the agency. These kinds of considerations have compelled courts to hold that employees filing FEHA claims are not required to exhaust other administrative remedies, the court acknowledged. But the FEHA was intended to provide an alternative remedy, and it is not clear that the legislature had the same intent in enacting Section 8547.8, the court said. It issued the following veiled invitation:

*The legislative intent of providing administrative remedies in the Whistleblower Act is murky.*

If the Legislature intends to allow whistleblowers to abort the administrative proceedings by filing a civil action without first overturning adverse findings through a writ of mandate, it will have to make its intentions explicit.

The court issued a directive to the trial court to vacate its previous order and enter a new order dismissing Trobee’s whistleblower claim. (*California Public Employees’ Retirement System v. Superior Court of Sacramento Co.* [2008] 160 Cal.App.4th 174.)\*

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## State Medical Employees Enjoy Ripple Effect From Prison Raises

Once again, prison litigation has pressured the Department of Personnel Administration to agree to pay hikes for employees outside the prisons. Unions representing state medical employees in the Departments of Mental Health, Developmental Services, and Veterans Affairs have reached tentative agreements with the state to raise the pay of physicians, nurses, pharmacists, dieti-

*Raises over 30 percent  
would not become  
fully 'PERSable' until  
the third year.*

cians, technicians, and dental employees in those departments above the 3.4 percent increase that employees in the units received in July 2007. DPA was able to slow the effect of very large raises on pension benefits to prevent "pension spiking." The increases are fallout from court-ordered raises for prison medical personnel in *Plata v. Schwarzenegger* and for prison dental workers in *Perez v. Tilton*.

### **PERSability Phase-In**

Last summer, a court order in a case involving inmate mental health

care, *Coleman v. Schwarzenegger*, led DPA to offer substantial salary increases to mental health workers in DMH and DDS. (See story in *CPER* No. 185, pp. 53-55.) Raises to mental health personnel in the prisons had led to an exodus of mental health employees from other departments to the Department of Corrections and Rehabilitation. As a result, inmates being treated in DMH suffered from understaffing in mental health facilities. When the court ordered raises for staff serving inmates in DMH facilities, DPA responded with a proposal to raise the salaries for all mental health staff in DMH, whether or not they treated inmates. In negotiations with the unions representing psychiatrists, psychologists, psychiatric technicians, and other mental health workers, the state agreed to raise salaries of DMH, DDS, and DVA employees to 95 percent of employees in the same classifications working in CDCR.

There was a new element to these agreements, however. In May 2007, DPA had reached an agreement with the Union of Physicians and Dentists to increase the pay to dentists at CDCR as a result of *Perez v. Tilton*, a lawsuit that alleged an unconstitutional level of dental care for prisoners. The maximum of each dentist salary range had doubled in an attempt to fill vacancies

in the prisons. The retirement laws allow most employees to use the highest 12 months of salary as "final compensation" when calculating retirement pay. As a result, a significantly higher salary in the last year of employment can boost a pension dramatically, much faster than working a few more years. DPA, conscious of the effect of large raises on retirement rates and pension benefits, had garnered an agreement that pay hikes of up to 15 percent immediately would be counted as final compensation. But for those with raises over 15 percent, final compensation

*This will be  
the only raise until  
June 30, 2010.*

would rise only 15 percent the first year, up to 15 percent more the second year, and if greater than 30 percent, would not become fully "PERSable" until the third year.

The phased-in PERSability was part of the agreement for psychiatrist raises that DPA also reached with UAPD in May. It was later incorporated into the agreements for raises for DMH and DDS mental health workers that DPA forged with the California Association of Psychiatric Technicians and the American Federation of State, County and Municipal Employees last July.

### Pay Parity Phase-In

Predictably, raises for mental health staff in DMH and DDS, as well as court-ordered raises for medical and dental staff in the prisons, led to pressure from non-corrections medical and dental workers for higher pay. State medical employees were transferring in droves to prison jobs. DPA first proposed setting non-prison workers' salaries at 18 percent below the pay for the same classifications within the corrections department. The unions balked because of the large salary differences. Pay for licensed vocational nurses outside the prisons was 26 percent less than for those with correctional jobs, for example, and the pay disparity for nurses was nearly 42 percent.

UAPD eventually agreed to the 18 percent lag for physicians, surgeons, and dentists in DDS, DMH, and DVA

in September. Pay raises of 5 to 13.5 percent, in addition to the 2007-08 cost-of-living increase of 3.4 percent, went into effect July 1, 2007, for doctors. The increases were subject to the same PERS conditions as in the prior agreements.

Other unions held out for pay parity with the corrections department employees. In December, after nearly a year of struggle, SEIU Local 1000 won an agreement to raise pay for medical technicians, nurses, records technicians, and dental assistants to within 10 percent of the pay for similar classifications in the prisons on January 1, 2008, and to within 5 percent of *Plata* and *Perez* pay on January 1, 2009. Any recruitment and retention differentials were folded into base pay. Except for a few classifications whose wages were already within 5 percent of their cor-

rectional counterparts, this will be the only raise until June 30, 2010, even if the court orders further increases for corrections department employees. Again, the ability to use the higher wages for final compensation calculations for pension purposes was spread over three years.

Since dental assistants and hygienists at DMS, DDS, and DVA had a better deal than the dentists received in September, DPA agreed with UAPD to the same provisions. Two weeks later, UAPD reached agreement on the same terms for physicians, surgeons, and podiatrists in the three departments. Salaries for these classes will remain the same until June 30, 2010, except that UAPD will be able to negotiate recruitment and retention bonuses and bilingual pay during bargaining for a new contract this year.

*cper*

**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>

Also in January, DPA reached similar agreements with AFSCME for clinical dieticians and pharmacists. The salary range maximums for the classes will increase to 90 percent of CDCR pay effective January 1, 2008, and 95 percent of that pay on January 1, 2009. Salaries for some pharmacists will rise 23 percent, and the new range minimums

are higher than the old range maximums.

SEIU Local 1000 members ratified their agreements in February. Several other agreements are awaiting ratification by union members. The addendums to the MOUs have yet to be approved by the legislature. \*

Pittman and Maldonado, complaining that the directors had prevented Division Chief Larry German from voting as a delegate at the statewide conference by improperly enacting a bylaw that prevented assistant and division chiefs in the union from being elected to Region IV office.

In January 2003, the union's retiree representative filed charges against Pittman for improper use of union funds and released time, and for illegally taping the conversation with the former president. The same day, the union's state board voted to impose a trustee-

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## Legal Setbacks for CDFP in Dispute with Members

CDF Firefighters and two former members will continue a nasty legal dispute after the California Court of Appeal reversed judgments in favor of the union. The appellate court found the union should not have won summary judgment on its contract claim for unpaid fines because it failed to prove the amount of damages and reasonableness of the fines it levied against the two members. In an unpublished section of the opinion, the court held the union members were not required to exhaust internal union remedies before filing in court since appeal within the union would have been futile. CDFP represents state firefighters in collective bargaining with the state employer.

### Illegal Tape Recording Charged

Michael Pittman's troubles began with his 2000 termination from CalFire. After the State Personnel Board overturned the termination, Pittman returned to work in January 2002, but the former president of the union did not

reinstate him to membership in CDFP until August 2002. In November, Pittman was elected director of the San Benito-Monterey Chapter of the union, a position that gave him a seat on the board of directors of Region IV of the union. Both the chapter and region are unincorporated, autonomous associations of CDFP, with their own elected officers, constitution, and bylaws.

Pittman charged the former union president with refusing to reinstate him for an improper motive, and used as evidence a tape recording of a conversation between the two men. Pittman was represented by Richard Maldonado, the Region IV director. The committee that was convened to hear Pittman's complaint dismissed his charges. Pittman had a Region IV check drawn to purchase a transcript of the hearing, and charged his absence from work for three days to union released time.

Around the same time, two Region IV members filed charges against

*Pittman charged the former union president with refusing to reinstate him for an improper motive.*

ship on the San Benito-Monterey Chapter and Region IV for "financial malfeasance and threat to democratic processes." All elected officials were removed from office. The retiree representative later filed further charges against Pittman and Maldonado, alleging that they had refused to comply with CDFP trustee directions and had disrupted a membership meeting concerning the trusteeship.

Pittman filed a charge against the union with the Public Employment Relations Board that was later dismissed. The union then requested that the Sacramento County district attorney file felony charges against Pittman for an illegal tape recording and for filing a false report under oath with PERB. The retiree representative also amended his charge against Pittman to complain that he had engaged in a pattern and practice to disrupt CDFE operations by failing to exhaust his internal union remedies before filing the PERB charge.

*The union requested that the Sacramento County district attorney file felony charges against Pittman.*

#### **Fines Levied**

As a result of the charges relating to prevention of Division Chief German from voting at the statewide conference, Maldonado was fined \$743 for German's expenses. He was informed of his right to appeal to the union's state board within 30 days.

In a separate hearing, the same committee sustained some of the retiree representative's charges against Maldonado and Pittman. Charges were

upheld against Maldonado for improper use of union funds, and against both Maldonado and Pittman for refusing to comply with the lawful directions of CDFE trustees. The committee's tentative decision was to expel the two from membership in the union and to fine each of them 30 percent of the costs of the trusteeship. The fines were based on a bylaws provision that authorized the committee to assess a penalty equivalent to full or partial restitution "where the consequences of the offense can be measured in material terms." Neither Pittman nor Maldonado responded to the tentative decision with additional documents, and the final decision was issued. They were informed they had 30 days to appeal to the state board. When neither appealed, they each were sent a letter demanding over \$22,000 in fines.

#### **Consolidated Cases**

Pittman filed a complaint in court seeking reversal of the fines and reinstatement as a member of the union. He claimed that appealing the fines within the union would have been futile. A couple weeks of later, the union sued Pittman and Maldonado for breach of contract for failure to pay the fines. The cases were consolidated.

Each party filed a motion seeking rulings in its favor prior to trial. The trial court ruled in favor of CDFE, and against Pittman and Maldonado. It concluded the union had shown there was no triable issue of fact that would defeat the union's claim for breach of con-

tract. It also ruled that Pittman should have exhausted internal union remedies before filing in court. Pittman and Maldonado appealed.

#### **Exhaustion of Internal Remedies**

The bylaws of the union state, "No officer or member...shall resort to judicial proceedings of any kind...with regard to any matter pertaining to this organization or its local chapters, or his/her office, until all remedies provided for within the Constitution and Bylaws/Organizational Policy have been exhausted." They prescribe that

*The union sued Pittman and Maldonado for breach of contract for failure to pay the fines.*

relief should be sought first from the chapter and then by proceeding to the region and state board levels.

The appellate court described the general rule that a member must first invoke the remedies provided by the union before seeking judicial relief. These internal procedures, the court said, can lead to settlement of disputes at less expense and by persons who are familiar with the context of the dispute.

However, the court explained, a member's failure to exhaust internal union remedies will be excused as futile if the member can show that the organization has declared how it will rule in a particular case.

Pittman argued that he was excused from exhausting internal remedies because the union's state board had re-

*The bylaws' exhaustion requirement did not apply when the union resorted to the courts.*

quested the Sacramento district attorney to charge him with felonies for taping a conversation and committing perjury. He contended that the imposition of trusteeship on the same grounds as the charges he would have appealed indicated the state board's predisposition to find against him.

Unlike the trial court, the appellate court sided with Pittman. Given that the state board had initiated charges against him and taken a position adverse to him, it was unlikely that it would have maintained an open mind on those charges, the court reasoned. The alleged financial malfeasance and threat to democratic processes on which the trusteeship was based were the \$120 check for the hearing transcript in Pittman's original grievance and the

exclusion of German from the statewide conference. The same two charges led to the decision to impose fines on Pittman and Maldonado. "It is inconceivable that the State Board would conclude that the very charges which led to the creation and imposition of the trusteeship were not valid charges against Pittman," the court declared. It held that the grant of summary judgment in CDFP's favor on Pittman's court case was therefore error.

CDFP also contended that Pittman and Maldonado could not oppose the union's suit for breach of contract because they failed to challenge the amounts of the fines before the union's state board. But the court found the bylaws' exhaustion requirement did not apply when the union, rather than the member, resorted to the courts. The bylaws do "not prevent a union officer or member from defending himself or herself from a lawsuit brought by the union," the court admonished.

The court also was not persuaded that the members' failure to challenge the amount and reasonableness of the fines foreclosed their opposition to the fines in the union's lawsuit. CDFP cited *McConville v. Milk Wagon Drivers' Union, Loc. No. 226* (1930) 106 Cal.App. 696, as authority for the general rule that a court should not independently decide whether charges against an expelled or suspended member have merit, only whether the union had substantial evidence to support its findings. But the CDFP court distinguished this case from *McConville* because, in *McConville*, the

union member sued the union, whereas here, CDFP sued the members.

The more important distinction, however, was that CDFP's suit sought to enforce a claim for money, not to obtain review of a decision to expel or suspend a member. The court did not depart from the rule that a decision to expel a member is subject to deferen-

*Where a union seeks a money judgment, it should be treated like any other civil litigant.*

tial review unless a vested or fundamental right is involved. However, said the court, "where a union seeks to use the courts to obtain and enforce a money judgment, we believe that it should be treated like any other civil litigant" and be required to show proof on all the elements of the contract it seeks to enforce. The court found no legal authority for the contention that the members' failure to challenge the fines internally prevents the court from determining whether the elements of a breach of contract claim have been proven.

The court agreed with Pittman and Maldonado that CDFP had failed to prove the element of damages in their motion for summary judgment. The trial court had concluded that it could not independently review the

amount and reasonableness of the fine since the union had provided a fair procedure. But the appellate court found this was error. It held that CDFF was required to prove that the amount of the fines constituted full or partial res-

titution, and that the trial court was authorized to review whether the fines were reasonable. The court reversed the judgment in favor of CDFF's contract lawsuit. (*CDF Firefighters v. Maldonado* [2008] 158 Cal.App.4th 1226.) \*

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## Peace Officer Entitled to Mandatory Reinstatement Need Not Submit to Background Investigation

A permanent state peace officer rejected from probation in a new position is not subject to another background investigation before exercising his right to mandatory reinstatement to his former position. The Court of Appeal found unlawful a practice of the Peace Officer Standards and Training Commission that required background investigations of employees mandatorily reinstated to a state peace officer position.

### Unsuccessful Transfer

Alberto Hulings had a permanent position as a fraud investigator with the Department of Health Services before he sought a transfer to an investigator position with the Department of Consumer Affairs. Both jobs were designated as peace officer positions. Under Government Code Sec. 1031, a peace officer must "be of good moral character, as determined by a thorough background investigation." Hulings was required to undergo a background investigation before his transfer. In his new

position, he was subject to a 12-month probationary position.

Toward the end of his probationary period, Hulings learned that he was being rejected from probation. He immediately exercised his right to mandatory reinstatement to his former po-

*DHS asked Hulings  
for his weapon  
and assigned him  
to desk duty.*

sition as a fraud investigator with DHS and began performing his former duties without a break in service. Under Gov. Code Sec. 19140.5, a permanent employee rejected from probation who timely requests reinstatement to his former job "shall be reinstated" if there has been no break in service. As the court explained, the fact that an employee does not do well in a new job

does not justify his separation from state employment if he has performed successfully in a prior position.

Three months later, Hulings was told that he must submit to a background investigation required by POST or be disciplined for insubordination. His representative wrote a letter advising that DHS could not require him to complete a personnel history statement or submit to other elements of a background check because he had mandatory reinstatement rights. The next month, POST removed Hulings from its list of active peace officers. In response, DHS asked Hulings for his weapon and assigned him to desk duty, but continued to compensate him as a fraud investigator with the usual benefits of a regular civil service peace officer.

Hulings petitioned the court for an order barring DHS from requiring that he submit to a background investigation as a condition of employment. He argued that conditioning his reinstatement on a background check would undermine the civil service protections provided to permanent employees under *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 27 CPER 37. DHS argued that it had complied with its duty to reinstate Hulings and had the discretion to determine whether he was fit for service by requiring a background investigation. The trial court sided with Hulings, and DHS appealed.

### Peace Officer Powers

The Court of Appeal explained that it could order DHS to perform a



ministerial duty, but not control DHS' discretion as an employer. Hulings argued that DHS had a ministerial duty under Gov. Code Sec. 19140.5 to reinstate him as a fraud investigator without conditions. DHS countered that it complied with that ministerial duty because Hulings served as a fraud investigator with peace officer powers for four months. The department asserted

*Where some positions in a class exercise peace officer powers, each person must meet the minimum standards.*

there was "no nexus" between his status as an employee and the background check requirement. The appellate court agreed with the trial court's characterization of the argument as "specious." The threat of discipline if Hulings did not submit to an investigation demonstrated that his reinstatement was conditioned on completing the background investigation.

DHS contended that, as his employer, it had the discretion to assign him different duties than before his transfer. The department relied on *Hanna v. Los Angeles County Sheriff's Dept.* (2002) 102 Cal.App.4th 887, 157 CPER 30, in which the court held that a deputy sheriff whose disability retire-

ment application was rejected had to be reinstated to a job with deputy pay, but need not be assigned the same duties as before her injury. The court reviewed the Government Code definition of "former position" for laws relating to state civil service. Section 18522 defines the phrase as a position in the classification to which the employee was last appointed, unless the employee agrees to return to a different classification. "Class" is defined as a group of positions that are similar with respect to duties and responsibilities, that require substantially the same tests of fitness and minimum qualifications, and for which the same schedule of compensation would be equitable.

The court observed that DHS seemed to be arguing that it could employ fraud investigators without peace officer powers as well as those with peace officer powers. But the implication that there could be two sets of qualifications for fraud investigators in the same class — those with and those without POST qualifications — was mistaken. "Where some but not all positions in a single civil service class exercise peace officer powers, each person in such class must meet the minimum standards set forth in Government Code section 1031," the court instructed, citing a 1961 Attorney General opinion. Although the department may exercise discretion over Hulings' assignments, the court concluded, he must be reinstated to the same class, and thus must be able to exercise the powers of a peace officer.

### **POST Incorrect**

DHS also contended that it had the discretion to require an investigator to undergo a background check at any time. The court acknowledged that Sec. 1031 does not specify when a background investigation is to occur. Administrative materials, however, led the court to the conclusion that the authority to order background checks applies only to applicants and cannot be triggered by mandatory reinstatement to a former position.

*The court deduced that those with mandatory reinstatement rights are to be treated like current employees.*

Both California regulations and the POST Administrative Manual indicate that the background investigation is conducted as part of the selection process and that the investigation must be completed by the date of appointment. Recent court cases have noted that Sec. 1031 applies when an employee is hired, prior to the employee's transfer between agencies, and possibly when transferring to a new position in the same agency, the court observed. But there is "no authority that the employer may require a background investigation of

a peace officer who is not changing positions,” the court emphasized, and Hulings was not changing positions when he was reinstated.

DHS contended that Gov. Code Sec. 19585 gives it the authority to order a background investigation because that section allows an employer to demote, terminate, or transfer an employee who fails to meet the requirements for continuing employment. The court agreed that the section could be used as authority to terminate a peace officer who lost his POST certification. But POST’s position that a mandatorily reinstated employee must submit to a background investigation to retain his certification is wrong, the court announced.

The court relied on the language of Sec. 19585 for this conclusion, although its reasoning is questionable. The court correctly noted that the section mentions Sec. 19140, a section relating to discretionary reinstatement, but not Sec. 19140.5, which governs mandatory reinstatement. It interpreted Sec. 19585 as requiring any employee who seeks discretionary reinstatement to meet requirements for continued employment. From the absence of reference to Sec. 19140.5, the court then deduced that those with mandatory reinstatement rights are to be treated like current employees. In fact, Sec. 19585 provides only that those who are demoted, transferred, or terminated for failing to meet requirements, but who regain certifications or other requirements for continued employment, may

be reinstated pursuant to Sec. 19140, the permissive reinstatement section. Section 19585 does not address the prerequisites applicable to other candidates for permissive reinstatement.

In the end the court ruled, “The only reason cited here for the loss of Huling’s POST certification was his reinstatement. Because reinstatement was mandatory, it cannot be the sole cause of the loss of requirements for continuing employment.” The court did not disagree that the Government Code provided DHS the authority to ensure that its employees were fit for their employment by allowing medical examinations, imposition of discipline, and investigation of peace officers. But nothing in the law permitted DHS to condition continued employment after mandatory reinstatement on a new background investigation. (*Hulings v. State Department of Health Care Services* [2008] 159 Cal.App.4th 1114.) \*

# Trial Courts

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## PERB Establishes Fundamental Principles Under Trial Court Act

In its first significant decision interpreting the Trial Court Employment Protection and Governance Act, PERB dismissed the union's unfair practice charge that alleged a unilateral change regarding court reporter position qualifications. In doing so, the board adopted several fundamental rules of law to be applied under the Trial Court Act.

### Change in Job Description

The union filed an unfair labor practice charge against the Fresno County Superior Court alleging that the court changed its "Realtime reporting" policy by requiring newly hired court reporters to sign an agreement agreeing to provide Realtime reporting services on request. Realtime reporting software instantly converts a courtroom stenographer's marks into English and sends the transcripts to the judge's computer, resulting in enhanced speed and efficiency. Prior to January 31, 2005, court reporters were not required to have the ability or equipment to provide Realtime reporting, and those who could provide the service had the option of signing an agreement committing to do so.

The court reporter job description issued on January 31, however, stated

that providing Realtime reporting was a necessary and essential job duty. At the time, the union voiced its disagreement to the policy change, but the court asserted that it was under no obligation to meet and confer regarding the new policy. No meetings took place, and the court, shortly thereafter, implemented the policy. In online job postings, it listed the ability to provide Realtime services as a "minimum qualification" for new court reporters. In May 2005, the court hired five court reporters and insisted that they sign agreements stipulating that they would provide Realtime reporting on request.

An administrative law judge found that the Fresno court's decision to require new court reporters to provide Realtime reporting services was non-negotiable pursuant to *Alum Rock Union Elementary School Dist.* (1983) PERB Dec. No. 322, 58 CPER 64. And, the ALJ also found that the union did not request to bargain over the impact of this decision.

On appeal, the union argued that *Alum Rock* was applied incorrectly and contended that it had requested to bargain over the impact of the policy change. The union also asserted that the policy change was implemented in

a manner that bypassed the exclusive employee representative in violation of the Trial Court Act.

The board found that the unilateral change was the modification in the court reporter job description, not the use of the pre-hire agreements, as the union alleged. For this reason, the board was required to determine whether to consider the unalleged violation. Relying on *Taboe-Truckee Unified School Dist.* (1988) No. 668, 78 CPER 74, the board focused on whether the court had been given adequate notice and an opportunity to defend the unalleged allegation, whether the acts were intimately related to the subject matter of the complaint and part of the same conduct, whether the unalleged violation had been fully litigated, and whether the parties had the opportunity to examine and cross-examine witnesses on the issue.

Applying the *Taboe-Truckee* requirements, the board found that the union and the court litigated the issue regarding the change in the job description. Witnesses testified about the events surrounding the implementation of the Realtime requirements. The job description was intimately related to the pre-hire agreements and was part of the same course of conduct. The board noted that the issue underlying both the new job description and the pre-hire agreements was whether the court could unilaterally require reporters to provide Realtime reporting. The pre-hire agreements simply incorporated the job description. The board also found that

the requirements in the job description were fully litigated. Both parties had notice of the unalleged violation and an opportunity to defend their positions. The board found the parties had examined and cross examined witnesses who testified about the Realtime requirements and relevant communications. Thus, the board found reason to address the unalleged violation and proceeded to consider whether creation of the job description was an unlawful unilateral change.

The board explained that Sec. 71826(b) provides that the language of the act is the same or substantially the

*The new job  
description changed  
past practice.*

same as that in the MMBA and should be interpreted and applied consistent with judicial interpretations of the same or similar language. The board held that to determine if the Realtime requirement was an unlawful unilateral change, it would use the “per se” or “totality of the conduct” tests enunciated in *Stockton Unified School Dist.* (1980) No.143, 48 CPER 61, and applied to MMBA Sec. 3505 in *County of Riverside* (2003) No. 1577-M, 164 CPER 120. The board announced that because MMBA Sec. 3505 is substantially the same as the Trial Court Act Secs. 71634.2 and

71601(e), *Stockton* and *Riverside* were applicable precedent.

The board found that the new job description changed past practice. Prior to the new policy, it was sufficient for court reporters to use only a stenograph machine to record in shorthand the proceedings in their assigned courtrooms. However, after January 31, the ability to provide Realtime services was no longer optional; it became mandatory.

The board found that the union did not have an opportunity to meet and confer regarding the new requirements despite the fact that, after receiving a copy of the new job description, it requested a meeting. Thus, the court explained, whether the court’s unilateral adoption of the policy was a per se unilateral change turned on whether the decision to add the Realtime requirement was within the scope of bargaining.

**Scope of Bargaining**

The court contended that the decision to add the Realtime reporting requirement was excluded from the scope of bargaining in accordance with Sec. 71634(b), as automation and delivery of court services. The board agreed, finding that the additional requirements fell within the act’s exclusion of decisions on delivery of services.

The board explained that to qualify for exclusion under Sec. 71634(b), the employer’s decision must not only reasonably fall within one of the excluded categories, but the *reason* for the particular decision must be *for the purpose* of carrying out the special responsibili-

ties of the trial courts. Citing evidence that the judicial executive committee and the court executive officer determined that Realtime reporting enhanced the efficient delivery of court services, the board concluded that the court’s decision to add the Realtime requirement was based on considerations consistent with the statutory justification for excluding decisions regarding such services from the scope of representation.

The board explained that Sec. 71634(c) requires that the impact from matters excluded under Sec. 71634(b)

*The additional  
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on delivery of services.*

be included within the scope of representation as those matters affect wages, hours, and terms and conditions of employment. PERB has long held that a request to bargain the impact of a decision not within scope need not be in a particular form, but it must adequately convey the desire to negotiate on a subject within the scope of bargaining. Citing *City of Richmond* (2004) PERB Dec. No. 1720-M, 173 CPER 95, the board applied MMBA precedent and announced that under the Trial Court Act,

a request to meet and confer over a non-negotiable decision will not be interpreted as a demand to bargain the effects of such a decision. Any demand to bargain over effects must clearly identify the negotiable areas of impact.

The board noted that the ALJ found the union's bargaining requests consisted of a statement that it did not agree with the job description, a request for a formal meet and confer meeting regarding its disagreement with the job specifications, and a statement asserting that the court's position that it did not have an obligation to meet and confer was incorrect. The board held that these requests were not sufficient to qualify as a demand to bargain the effects of the new job requirements.

### **Unilateral Change Charge**

Next, the board considered whether the court's requirement that newly hired court reporters sign the pre-hire agreement was an unlawful unilateral change. The board explained that this act was analogous to an assignment of Realtime reporting duties to these new reporters. Citing *City and County of San Francisco* (2004) PERB Dec. No. 1608-M, 166 CPER 78, the board again applied MMBA case precedent and explained that the assignment of work, if reasonably related to existing duties, is a management prerogative. Requiring newly hired reporters to sign a pre-hire agreement obligating them to fulfill this duty was a proper assignment of existing duties

and fell within the court's management prerogative, the board concluded.

The union alleged that by conditioning employment of new court reporters on their consent to sign the pre-hire agreement, the court improperly bypassed the union. To assess this allegation, the board cited *County of Fresno* (2004) PERB Dec. No. 1731-M, 173 CPER 96, which dealt with a charge of union bypassing under the MMBA. To establish that an employer has unlawfully bypassed the union, the charging

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to existing duties,  
is a management  
prerogative.*

party must demonstrate that the employer dealt directly with its employees to create a new policy of general application, or to obtain a waiver or modification of existing policies applicable to those employees.

The board found that while the pre-hire agreement's Realtime requirements were a modification of past practice, this practice was not memorialized in the MOU. The parties' contract only dealt with the pay differen-

tial afforded to reporters who agreed to provide Realtime services. Relying on *County of Fresno*, the board explained that once a policy is established by lawful means, an employer can take necessary actions, including consulting with employees, to implement the policy. Because the change in past practice was non-negotiable under the Trial Court Act, the court's implementation of the change did not unlawfully bypass the union, the board concluded.

Finally, the union argued that the terms of the disciplinary procedure in the pre-hire agreements were an unlawful unilateral change because they differed from the MOU provisions. Specifically, the union contended that under the pre-hire agreement, court reporters agreed that they could be subject to formal discipline, up to and including termination. Under the MOU, refusal to provide Realtime services resulted only in a loss of premium. The board found that because the issues regarding the disciplinary language in the pre-hire agreements were not included in the union's unfair practice charge, were not pled in its complaint, and were a new contention raised for the first time in the union's post-hearing brief, it could not adjudicate those claims under PERB Reg. 32615(a)(5). (*Service Employees International Union, Loc. 535 v. Fresno County Superior Court* [1-31-08] PERB Dec. No. 1942-C.)\*

## *Discrimination*

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### **U.S. Supreme Court: Admissibility of ‘Me Too’ Evidence Depends on Facts**

The United States Supreme Court, in a unanimous opinion, ruled that the admissibility of evidence of discrimination directed at employees other than the plaintiff, who are not parties to the lawsuit, must be evaluated on a case-by-case basis. The court’s decision in *Sprint/United Management Co. v. Mendelsohn*, authored by Justice Clarence Thomas, vacated the Tenth Circuit Court of Appeals decision indicating that such evidence always is admissible.

Ellen Mendelsohn sued her employer for age discrimination in violation of the Age Discrimination in Employment Act after she was terminated as part of a company-wide reduction in force. At trial, Mendelsohn sought to introduce testimony of five other employees who claimed they had been discriminated against because of their age. None of them worked in Mendelsohn’s group, and none had worked under supervisors in her chain of command. Further, none of them had heard any of her supervisors make discriminatory remarks.

Sprint brought a motion to exclude the evidence, arguing that it was irrelevant under Federal Rules of Evidence 401 and 402. It also argued that, under Rule 403, the probative value of the

evidence was outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, and undue delay. The district court granted Sprint’s motion, ruling that Mendelsohn could only introduce “evidence of discrimination against employees similarly situated” to her. The court defined “similarly situated” as those for whom Mendelsohn’s supervisor was the decisionmaker in any adverse employment action and where there was “temporal proximity” to the adverse action that she suffered. The Court of Appeals determined that the evidence was relevant and not unduly prejudicial, and sent the case back to the district court for a new trial.

The Supreme Court granted review to determine “whether, in an employment discrimination action, the Federal Rules of Evidence require admission of testimony by non-parties alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff.”

Justice Thomas explained that the Tenth Circuit had mistakenly concluded that the district court had applied a per se rule excluding this type of evidence in all cases. A review of the district court’s ruling indicated it was

not clear that it had applied a categorical rule of exclusion. “When a district court’s language is ambiguous, as it is here, it is improper for the court of appeals to presume that the lower court reached an incorrect legal conclusion,” admonished the court. “A remand directing the district court to clarify its order is generally permissible and would have been the better approach in this case.”

*A remand directing the district court to clarify its order would have been the better approach.*

The appellate court assumed that the district court had applied an across-the-board rule excluding the evidence and, therefore, had not reached the issue of whether, if relevant, it would be admissible as probative evidence under Rule 403. The Tenth Circuit determined that the evidence was relevant, and balanced the competing factors under Rule 403. This was improper, said Justice Thomas, because “questions of relevance and prejudice are for the District Court to determine in the first instance.”

The operative language that should be carefully studied by those seeking to introduce “me too” evidence

in order to prove a pattern of discrimination is in the last paragraph of the court's decision:

The question whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case. Applying Rule 403 to determine if evidence is prejudicial also requires a fact-intensive, context-specific inquiry. Because Rules 401 and 403 do not make such evidence *per se* admissible or *per se* inadmissible, and because the inquiry offered by those

Rules is within the province of the District Court in the first instance, we vacate the judgment of the Court of Appeals and remand the case with instructions to have the District Court clarify the basis for its evidentiary ruling under the applicable rules.

Although the court only referred to actions brought under the ADEA, it is clear that the same analysis applies to all discrimination cases brought under any federal discrimination statute. (*Sprint/United Management Co. v. Mendelsohn* [2-26-08] Supreme Ct. 06-1221, \_\_\_U.S.\_\_\_, 2008 DJDAR 2793.)\*

strict Court of Appeals reversed, and the Supreme Court accepted the case for review.

The ADEA does not define the word "charge." And, "while EEOC regulations give some content to the term, they fall short of a comprehensive definition," the majority said. One of the regulations specifies five different pieces of information a charge "should contain," while another seems to qualify these requirements by stating that a charge is "sufficient" if it is "in writing and names the prospective respondent and generally alleges the discriminatory acts," noted the majority.

The court rejected Kennedy's position that an intake questionnaire meets the regulatory definition of a "charge," and likewise was not persuaded by the company's argument that an intake questionnaire cannot be a charge unless the EEOC acts on it. Instead, it endorsed the EEOC's view that the regulations identify certain require-

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## U.S. Supreme Court Adopts Liberal EEOC Definition of 'Charge'

In *Federal Express Corp. v. Holowecki*, the United States Supreme Court, by a vote of seven to two, with Justices Clarence Thomas and Anonin Scalia dissenting, adopted the Equal Employment Opportunity Commission's liberal interpretation of the term "charge" under the Age Discrimination in Employment Act. The ruling was a surprise in light of the court's recent decision in *Ledbetter v. Goodyear Tire and Rubber Co.* (2007) 550 U.S. \_\_\_, 127 S.Ct. 2162, 185 CPER 61. There, the court rejected, by a vote of five to four, the EEOC's position that an employee's pay discrimination claim was not time-barred where the discriminatory decisions that resulted in unequal pay took place outside of the limitations period,

but the negative effects of those decisions continued into the statutory period.

In this case, Patricia Kennedy, a FedEx courier, filed a Form 283, entitled "Intake Questionnaire," and a detailed affidavit with the EEOC, alleging that the company discriminated against older workers in violation of the ADEA. She then filed a lawsuit against the company. FedEx argued that the case should be dismissed because Kennedy had failed to file a "charge" with the EEOC prior to filing her lawsuit, as required by the ADEA. Kennedy responded that the Form 283 and the affidavit constituted a valid charge, but the district court disagreed and dismissed her case. The Second Dis-

*The ADEA does not  
define the word  
'charge.'*

ments for a charge but do not provide an exhaustive definition. It found that the agency is entitled to judicial deference "when it adopts a reasonable interpretation of regulations that it has put in force," citing *Auer v. Robbins* (1997) 519 U.S. 452, 123 CPER 68.



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The majority also embraced the agency's statutory interpretation of the term "charge" as requiring a request for action. "In addition to the information required by the regulations, *i.e.*, an allegation and the name of the charged party, if a filing is to be deemed a charge it must be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee," it clarified.

Recognizing that, under this standard, "a wide range of documents might be classified as charges," the majority found this result "consistent with the design and purpose of the ADEA," because "the ADEA, like Title VII, sets up a remedial scheme in which lay-

persons, rather than lawyers, are expected to initiate the process." "The system must be accessible to individuals who have no detailed knowledge of the relevant statutory mechanisms and agency processes," it explained. "It thus is consistent with the purposes of the Act that a charge can be a form, easy to complete, or an informal document, easy to draft."

The majority agreed with the EEOC that the documents Kennedy filed met the request-to-act test, noting that, in her affidavit, she asked the agency to "please force Federal Express to end their age discrimination plan." It affirmed the decision of the Second District Court of Appeals.

Justice Thomas authored the dissenting opinion, objecting to the court's holding that a charge of discrimination under the ADEA "is whatever the Equal Employment Opportunity Commission says it is." Although Justice Thomas "would not rule out the possibility that, in appropriate circumstances, an intake questionnaire, like other correspondence, could contain the elements necessary to constitute a charge," the documents at issue here, in his opinion, "did not objectively manifest an intent to initiate the EEOC's enforcement processes." (*Federal Express Corp. v. Holowecki* [2-27-08] No. 06-1322, \_\_\_ U.S. \_\_\_, 20087 DJDAR 2873.)\*



## California Supreme Court Lets Retaliatory Supervisors Off the Hook

In *Jones v. Lodge at Torrey Pines*, the California Supreme Court, by a vote of four to three, ruled that an individual cannot be held liable for retaliation under California's Fair Employment and Housing Act. The majority, in coming to its conclusion, applied the same analysis used by the court in *Reno v.*

*The decision contradicted every other court that has addressed the issue.*

*Baird* (1998) 18 Cal.4th 640, 131 CPER 62, where it held that non-employer individuals are not personally liable for discrimination under the FEHA. The decision not only reversed the Court of Appeal's holding in this case, but also contradicted every other court that has addressed the issue.

### Factual and Procedural Background

Scott Jones brought a lawsuit against his employer, the Lodge at Torrey Pines, and his supervisor, Jean Weiss, for sexual orientation harassment, sexual orientation discrimination, and retaliation in violation of the FEHA. Jones alleged that Weiss ha-

arrassed him because of his sexual orientation and also sexually harassed female employees. Jones further alleged that Weiss retaliated against him for complaining about the harassment to Weiss, to Weiss' supervisor, and to the Department of Fair Employment and Housing.

The trial court dismissed some of the causes of action, including the harassment charge. The jury found in favor of Jones on the only two causes of action that proceeded to trial: sexual orientation discrimination against the Lodge and retaliation against both the Lodge and Weiss. Despite the jury's verdict, the trial court dismissed the claims based on insufficient evidence that Jones had suffered an adverse employment action. It also ruled that Weiss, as an individual, cannot be liable for retaliation under the act. Jones appealed.

The appellate court reversed the trial court and reinstated the jury's verdict. The Supreme Court granted review limited to the question of whether an individual may be held personally liable for retaliation under the FEHA.

### The Majority Decision

Section 12940 of the FEHA sets forth various unlawful practices. Subdivision (a) makes it an unlawful practice for "an employer" to discriminate. Subdivision (h) makes it an unlawful

employment practice for "any employer, labor organization, employment agency, or person" to retaliate. Jones argued that the plain language of subdivision (h) requires the conclusion that all persons who retaliate are liable, not just the employer. According to the rules of statutory construction, reasoned Jones, where the language of a statute is clear, the court must follow that plain meaning without consideration of other kinds of statutory interpretation.

*The majority found 'the statutory language is not plain.'*

Justice Ming Chin, writing for the majority, acknowledged that "the courts that have considered the same argument" as advanced by Jones, "including the Court of Appeal in this case, have so held." The majority, however, disagreed with those other courts, finding that "the statutory language is not plain." The language of subdivision (h) "does lend itself to plaintiff's interpretation," said the court, but "that is not the only reasonable interpretation." And, "if the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy," it instructed.

The majority declared that the language difference between subdivisions (a) and (h) “is not as great as initially appears.” In coming to this conclusion, it pointed to its decision in *Reno* in which the court ruled that non-employer individuals are not personally liable for discrimination under subdivision (a). In that case, the plaintiff argued that even though subdivision (a) does not use the word “person” in describing who can be held liable for discrimination, it should be interpreted to include individuals. This is because Sec. 12926(d) defines “employer” to include “any person acting as an agent of an employer” and because Sec. 12940(i) makes it an unlawful practice “for any person to aid, abet, incite, compel, or coerce” the execution of any forbidden act. The court was not persuaded and found that the “person-as-agent” lan-

guage in Sec. 12926(d) could have been “intended only to ensure that *employers* will be held liable if their supervisory employees take actions later found to be discriminatory, and that *employers* cannot avoid liability by arguing that a supervisor failed to follow instructions or deviated from the employer’s policy.”

The majority found the question presented in *Reno* similar to the one in this case and analyzed it in the same way. Here, the court said, “the Legislature may have used the word ‘person’ in subdivision (h) for reasons unrelated to a desire to make individuals personally liable for retaliation.” Noting that subdivision (h) is a “catchall provision” that “incorporates other unlawful employment practices defined in other parts of section 12940,” the majority speculated that “it is possible the Legislature merely wanted to use each of these

terms in subdivision (h) to conform to the fact that other provisions use those terms, rather than to impose personal liability on individuals in addition to the employer itself.” Therefore, it reasoned, “we must engage in statutory interpretation to resolve this ambiguity, as we did in *Reno* itself.”

The majority concluded that “*Reno*’s rationale for not holding individuals personally liable for discrimination applies equally to retaliation.” In *Reno*, the court ruled that under the FEHA, individuals could not be found liable for discrimination, but could be liable for harassment. Relying on *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 119 CPER 66, it reasoned that harassment consists of conduct that is not necessary to a supervisor’s job performance, whereas personnel or management decisions

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that may be discriminatory are inherently necessary to a supervisor's job. It also gave many other reasons for drawing the distinction. It noted that the FEHA exempts small employers from liability for discrimination but not for harassment. It worried that to hold su-

*'I presume that the Legislature meant what it said when it added the word 'person' to the FEHA's retaliation provision,' wrote Justice Moreno.*

perators personally liable for discrimination would "place a supervisory employee in direct conflict of interest with his or her employer every time that supervisory employee was faced with a personnel decision." As a matter of policy, supervisors should not be subjected to the threat of a lawsuit every time they make such a decision, said the court.

All of the reasons listed in *Reno* for not imposing individual liability for discrimination apply equally to retaliation, wrote Justice Chin:

If an employee gains a reputation as a complainer, supervisors might be particularly afraid to impose discipline on that employee or make other

lawful personnel decisions out of fear the employee might claim the action was retaliation for the complaining. The Legislature has given the same exemption to small employers against claims of retaliation that it gave small employers against claims of discrimination....No reason appears why it would want to make non-employer individuals personally liable for retaliation but not for discrimination.

In further support of its position, the majority pointed to *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 174 CPER 23. In that case, the court rejected Yanowitz's argument that the test for an adverse employment action should be broader for retaliation claims than for discrimination claims. "If, as we held in *Yanowitz*, the employment actions that can give rise to a claim for retaliation are *identical* to the actions that can give rise to a claim for discrimination, it is hard to conceive why the Legislature would impose individual liability for actions that are claimed to be retaliatory but not for the *same* actions that are claimed to be discriminatory," wrote Justice Chin.

The majority concluded that the legislative history was consistent with its interpretation. It noted that when the word "person" was added to the forerunner to subdivision (h), the legislative history viewed the amendment as making "various technical and conforming changes to the act." "A change that created individual liability for retaliation where none had existed previously would be quite substantive, not technical," opined the majority.

## The Dissent

Justice Carlos Moreno wrote a dissenting opinion; he was joined by Justices Kathryn Werdeger and Joyce Kennard.

"I presume that the Legislature meant what it said when it added the word 'person' to the FEHA's retaliation provision," wrote Justice Moreno. "Such an interpretation is consistent

*The majority holding incentivizes supervisors who harass to also retaliate.*

with established canons of statutory construction — when a statute's language is clear, our inquiry ends." Any concerns by the majority about the wisdom of imposing liability on individuals who retaliate should be directed to the legislature, he said.

Justice Moreno argued that the majority's position means that a supervisor who harasses an employee and then retaliates against him for complaining about it, as happened in this case, is personally liable for the harassment but not for the retaliation. The legislature could not have intended this incongruous result, he said:

In my view, neither the statutory language, nor the legislative history, nor logic can bear the weight of the majority's reasoning. Its holding

*incentivizes* supervisors who harass (and thus face the risk of personal liability) to also retaliate against employees who oppose the harassment in an effort to dissuade their victims from reporting the conduct — under the majority’s view, the supervisor risks no additional liability for retaliating and might avoid liability for harassment as well, if he or she successfully “discourages” the employee from pursuing a claim. I cannot conclude the Legislature intended such a perverse and irrational result. I therefore dissent and urge the Legislature to clarify the circumstances under which individuals may be held personally liable for retaliation.

Justice Moreno argued that the majority’s reliance on *Reno* was misplaced, finding *Reno* distinguishable. He noted that the language of subdivision (h) is “entirely unlike” that of subdivision (a). The court in the *Reno* decision, also authored by Justice Chin, “*emphasized* differences between the language of the FEHA’s discrimination and harassment provisions, the latter of which uses language nearly identical to the retaliation provision at issue here.” In this case, the majority claims that the language difference between the two subdivisions is minimal. “I find it difficult to comprehend how linguistic differences we found significant in *Reno* could suddenly be of no interpretive import here,” wrote Justice Moreno.

He pointed out that the majority’s policy concerns regarding the imposition of liability for retaliation on supervisors are the province of the legislature, not the courts. “Whatever the Legislature’s motivation, if a statute’s

language clearly imposes individual liability, it is not for this court to second-guess the wisdom of the Legislature’s policy choices,” he admonished.

Justice Moreno would “adopt the plain and commonsense meaning of the words the Legislature has employed,” and find “that the Legislature intended the word ‘person’ in subdivision (h) to mean that any individual who retaliates may be held personally liable.” He found no support for the majority’s conclusion. “Fortunately, the majority’s adoption of an interpretation of the statute that has no support in its language or legislative history is not the

final word on the meaning of the statute,” he wrote. “The Legislature can, and should, clarify that meaning.”

Justice Werdeger wrote separately to emphasize Justice Moreno’s conclusion and her disagreement with the majority. “Not only do I agree with Justice Moreno’s refutation of the majority’s tortured reasoning, I also find the majority undermines the entire purpose of the FEHA,” she said. (*Jones v. Lodge at Torrey Pines Partnership* [3-3-08] Supreme Ct. S151022, \_\_\_ Cal.4th \_\_\_, 3101 DJDAR 2008.)\*

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## En Banc Ninth Circuit Reverses Panel Decision in *Bates v. UPS*

The full Ninth Circuit Court of Appeals overturned a three-member panel’s decision in *Bates v. United Parcel Service* (2007) 465 F.3d 1069, 181 CPER 57. The same decision had upheld the trial court’s ruling prohibiting United Parcel Service from categorically excluding from employment applicants for the position of “package-car driver” who cannot pass a Department of Transportation hearing test. (For a complete discussion of the panel decision, see CPER No.181, at pp. 57-60.)

In its decision, the full court criticized the district court’s use of the pattern-or-practice, burden-shifting framework of *International Brotherhood of Teamsters*

*v. United States* (1977) 431 U.S. 324. “Because this case involves a facially discriminatory qualification standard, we conclude that the *Teamsters*’ burden-shifting protocol is inapplicable,” said the court.

According to the trial court’s analysis, once it was shown that the DOT standard screened out individuals with disabilities from consideration for driving positions, the burden shifted to UPS to show that the standard is job-related. The Ninth Circuit disagreed, holding that the plaintiffs “bear the burden of proving that they are qualified individuals with disabilities.” They must first show that they can perform the essential job function of safely driv-

ing package cars even though they are hearing impaired. “Only if they meet this burden does the question become whether the qualification standard used by the employer satisfies the business necessity defense,” said the court. At that point, the burden shifts to the employer:

[W]hen an employer asserts a blanket safety-based qualification standard — beyond the essential job function — that is not mandated by law and that qualification standard screens out or tends to screen out an individual with a disability, the employer — not the employee — bears the burden of showing that the higher qualification standard is job-related and consistent with job necessity, and that performance cannot be achieved through reasonable accommodation.

*The court determined that its imposition of a BFOQ standard under the ADA in Morton was a mistake.*

The court determined the district court did not analyze whether the plaintiffs are “qualified individuals” capable of performing the “essential function” of safely driving a package car. Therefore, it sent the case back to the trial court “for the employees to prove that they are so qualified” and to consider whether they can perform the job with or without reasonable accommodation.

The court also took issue with its own decision in *Morton v. United Parcel Service, Inc.* (9th Cir. 2001) 272 F.3d 1249, which the trial court had relied on to determine whether UPS met its asserted “business necessity” defense under the Americans with Disabilities Act. The court acknowledged that, in *Morton*, it had brought into its ADA analysis concepts from both the traditional Title VII business necessity defense to disparate impact claims and the “bona fide occupational qualification (BFOQ) standard” from Title VII and Age Discrimination in Employment Act disparate treatment challenges to a proscribed classification. Because it incorporated the BFOQ defense, the *Morton* court concluded that “if a transportation employer can demonstrate neither that all persons who fail to meet a disability-related safety criterion present an unacceptable risk of danger nor that it is highly impractical more

discretely to determine which disabled employees present such an unacceptable risk — the Title VII/ADEA [BFOQ] safety standard requirements — we would not think that the safety criterion would provide an accurate measure of actual ability.”

The court in this case determined that its imposition of a BFOQ standard under the ADA in *Morton* was a mistake, “as the plain language of the ADA does not support such a construction,” and overruled *Morton* to that extent. Therefore, at the new trial of the case, UPS will have the lesser burden of presenting a traditional business necessity defense where it will prevail if it can show that the qualification standard is job-related and consistent with business necessity, and that performance of the position cannot be accomplished with reasonable accommodation. (*Bates v. United Parcel Service, Inc.* [9th Cir. 2007] 511 F.3d 974.)\*

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## Two Incidents of Discrimination Insufficient to Establish Civil Rights Violation

In *Johnson v. Riverside Health Care System*, the Ninth Circuit Court of Appeals upheld the dismissal of a complaint of race discrimination in violation of 42 USC Sec. 1981, finding that the conduct alleged was insufficiently severe or pervasive to create an abusive work environment. It also upheld the dismissal of allegations of race and sexual

orientation discrimination brought under California’s Unruh Civil Rights Act and the Fair Employment and Housing Act.

### Factual Background

Christopher Johnson, who is African American and bisexual, worked as a physician at the Riverside Commu-

*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>

nity Hospital. Johnson alleged that, during the course of his employment, several physicians regularly harassed him about his sexual orientation and because they mistakenly believed that he suffered from HIV/AIDS. In one incident, a colleague, Dr. Vlasak, became irate after learning that Johnson performed surgery on one of Vlasak's patients. Johnson had discovered that the patient had sustained a skull fracture, a fact Vlasak had missed because he failed to review the patient's CT scan. According to Johnson, Vlasak charged into the room where Johnson was standing and screamed "you fucking nigger — why did you do that to me?"

Under the terms of Johnson's contract with the hospital, he was required to maintain his membership and privileges with the Medical Staff of Riverside Community Hospital. Failure to do so was cause for termination. Johnson's privileges were revoked in February 2002 for failure to pay dues, and Riverside terminated him soon after. His application for reinstatement was denied, and he was told that he would have to reapply as a new applicant and submit to a hearing before the credentials committee. At the hearing, Johnson was confronted with a number of coworker complaints about his behavior. The committee voted to deny membership.

Johnson filed a lawsuit. The trial court dismissed all of his claims, and Johnson appealed.

#### **Court of Appeals Decision**

##### ***The 42 USC Section 1981 Claim.***

To establish a prima facie case of hostile work environment under Sec. 1981, instructed the court, Johnson must show that he was subject to unwelcome verbal or physical conduct because of his race and that the conduct was sufficiently severe or pervasive to alter the conditions of his employment and create an abusive work environment, from both an objective and subjective point of view. The court said "in considering whether the discriminatory conduct

was sufficiently severe or pervasive, we look to all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."

Here, said the court, though Dr. Vlasak's conduct "is unquestionably evidence of discrimination standing alone," Johnson presented no other evidence of racial discrimination directed towards him. He did allege that the Medical Staff's Selection Committee refused to consider another African-American candidate because of his race and because he might be gay. "It is true that discriminatory conduct directed at an individual other than the plaintiff may be relevant to a plaintiff's hostile work environment claim in certain circumstances," the court noted. "In this case, however, the Committee members' conduct was not directed at Johnson, and he alleges that he only learned about it indirectly," continued the court. "Thus, Johnson points to just two incidents of discriminatory conduct over the course of his twenty-eight-month tenure at Riverside, and only one in which he was the victim."

The court concluded that in prior decisions, "we have required plaintiffs to allege that the offending conduct occurred with a greater frequency than Johnson has here." It pointed to *Vasquez v. County of Los Angeles* (9th Cir. 2002) 349 F.3d 634, 157 CPER 56, where the court dismissed the complaint of an

employee who was told he had a "typical Hispanic macho attitude" and should work in the field because "Hispanics do good in the field." In *Kortan v. California Youth Auth.* (9th Cir. 2000) 217 F.3d 1104, the court found no hostile work environment where the female employee's supervisor referred to other women as "castrating bitches," "Maddonnas," or "Regina" in her presence. In contrast, in *Craig v. M & O Agencies, Inc.* (9th Cir. 2007) 496 F.3d 1047, 186 CPER 69, the court determined that a female employee established a prima facie case of hostile work environment

*The Ninth Circuit  
found 'several actual  
distinctions between  
Johnson's case  
and Payne.'*

where her boss repeatedly solicited her for sexual favors over a period of months. And, in *Nichols v. Azteca Restaurant Entertainers* (9th Cir. 2001) 256 F.3d 864, the employee was held to have stated a claim for hostile work environment where he was called a "faggot" and a "fucking female whore," at least once a week. The court found its decision in *Manatt v. Bank of America* (9th Cir. 2003) 339 F.3d 792, to be "particularly instructive." There, an employee of Chinese descent established

a prima facie case of racial discrimination where she frequently overheard employees make jokes about China and, on two occasions, coworkers pulled their eyes back with their fingers to mock the appearance of Asians. She was also called "China woman" and laughed at because of the way in which she pronounced a word.

***Unruh Civil Rights Act claim.***

The court noted that in *Strother v. Southern California Medical Group* (9th Cir. 1996) 79 F.3d 859, it ruled that liability for discrimination under California Civil Code Sec. 51, the Unruh Act, was limited to situations in which the plaintiff's relationship to the offending business was "similar to that of a customer in a customer-proprietor relationship," and did not extend to employment discrimination.

However, Johnson argued that the court was bound by the California Court of Appeal's decision in *Payne v. Anaheim Memorial Hospital* (2005) 130 Cal.App. 4th 729, holding that a physician could assert a Sec. 51 claim against the hospital where he treated patients because he did not have the type of employment relationship with the hospital that foreclosed Sec. 51 relief. The Ninth Circuit rejected this argument, finding "several factual distinctions between Johnson's case and *Payne*." Johnson was compensated by the hospital; Payne was not. And, although Johnson's contract with the hospital referred to him as a "contractor," the hospital "retained control over all material aspects of his activities," unlike in

*Payne*. The court concluded that Johnson's relationship with Riverside was more akin to that between the physician-plaintiff and the defendant-hospital in *Strother* than that presented in *Payne*, and that his relationship with the hospital was "materially indistinguishable from that of an employee."

**FEHA claims.** The Court of Appeals agreed with the trial court that Johnson's claims under the FEHA were barred by the statute of limitations. Although Johnson filed his lawsuit in state

court within one year after issuance of the right-to-sue letter, as required by the act, he dismissed that case after the expiration of that year, and then later filed another lawsuit containing the same allegations in federal court. The Ninth Circuit was not persuaded by Johnson's argument that his timely state court filing extended the statute of limitations period. (*Johnson v. Riverside Health Care System* [9th Cir. 2-13-08] No. 06-55280, \_\_\_F.3d.\_\_\_, 2008 DJDAR 2277.) \*

her and in her presence about other African-American employees, such as, "they don't know anything," and "they're dumb." Once, while monitoring Hammond, Brennan remarked to another employee that she didn't understand Hammond because Hammond was "probably speaking 'Ebonics.'"

Hammond complained to Brennan's immediate supervisor and another supervisor. An investigation ensued, and the department concluded, in a letter issued June 8, 2004, that the complaints were "founded." Hammond filed a complaint with the Department of Fair Employment and Housing on July 1, 2004. She received a right-to-sue letter from the DFEH on July 13, 2004, and filed a lawsuit.

The trial court dismissed the case, and Hammond appealed.

### Court of Appeal Decision

In the appellate court, the county argued that Hammond's FEHA claims were barred under the one-year statute of limitations because they arose before July 1, 2003, or more than one year prior to the date she filed her complaint with the DFEH. Hammond contended that the continuing violation doctrine applied. That doctrine holds an employer liable for actions that take place outside the limitations period if those actions are sufficiently linked to unlawful conduct within the limitations period.

"We do not need to determine whether the continuing violation doc-

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## FEHA Claims Not Time-Barred Where Adverse Actions Continued Within Limitations Period

In *Hammond v. County of Los Angeles*, the Second District Court of Appeal, by a vote of two to one, reversed the dismissal of claims of age and race discrimination and of retaliation in violation of California's Fair Employment and Housing Act, finding evidence the plaintiff experienced adverse employment activity that began outside the limitations period but continued within it.

### Factual Background

Yvonne Hammond was employed as a nursing instructor by the Los Angeles County Sheriff's Department in the Medical Staff Development Unit. In late 2001, Betty Brennan became the new supervisor of the unit. Before Brennan arrived, Hammond taught

seven to ten classes a month, or 25 to 30 hours weekly.

Shortly after her arrival, Brennan asked Hammond to "demote" to the position of staff nurse, which paid less than her previous position. Hammond refused. In early 2002, Brennan removed Hammond, then age 62, from the classroom because she was "too old." Hammond taught no classes from February 14 to November 6, 2002. She did teach some classes after that point, but not as many as she had taught before Brennan arrived. Brennan monitored her classroom performance, but not that of the other three teachers.

Hammond was the only African-American instructor in her unit. Brennan made derogatory remarks to



trine applies because plaintiff has submitted evidence that within the one-year limitations period actionable conduct occurred,” reasoned the majority. “That evidence shows... that the alleged actionable conduct — reduction in plaintiff’s classroom teaching assignments — began in early 2002 and continued after July 1, 2003.”

*The court distinguished this case from Ledbetter v. Goodyear.*

The court relied on *National Railroad Passenger Corp. v. Morgan* (2002) 536 U.S.101, 155 CPER 70, for guidance. There, the United States Supreme Court held that an act of racial discrimination or retaliation that occurred within the limitations period is a discrete act and not barred by the statute of limitations. And, evidence of such conduct outside the limitations period is admissible as “relevant background evidence” to show a prohibited motivation for the discrete act about which a timely claim was filed.

Applying the methodology of *National Railroad* to the case before it, “Brennan’s decisions concerning the number and type of teaching assignments that plaintiff received from and

after July 1, 2003 — alleged adverse employment actions — can be attributed to plaintiff’s race and age based on the statements and acts that took place before July of 2003,” the majority concluded. “Therefore, her FEHA claims based on acts that occurred within the limitations period are not barred.”

The court distinguished this case from the recent United States Supreme Court case of *Ledbetter v. Goodyear* (2007) 550 U.S. \_\_\_\_, 127 S.Ct. 2162, 185 CPER 61. In *Ledbetter*, the high court held that the plaintiff’s pay discrimination claim was time-barred because the discriminatory decisions that resulted in her unequal pay took place outside of the limitations period, even though the negative effects of those decisions on her rate of pay continued into the statutory period. The appellate court explained the distinction:

Unlike the supervisors in *Ledbetter*, Brennan did not just make a single decision based on age or race outside the limitations period that continued to affect plaintiff adversely during the limitations period, such as, for example, demoting plaintiff to a staff nurse or permanently removing her from the classroom. Instead, Brennan initially removed plaintiff from the classroom in early 2002, but then allowed her to teach classes on a sporadic basis beginning in late 2002 and continuing through July 1, 2003. Thus, if Brennan’s initial decision to remove plaintiff from the classroom was tainted by a prohibited motive under the FEHA, a reasonable factfinder could infer that Brennan’s subsequent decisions con-

cerning plaintiff’s teaching assignments within the limitations period were similarly motivated.

The majority also rejected the county’s argument that Hammond had not suffered an adverse employment action. “Substantially reducing or eliminating a teacher’s classroom teaching assignments impairs the teacher’s ability to perform the job for which she was hired and, in effect, relegates her to some undefined, but lesser, status other than that of a full-time classroom instructor,” it said.

The majority was likewise not persuaded by the county’s contention that it had submitted evidence sufficient to rebut Hammond’s prima facie case of age and race discrimination. The county did not provide any evidence of a neutral, nondiscriminatory reason for the treatment Hammond received, such as poor job performance. Rather, it simply denied the treatment ever took place. And, even if it had rebutted the presumption of race discrimination, Hammond “supplied the requisite evidence of racial animus” to raise a triable issue of fact that the reasons for the reduction in classroom time were pretextual.

The court sent the case back to the lower court for trial. (*Hammond v. County of Los Angeles* [2008] 159 Cal.App.4th 1430.) \*

## General

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### DOL Statistics Show First Increase in Union Membership Since 1983

The number of U.S. workers who belong to labor unions rose last year by the greatest increase since 1983, when the Bureau of Labor Statistics first began collecting annual union membership rates. In 2007, union membership jumped by 311,000 to 15.7 million. In total, union members accounted for 12.1 percent of wage and salary workers, BNA reported, unchanged since 2006.

Public sector union membership continues to outpace the rate among private sector employees. In the private sector, 7.5 percent of workers were union members, up from 7.4 percent in 2006. In the public sector workforce, however, unionization was 35.9 percent, a dip from 36.2 percent in 2006.

This amounts to nearly a five times greater percentage of union members in the public sector as compared to their private sector counterparts.

Within the public sector, local government employees have the highest percentage of union membership at 41.8 percent. This group includes employees in highly unionized occupations, such as teachers, firefighters, and police officers. State government employees in the U.S. have a 30.4 percent rate of union membership.

BNA statistics reveal that union membership was higher for men than women, 13.0 percent compared to 11.1 percent. This gap has narrowed since 1983, when the rate for men was about 10 percentage points higher than for women. The trend is explained by declining rates for both males and females, with the rate for men declining more rapidly.

African-American workers are more likely to be union members than white workers, 14.3 percent in contrast to 11.8 percent. Asians and Hispanics have union membership rates of 10.9 and 9.8 percent, respectively. Within these groups, African-American men had the highest union membership rate at 15.8 percent. Hispanic women had the lowest rate at 9.6 percent.

The rate of union membership is highest among all workers aged 55 to 64 years old, at 16.1 percent. Employees between ages 45 and 54 have a union membership rate of 15.7 percent. Not surprisingly, the lowest union membership rates occurred among those between 16 and 24 years old, checking in at only 4.8 percent. Full-time workers were about twice as likely to be union members as part-time work-

ers, with rates of 13.2 percent compared with 6.5 percent.

BNA data also is broken down geographically. As has been true in the past, the largest number of union members lived in California (2.5 million) and New York (2.1 million). Nearly half of the 15.7 million union members in the U.S. lived in six states, California, New York, Illinois, Michigan, Pennsylvania, and New Jersey. North Carolina and Virginia had the lowest rates of union membership, 3 percent and 3.7 percent, respectively.

*The largest number of union members lived in California.*

State union membership levels depend on both the employment level and the union membership rate, the BNA report explained. Texas had less than one-quarter as many union members as New York despite having over 1.7 million more workers. Tennessee and Hawaii had comparable numbers of union members even though Tennessee's employment level was more than four-and-one-half times that of Hawaii.

The full report is available from BNA at <http://www.bls.gov/news.release/union2.toc.htm>.\*

## Benefits Extended to Military Personnel and Their Families

New provisions of the federal Family and Medical Leave Act of 1993 grant leave to employees whose spouse, son, daughter, parent, or next of kin is an injured member of the armed forces. The law defines "next of kin" to mean the nearest blood relative of the injured individual.

Part of the 2008 National Defense Authorization Act, the new law grants an employee up to 26 workweeks of FMLA leave during a 12-month period to care for an injured service member on active duty. Leave is available for an injury or illness incurred by the service member in the line of duty that renders him or her medically unfit to perform

the duties associated with the member's rank.

The employee may elect to substitute any accrued paid vacation leave, personal leave, family leave, or medical or sick leave, or the employer may require the employee to do so. The employee must provide reasonable notice of the need for leave, and the employer can require that a request for leave be supported by documentation.

Service members covered by the amendments include members of the armed forces, including the National Guard and Reserves. Leave is permitted for a family member who is caring for a service member undergoing medical treatment, recuperation, or therapy,

or is an outpatient or temporarily disabled because of a serious illness or injury.

In California, a law signed by Governor Schwarzenegger last fall requires employers to give husbands and wives of a soldier returning from combat up to 10 days of unpaid leave. The idea behind the legislation, A.B. 392, sponsored by Assembly Member Ted Lieu (D-Torrance), is to give members of the military and their families time together before the soldier is returned to active duty in Iraq, Afghanistan, or another combat zone.

Another bill, S.B. 272, introduced by Senator George Runner (R-Lancaster), gives members of the armed services enrollment priority for classes at California's state universities and community colleges. \*

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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>

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## PERB's Revocation Card Decisions Analyzed in Context of Card Check Debate

While organizing through card check is being promoted in the federal political arena, it is being viewed with suspicion at the National Labor Relations Board. One of the first articles to analyze the NLRB's decision regarding card check in *Dana Corp.* (Sept. 29, 2007) 351 NLRB No. 28, also reviews two recent California Public Employment Relations Board decisions on revocation cards and PERB's attempt to promulgate revocation rules.

The author contends the NLRB's reasoning "illustrates a fundamental shift in American labor relations, away from safeguarding the rights of employees to collectively bargain..., and to-

wards safeguarding *employer* choice as to whether to engage in such bargaining to begin with." He sees the shift as a rejection of the principle of asymmetrical employer power that was fundamental to NLRB decisions from the 1960s. The same shift in focus is evident, he notes, at the state level in California and in recent legislation in Illinois. The article, "Stacking the Deck: Privileging 'Employer Free Choice' Over Industrial Democracy in the Card Check Debate," by Raja Raghunath, is University of Denver Legal Studies Research Paper No. 08-10 (March 10, 2008). It is available at <http://ssrn.com/abstract=1105030>. \*

# News From PERB

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## Governor Fills PERB Seat

Alice Dowdin Calvillo is the most recent appointee to the Public Employment Relations Board. Calvillo is a fifth-generation Californian and has more than 20 years of experience working in state and local government. Prior to her appointment, she served as chief deputy cabinet secretary to Governor Schwarzenegger. She first joined the governor's staff in 2005 as deputy appointments secretary, responsible for appointments within the environmental, energy, and agricultural areas of government. Previously, she was the governor's legislative director for the Department of Toxic Substances Control.

Calvillo also served as chief advisor to the California Integrated Waste Management Board, appointed to the post by Governor Pete Wilson. Prior to that, she was Governor Wilson's deputy director of legislation and operations for the Managed Health Care Improvement Task Force. She has served as the chief consultant to the California State Assembly Consumer Protection, Governmental Efficiency, and Economic Development Committees.

Calvillo is also active in local government. She was a member of the Auburn City Council from 1998 to 2005, and served as mayor of the city in 2001 and 2005. While serving on the council, she was chair of the Placer

County Economic Development Board, and on the board of directors for the Sacramento Area Council of Governments and the Local Agency Formation Commission for Placer County. The Placer County Board of Supervisors appointed Calvillo as the District 3 representative on the Placer County Parks Commission in 1997,

and she served as its chair in 1999 and 2000.

Calvillo was the recipient of the Auburn Business and Professional Women's Young Careerist Award, and in 2003 was honored as Woman of the Year by the California Assembly. Calvillo obtained Bachelor of Arts degrees in Political Science–Public Service and in German from the University of California, Davis, in 1990.

Calvillo joins the other four members of the board, Chair Karen Neuwald, and Sally McKeag, Robin Wesley, and Tiffany Rystrom. \*

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## More Personnel Changes

Laura Davis was hired as staff counsel in the PERB San Francisco Regional Office on November 1, 2007. Davis comes to PERB from the Department of Industrial Relations, where she worked as an attorney for the last three years. Prior to that, she worked as an attorney at the Law Offices of Robert Bezemek and at the law firm of Cullom, Burland, Bacon & Overpeck.

In December 2007, San Francisco Regional Attorney Kristin Rosi left PERB and joined the Department of Insurance.

Harry Gibbons joined PERB as senior counsel in the Sacramento Regional Office on November 19, 2007. Gibbons comes to PERB from the Department of Consumer Affairs, with 23 years of experience in public sector la-

bor relations and labor law, including 14 years as an attorney with the California State Employees Association and 9 years as an attorney with California School Employees Association. Prior to that, he worked for the National Labor Relations Board.

Kevin Geckeler was appointed as legal advisor to Board Member Tiffany Rystrom on December 3, 2007. Since 2004, Geckeler served as labor relations counsel for the Department of Personnel Administration. From 2000 to 2004, he was the managing attorney for the Human Rights/Fair Housing Commission. Previously, Geckeler was in private practice. He earned a Juris Doctorate degree from McGeorge School of Law and a Bachelor of Arts degree from Kenyon College. \*

# Public Sector Arbitration

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## FERP Program Participants Cannot Be Assigned Teaching-Only Duties

Arbitrator Bonnie G. Bogue resolved three consolidated grievances, all dealing with the assignment of workloads to California State University faculty members participating in the Faculty Early Retirement Program, which allows retiring faculty members to continue to work part-time. The grievances were brought by the California Faculty Association. The key issue in dispute was whether the collective bargaining agreement allows CSU to assign FERP participants “all teaching” rather than a mix of classroom instruction and related activities normally required of regular tenured faculty members. The arbitrator found that FERP faculty members could not be given teaching-only assignments without their consent because such an assignment would not be proportionate to their pre-retirement combination of instructional and non-instructional duties as mandated by the contract.

The first of the three grievances was a systemwide complaint that challenged the university assistant vice-chancellor’s policy statement which announced that campuses could assign FERP participants solely teaching duties without assigning other related tasks.

The second grievance concerned a February 2005 memorandum issued

to university faculty by the dean of the College of Science and Math at Cal Poly. The memo advised FERP participants working 50 percent of the time during the year immediately preceding retirement, that they would be assigned 18 “weighted teaching units” of actual teaching and 4.5 units for service or professional development activities; and teachers choosing primarily to teach would have to work with the university to “determine a reasonable assignment between 18 and 22.5 wtu’s.” The grievance claimed that the memo amounted to a unilateral elimination of FERP participants’ eligibility for “indirect” instructional units earned for non-teaching tasks.

The third grievance involved a specific workload assignment given to a FERP participant in the Sociology Department at CSU-San Bernardino. The grievant complained that although he was in the FERP program, his teaching assignment had been increased from the prior year, and he had been assigned the same teaching load as before he retired to the program. In the grievant’s second year in FERP, the grievant claims he was assigned a workload equating to 42 percent of the standard full-time assignment in the Sociology Depart-

ment, even though he was on a 33.3 percent FERP timebase. The university argued that his FERP assignment was properly based on the university’s nine-course standard, not the seven-course standard employed by the Sociology Department.

The association contended that CSU violated the contract by crediting FERP participants with only “direct” units, units earned solely through teaching, and not for “indirect” instruction-related services. The association asserted that as a result, FERP participants were treated like lecturers, who

*Contract language that required a specific ratio between direct and indirect instructional activities had been eliminated.*

receive no credit for indirect services. Regular tenured faculty members receive indirect unit credit.

The university argued that the contract allows it to assign FERP participants a workload which consists only of teaching, direct instructional duties. Because there is no strict numerical ratio between direct and indirect instruction workload applicable to faculty assignments, no ratio need be applied to

FERP participants. The university pointed out that contract language which required a specific 12:3 ratio between direct and indirect instructional activities had been eliminated in 1995. It argued that nothing in the agreement relies on a formula for determining whether a faculty assignment is excessive.

Arbitrator Bogue explained that FERP is governed by Article 29 of the contract. Section 29.6 states that the FERP appointment “shall be proportional to the timebase” of the FERP participant’s pre-retirement timebase, without any language describing what makes up that timebase. The university interprets this provision to mean that if the faculty member worked 100 percent time in the pre-retirement year, a 50 percent FERP appointment would be for 50 percent of full time in terms of salary, whereas if the faculty member had worked only 50 percent the prior year, a 50 percent FERP assignment would result in 25 percent of a full-time appointment. But, it contends nothing in the contract specifies the content of the participant’s assignment.

The association interpreted Sec. 29.6 to require that the FERP workload assignment be proportional to the actual content of the participant’s pre-retirement workload, not merely the percentage of the timebase of the pre-retirement appointment. Under CFA’s interpretation, if the participant had a pre-retirement full-time position in which he or she were assigned to teach three courses each semester

for six courses in an academic year, plus related instructional duties and responsibilities (as defined in Article 20), then a 50-percent FERP appointment would mean an assignment of three courses over the academic year, with a proportional assignment of related duties and responsibilities.

*The FERP workload  
is to be proportional  
to that carried in  
the last year before  
retirement.*

Section 29.18 of the contract states that a FERP participant “shall be required to perform normal responsibilities and his/her share of normal duties and activities.” Based on this, the arbitrator found support for the association’s interpretation. She found this language showed the parties’ mutual understanding that a FERP participant is to have primarily the same type of work as a full-time tenured faculty member, but with an overall assignment proportionally reduced to reflect the percentage of his or her timebase.

Bogue noted that the contract expresses the expectation that FERP faculty are to perform the same ancillary indirect, instructionally related duties they performed when working full time. She concluded that a finding that FERP participants only teach classes, with no

credit for related instructional activities or duties, would render the contract language meaningless. She found the contract plainly contemplated that FERP employees must continue to fulfill the same indirect, instruction-related responsibilities as they did before retiring to the program.

The arbitrator explained that if a FERP participant is given an “all teaching” assignment, it would create a workload greater than a “normal” teaching load since regular teachers spend some of their credited time on other assignments. Bogue emphasized that Article 29 dictates that the FERP workload be the same in content, but reduced in quantity so as to be proportional to the workload that an individual carried in the last year before retirement. Therefore, unless an employee had no non-teaching responsibilities before joining FERP, assigning “all teaching” to that employee in FERP would violate Article 29.

The university charged that this interpretation of the contract uses a “strict numerical formula” to calculate the ratio of instructional and non-instructional units in order to determine the “normal workload.” The parties intentionally removed this concept from the contract as applied to regular tenured faculty, argued CSU, and it should not be resurrected to determine a FERP participant’s workload. The association contended that a numerical formula or ratio of direct and indirect teaching credits is not required in assigning FERP workload. But, it

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added, an “all teaching” FERP assignment constitutes an excessive workload.

To address these contentions, Bogue turned to the bargaining history regarding the understanding of “normal” workload. The 1991-93 collective bargaining agreement included a detailed definition of the normal average workload including the number of units dedicated to non-instructional services. This created an explicit “normal” ratio of 12:3. This ratio pre-existed collective bargaining, and was derived from a 1976 university policy. In 1995, when the parties agreed to eliminate numerical averages or norms, they executed a side memorandum of understanding, and specifically agreed to continue reporting faculty workload in accordance with 1976 policy, which defined weighted teaching units.

Bogue concluded from this bargaining history that the parties intended to grant more discretion to the university in structuring workloads, and to move away from a formulaic approach;

but it did not eliminate the use of weighted teaching units to determine what constituted a reasonable workload.

Arbitrator Bogue next turned to the parties’ past practice. Since 1995, she noted, administrators continued to quantify regular faculty workloads by using weighted teaching units to assure that workloads were balanced among faculty members. Some faculty members voluntarily agreed to a workload that varied from the generally accepted relationship between direct and indirect duties, even to the point of accepting “all teaching” assignments. However, the arbitrator found that an “all teaching” assignment is not a long-standing, well-known practice, and the predominant current practice across the CSU system, consistent with the contract, is to assign a mixed workload of direct and indirect instructional duties.

The arbitrator also credited the association’s argument that CSU violated the contract by applying to FERP participants the established practice governing lecturers. She explained that

lecturers are given no weighted teaching unit credit for non-instructional activities, and are assigned more classes than a regular tenured faculty member because they are not required, and do not typically engage in, the indirect duties. Bogue found that the past practice of allowing lecturers to have an “all teaching” workload did not establish a contractual basis for doing the same with regard to FERP participants. The practice had never been applied to tenured faculty, and Article 29 does not permit that practice for FERP faculty whose assignments are contractually required to be based on their own pre-retirement, regular faculty workload.

Arbitrator Bogue held that an “all teaching” assignment for a regular faculty member would create an excessive workload because it would leave no time for other contractually enumerated duties. Accordingly, she concluded, absent a voluntary agreement to the contrary, a FERP participant’s workload must reflect a combination of teaching and non-teaching duties,



and be proportionate to their pre-retirement assignment. She cautioned, however, that specific class assignments and indirect duties can differ from those assigned to the FERP participant prior to retirement to accommodate the department needs, and a numerical formula is not required to calculate the workload mix.

*An ‘all-teaching’ workload is permissible as long as it is voluntarily accepted.*

The arbitrator sustained the systemwide grievance. By expressly authorizing campuses to require FERP faculty members to accept an “all teaching” workload, the university violated the contract. She directed CSU to issue a written directive to all campuses, colleges, and departments expressly stating that the collective bargaining agreement requires FERP participants to be assigned proportionate workloads, consisting of direct and indirect instructional duties, in the same manner as regular tenured faculty. Further, she ordered that all FERP participants who did not voluntarily agree to an “all teaching” workload were entitled to a monetary award compensating them for excess workload, or a compensatory reduction in future workload.

Arbitrator Bogue denied the Cal Poly grievance because the dean’s February 2005 memorandum only invited FERP participants to accept an “all teaching” workload on a voluntary basis. The arbitrator reiterated that an “all-teaching” workload is permissible as long as it is voluntarily accepted. She added that any misunderstanding of the dean’s memo would be clarified by the remedy ordered in the systemwide grievance.

The arbitrator sustained the San Bernardino grievance, finding that the grievant’s workload was incorrectly and disproportionately based on the nine-

course faculty workload, not on his pre-retirement, seven-course, Sociology Department workload. The arbitrator explained that the contract calls for FERP participants’ workloads to be based on their own pre-retirement assignments, and ordered the university to compensate the grievant for the excessive workload. (*California State University and California Faculty Assn.* [4-20-07; 22 pp.]. *Representatives:* Paul G. Verellen [labor relations manager] for the university; Kathryn Sheffield, [CFA] for the union; *Arbitrator:* Bonnie G. Bogue.)\*

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### **Arbitrator’s Disclosure Obligations Not Triggered Until Notified of Selection**

In a case that may serve as guidance to public sector practitioners and arbitrators alike, the Second District Court of Appeal announced that an arbitrator’s required disclosures must be made when the arbitrator is notified in writing that he has been selected by the parties or appointed by the court, not when the names of a group of potential arbitrators are given to the parties for their consideration.

The case arose when Jakks Pacific, Inc., and THQ, Inc., members of a limited liability company that manufactures and sells video games, had a dispute regarding a provision in their agreement related to the calculation of

the percentage of net sales that THQ was to pay Jakks. In June, 2007, from lists proposed by the parties, a trial court nominated five candidates to serve as arbitrator, four from THQ’s list and one from Jakks’ list. Jakks gave notice that the five nominees were obliged to provide disclosures required by Code of Civil Procedure Sec. 1281.9(b). THQ objected, asserting that disclosure is required at the time of the arbitrator’s selection or appointment, not earlier. The court determined that disclosure is required only when the arbitrator is appointed, and selected one of the arbitrators THQ had nominated. Jakks then sought the Court of Appeal’s

intervention by way of a petition for a writ of mandate.

The Second District Court of Appeal explained that, under Code of Civil Procedure Sec. 1281.6, when the parties to an arbitration agreement are unable to select an arbitrator, the court nominates five persons from lists supplied jointly by the parties. If they are unable to agree on a selection from the list, the court appoints the arbitrator

*If all candidates are required to comply with the disclosure requirements, four will have wasted their time.*

from the nominees. Regardless of the manner in which the arbitrator is selected, however, he or she is required to make certain disclosures. In general, this includes any facts that may demonstrate the potential that the arbitrator might not be impartial.

The Court of Appeal agreed with the trial court that Sec. 1281.9(b) “means what it says — that the disclosure obligation is triggered ‘when a person is to serve as a neutral arbitrator,’” not when the court nominates five persons at the beginning of the process.

This occurs when the arbitrator has received written notice of his proposed nomination by the parties or appointment by the court.

The court’s interpretation of the statutory language was bolstered by practical considerations. If all five candidates are required to comply with the disclosure requirements, four will necessarily have wasted their time. (*Jakks Pacific, Inc. v. Superior Court of Los Angeles* [2-28-08] B201466 [2d Dist.] \_\_\_ Cal.App.4th \_\_\_, 2008 DJDAR 2970.)

Section 1281 does not apply to labor arbitration arising under collective bargaining agreements or public sector proceedings. However, public sector arbitrators must make disclosures similar to those required by Sec. 1281. For example, selected arbitrators must disclose their resume and any personal or financial relationship with either party or its attorney. Also, a similar selection process is used in the public sector. For example, a list of five or seven arbitrators is submitted to the parties for their review. By application of this case, the disclosure typically volunteered by public sector arbitrators need not be made until selection. \*

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# Arbitration Log

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- **Contract Interpretation**
- **Maternity Leave**

**United Educators of San Francisco and San Francisco Unified School Dist.** (6-18-07; 11 pp.). *Representatives:* William M. Quinn, Jr. (deputy general counsel) for the district; Bradley G. Booth (Weinberg, Roger & Rosenfeld) for the union. *Arbitrator:* William E. Riker (CSMCS Case No. ARB-06-0197).

*Issue:* Did the district violate the contract by assigning the grievant to a different school after she returned from maternity leave?

*Union's position:* (1) The grievant worked at Hillcrest Elementary School as a speech language pathologist before she went on maternity leave. The district violated the collective bargaining agreement when it assigned her to Jefferson Elementary School after she returned.

(2) Employees returning from sick leave of less than one year are entitled to return to their previous assignment. Teachers who return from maternity leave are similarly entitled to return to the same position at the same location.

(3) The contract provision governing maternity leave states that an employee returning from such leave must be assigned to his or her previously held "position." The term "position" means "assigned location," not just job type.

(4) Under the contract, the griev-

ant had an enforceable right to replace a permanent or probationary employee assigned to her position during her absence.

(5) Although the contract does not explicitly state that a teacher has a right to return to the school to which she had been previously assigned, neither does it state that a teacher returning from maternity leave is entitled only to a "similar position."

*District's position:* (1) The contract does not guarantee the grievant the right to work in the same location as before she went on maternity leave. The contract only guarantees work in the same position. Return rights to a "position" is intended to mean job title or classification. "Assignment" refers to the school site or location where the duties of the position are performed.

(2) There are provisions in the contract where the parties agreed that an employee was entitled to return to the same assignment as before leave was taken. Maternity leave is not a category of leave covered by those provisions.

The contract makes clear that unless otherwise noted, an employee returning from long-term leave does not have a right to a particular school assignment, but only to a position similar to the one previously held. This allows the district to hire permanent replacements for long-term absentees.

(3) The reason for reassigning the grievant was based on the district's legitimate educational needs.

*Arbitrator's holding:* Grievance denied.

*Arbitrator's reasoning:* (1) It is understandable that the grievant wanted to return to her former school where she enjoyed positive relationships with parents, students, and staff. Not all individual preferences can be accommodated. The district's responsibilities extend to the entire education system, and the best utilization of employee expertise is a fundamental device to achieve that goal.

(2) Both policy and the contract dictate that the speech language pathologist position is itinerant, and the district retains the authority to assign employees in such specialized positions to where they are most needed during each school year.

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(3) The section of the contract that authorizes maternity leave provides that a returning teacher shall return to the “position” previously held; it does not mention assignment. “Position” and “assignment” are not interchangeable terms, and the contract differentiates between the two. The contract is clear that “position” means job classification, not work location.

(4) While returning the grievant to her former assignment would benefit that school, the district’s reasons for assigning her to a different school in the interest of the total student population have not been refuted.

*(Binding Grievance Arbitration)*

#### • Contract Interpretation

**Service Employees International Union, Loc. 503, OPEU, and City of Beaverton** (7-30-07; 10 pp.).

*Representatives:* William J. Scheiderich (deputy city attorney) for the city; Joel Rosenblit (staff attorney) for the union.  
*Arbitrator:* Luella E. Nelson.

*Issue:* Did the city violate Article 30.1 of the collective bargaining agreement when, due to hazardous winter weather conditions, it closed the library early on January 16, 2007, and neither paid employees who left early for the remainder of their shifts nor credited employees who stayed until the end of their shifts with compensatory time off?

*Pertinent contract language:* Section 30.1 states, “When, in the judgment of the City, weather conditions require the closing or curtailing of City offices after [employees report to work, those employees]...who are unable to reach

their work location prior to its closure, and who do arrive...shall be paid for the remainder of the shift. In the event that some employees in a department are sent home due to inclement weather conditions and others are instructed to remain and continue to work, those employees remaining on duty will be credited with compensatory time off on a one-to-one basis for hours worked after other employees were sent home.” Section 30.2 states, “If weather conditions become hazardous, the employee may go home prior to the end of the employee’s work shift, after notifying and receiving approval from the employee’s supervisor or designee.”

*Union’s position:* (1) This case is governed by Article 30.1, which applies when the city decides to close services. That language does not condition pay on the employees having been sent home, it simply provides that employees “shall be paid” for the remainder of their shifts.

(2) Provisions of the inclement conditions article of the contract that address situations where individual employees are allowed to leave early due to hazardous weather, but the facility remains open, are not applicable. Only Article 30.1 deals with the closing of operations.

(3) The city evaded its contractual responsibilities by giving employees a choice of going home; nothing in the contract authorizes the city to give employees that choice. Employees who left early due to the library closing should be paid through the end of their shift. Those who stayed until the end of their

shift should receive compensatory time for the hours worked past closing.

(4) Whether there was work to do in the library after it closed is irrelevant. The question is whether there was a closing of services. Where services are closed, it is common for a premium “show-up pay” to be made available to employees who come to work in “inclement” weather. Here, the parties bargained a premium for showing up in inclement weather regardless of whether the employee is sent home early or works after the facility is closed.

(5) A neighboring city handled the situation appropriately under identical contract language. It sent all its library employees home and paid them through the end of their shifts. It could have asked some to stay and paid them compensatory time, but chose not to do so.

*City’s position:* (1) The union improperly reads Article 30 one paragraph at a time, instead of as a whole. The relevant question is whether the article as a whole was violated.

(2) The library closed because it had insufficient staff to serve the public, not because of inclement weather. The staff had work to do even though the public was not present, and those who left early did not expect to be paid for the remainder of their shifts.

(3) The contract does not require an “all or nothing” decision on closing. The parties did not agree to delegate to employees the decision regarding minimum staffing. Under the union’s theory, employees could generate premium for other employees simply by choosing not to show up for work.

(4) Whether employees should have been sent home or whether the library had to close are management decisions. There is no evidence that employees who remained until the end of their shift to avoid taking leave placed themselves at physical risk. The threat of icy roads did not materialize.

(5) The manner in which the neighboring city handled its library closure is irrelevant.

*Arbitrator's holding:* Grievance denied.

*Arbitrator's reasoning:* (1) Article 30 applies to situations where employees might go home early because of bad weather. Article 30.5 provides that employees who miss work due to hazardous weather conditions can take paid or unpaid time off, or make up the work later. In contrast, employees affected by Article 30.1 are paid through the remainder of their shift if they are sent home, or receive compensatory time in addition to pay if they are ordered to remain at work despite the closure.

(2) Under Article 30.1, employees may go home early if the city determines that "weather conditions require the closing or curtailing of city offices after the employee reports to work." Un-

der Article 30.2, employees may go home early, after seeking and receiving supervisory approval, when "weather conditions become hazardous." In either event, bad weather results in employees' going home early. Thus, neither the fact that some employees went home early, nor the fact that their early departure was the result of bad weather, determines whether this matter is governed by Article 30.1 or 30.2.

(3) Read in isolation, the first sentence of Article 30.1 is susceptible to more than one interpretation. "Curtailing" could be read to indicate that it is not even necessary for an office to close completely for the language to apply, thus favoring the union's position. However, the final sentence of Article 30.1 distinguishes between those employees who are sent home and those employees who are instructed to continue to work while others are sent home, with only the latter credited with compensatory time off. On January 16, no employees were ordered to continue working while others were sent home.

(4) The contract authorizes the city to decide if weather conditions require it to close or curtail the operation of

any office. On January 16, the city did not determine it was necessary to close or curtail library offices because of the weather. Instead, it gave blanket supervisory approval to permit any library employee to leave early. It elected to operate with limited staff due to very little patronage because of weather conditions. It barred the public from the library but continued to function as it routinely does when the library is closed. Therefore, employees who left early were fully compensated under Article 30.5.

*(Binding Grievance Arbitration)*

- **Contract Interpretation**
- **Preparation Periods**
- **Length of School Day**

**Livermore Education Assn., CTA/NEA, and Livermore Valley Joint Unified School Dist.** (8-17-07; 16 pp.). *Representatives:* Ann M. Murray (Kronick, Moskowitz, Tiedemann & Girard) for the district; Bruce Colwell (Chapter Services Consultant) for the association. *Arbitrator:* William E. Riker (CSMCS Case No. ARB-05-0656.)

*Issue:* Did the district's 2006-07 workday schedule for teachers at Granada High School violate the collective bargaining agreement?

*Association's position:* (1) The district violated the contract when the principal of the high school implemented a schedule for the 2006-07 school year that increased the length of teachers' workdays beyond six-and-a-half hours.

(2) The district violated the contract by decreasing the daily 90-minute class preparation period required by the

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contract. Prior to implementation of the new schedule, it was the past practice for teachers to receive a preparation period equal to the usual instructional period, which was 90 minutes for high school teachers.

(3) On many occasions during contract negotiations, the district has attempted to extend the workday beyond the regular school day. However, the district has been unsuccessful in changing the length of the workday, and it is aware that the contract sets a six-and-one-half-hour ceiling.

*District's position:* (1) The contract requires the district to provide a daily preparation period, but no time limitation is specified. The contract does not require preparation periods occurring during the day to be contiguous or longer than 40 minutes.

(2) The clear language of the contract demonstrates that the six-and-one-half-hour workday was meant to be a minimum, not a maximum.

(3) The high school principal worked with teachers to develop the 2006-07 schedule, and the school faculty adopted it by a vote of 51 to 28.

(4) During the school year, each high school teacher received a 45-minute preparation period on four days and an additional 20 minutes on one day to use for preparation. This did not violate the contract.

(5) Although the six-and-one-half-hour workday has been used for a variety of calculations such as transferability between the districts and the calculation of retirement benefits, it has not

been used to ensure that teachers receive a 90-minute preparation period.

*Arbitrator's holding:* Grievance sustained in part, denied in part.

*Arbitrator's reasoning:* (1) A consequence of the district's revised schedule is that teachers must work beyond six-and-one-half hours in order to receive their requisite preparation time.

(2) It is not clear why the association brought this grievance after it approved the schedule by a secret ballot vote. However, the purpose of arbitration is not to decide the authenticity of the vote or review the merits of what the faculty and administrator were trying to achieve. Rather, the arbitrator must rule on whether the result violated the contract.

(3) Every time the district proposed that the class day be increased beyond six-and-one-half hours, it was soundly rejected. Under the contract, a full-time teacher is entitled to additional income for teaching in excess of six-and-one-half hours. Changes to the length of the workday can occur only through bargaining. Thus, under the contract language and the 30-year past practice, the six-and-one-half-hour workday is a maximum, as well as a minimum.

(4) Contrary to the association's contention, the contract does not define the right of a teacher to have a preparation period equal to the length of the periods they teach students. It specifies only that every high school teacher shall have a preparation period each day.

(5) The current contract requires the district to provide preparation pe-

riods for high school teachers of no less than forty minutes duration for five days a week, within the six-and-one-half-hour regular school day.

*(Binding Grievance Arbitration)*

#### • Discipline — Just Cause

**County of Butte and Butte County Deputy Sheriffs Assn.** (10-12-07; 16 pp.). *Representatives:* Elizabeth McGie (chief deputy county counsel) for the county; Steven W. Welty (Mastagni, Holstedt, Amick, Johnson & Uhrhammer) for the association. *Arbitrator:* John F. Wormuth (CSMCS Case No. ARB-06-0389).

*Issue:* Does just cause support imposition of a one-year disciplinary salary decrease on the grievant?

*County's position:* (1) After the grievant received a poor job evaluation, he was directed as part of an "improvement program" to list three qualities of a good leader, to identify three individuals in the department whose leadership skills he most admired, and to specify aspects of his job he found most satisfying. The assignment was due on May 19, but the grievant did not turn it in until June 7. The grievant's failure to comply with this order was insubordination.

(2) On May 20, at the firing range, the grievant engaged in additional insubordinate behavior when, in the presence of subordinate officers, he said that the written assignment was irrelevant to his job responsibilities. He said he considered the order intrusive because he was asked who he liked or disliked.

(3) A one-step pay reduction was appropriate discipline and has served

its intended purpose. The grievant has brought his performance up to the standards expected of a sergeant.

*Association's position:* (1) The grievant's conduct was not insubordination because the department did not establish that the grievant intended to disobey the instructions of his superior officer. The grievant simply placed a higher priority on his patrol responsibilities and failed to request a time extension. Failure to prioritize work warrants a lesser form of progressive discipline.

(2) The grievant did not make disparaging remarks about any supervisors or the written assignment while at the rifle range. Nor did he indicate his refusal to complete the assignment, as was verified by the officer who reported the incident. The subordinate officer was not meant to hear the conversation between the grievant and another sergeant.

(3) The department failed to apply progressive discipline. No compelling evidence was produced to support a pattern of misconduct or blatant disregard of the orders of a superior officer. The grievant's 18 years of service with no prior instances of significant discipline or misconduct were not given proper weight.

*Arbitrator's holding:* Grievance sustained in part.

*Arbitrator's reasoning:* (1) The grievant failed to complete the written assignment within the specified time. Even if he were too busy with other work and he believed those duties took priority over the written assignment, he

still had a responsibility to inform his superiors of any problems in completing his assigned tasks.

(2) Sergeants, as supervisors, are held to a high standard of performance. Thus, it was reasonable for the department to expect the grievant to know there was no distinction between an assignment and an order. A lack of such understanding of the rules and regulations is not a mitigating factor warranting a reduction of discipline.

(3) The grievant's understanding that the assignment required him to identify individuals he liked or disliked was mistaken. He should have asked for clarification of the assignment. There is little doubt the grievant resented the assignment and made minimal effort to comply with it.

(4) The grievant's comments at the firing range were made in the presence of subordinate officers and indicated he knew that he had failed to submit the written assignment on time. While the grievant did not speak in condescending terms or intend his remarks to be heard by his subordinates, his conduct demonstrates a lack of judgment. Although the grievant's conduct was not insubordinate, his explanation as to why he failed to complete the assignment is not persuasive and displays insubordination.

(5) The grievant's disparate treatment claim fails because the other sergeants who did not submit book reports during the "leadership training program" were not disciplined because they had obtained time extensions.

(6) Because the grievant has re-

ceived two written reprimands for performance-related issues since his promotion to sergeant, discipline beyond a letter of reprimand is appropriate. However, in light of the grievant's 18-year successful service record and the absence of subsequent misconduct, a lessening of the level of discipline from a one-year reduction in salary to a 30-day reduction is appropriate.

*(Binding Grievance Arbitration)*

- **Premium Pay**

- **Contract Interpretation**

**Sacramento Regional Transit Dist. and Div. 256 of the Amalgamated Transit Union, AFL-CIO** (12-5-07; 6 pp.). *Representatives:* Larry M. Kazanjian (Palmer, Kazanjian & Holden) for the district; Bradley G. Booth for the union. *Arbitrator:* Jerilou H. Cossack (CSMCS Case No. ARB-06-0488).

*Issue:* Are light-rail operators who receive premium pay for not getting rest and lunch breaks entitled to an additional premium if the operator must respond to radio communications during meal or rest periods on the same day?

*Union's position:* (1) Consistent with the arbitrator's first award in this matter, which verbally set forth the parties' settlement agreement, an operator who is receiving a premium for previously forfeited breaks is entitled to an additional premium if the operator is required to respond to a radio communication during meal or rest periods on the same day he is already receiving a single premium.



(2) The grievance history shows that management raised the issue of dual premiums, but the union never agreed to the issue as framed by management.

*District's position:* (1) An operator who receives premium pay for not receiving break time is not entitled to an additional hour of premium pay. Such pay would be inappropriate and outside the limits of the arbitrator's first award.

(2) Monitoring of radios does not constitute work time during lunch and rest periods unless the operator is required to respond to a radio communication. Under those circumstances, the operator is entitled to one hour of premium pay.

(3) The arbitration record should not be reopened for the purpose of interpreting the settlement agreement.

*Arbitrator's holding:* Grievance denied.

*Arbitrator's reasoning:* (1) The issue of dual premiums was never discussed when the parties negotiated the terms that made up their settlement which became the arbitrator's first award. However, an arbitrator retains jurisdiction to resolve questions about implementation of the remedy ordered, and settlement language becomes "part and parcel" of the collective bargaining agreement.

(2) The parties' subjective intent is irrelevant to determine the meaning of the language of the collective bargaining agreement unless that intent is clearly communicated during the

course of negotiations. The topic of dual premiums was not discussed during their settlement negotiations. Thus, further proceedings to explore the subjective intent of either party would not be fruitful.

(3) The first award clearly states, "An operator shall not be eligible for more than one hour premium pay per day." Under Article 66, Sec. 4, operators who do not receive 85 percent of their intended breaks receive one hour "of straight time" as premium pay. If the same operators were to receive a second hour of premium pay because they were required to respond to the radio on a day they were receiving Section 4 premium pay, the result would be contrary to the clear language of the award.

(4) An operator who is paid one-hour of straight-time premium pay pursuant to Section 4 is not entitled to an additional hour of premium pay when required to respond to a radio communication during meal and rest periods on the same day.

*(Binding Grievance Arbitration)*

# Public Employment Relations Board

## Orders & Decisions

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

### EERA Cases

#### *Unfair Practice Rulings*

#### **Unfair practice charge dismissed as untimely: Yuba Community College Dist.**

*(Schoessler v. Yuba Community College Dist., No. 1936, 12-31-07; 8 pp. dec. By Chairperson Neuwald, with Members Rystrom and Wesley.)*

**Holding:** The charging party's unfair practice charge was dismissed as untimely because the statute of limitations began to run when the charging party was informed about his reassignment, not on the date he rejected it.

**Case summary:** The charging party alleged that the Yuba Community College District violated EERA when it decided not to renew his contract in retaliation for commenting on and participating in a disciplinary process involving another district employee.

The charging party was employed by the district as an administrator. In 1992, he became the director of public safety programs. The district renewed his employment contract each year for 14 years. On February 15, 2006, the district's board of trustees decided not to renew his contract as an educational administrator.

The charging party asked the personnel services director to provide him with a statement of the reasons for the district's decision. On February 28, 2006, he was informed

that the board, by unanimous vote, decided not to renew his contract. Pursuant to Education Code Sec. 87458, he was offered a probationary faculty position. That position paid 40 percent less than the charging party's prior administrative position. On June 30, 2006, the charging party declined the district's reassignment offer, and on the date his contract expired, elected to retire.

On December 28, 2006, the charging party filed an unfair practice charge alleging that the district's decision not to renew his contract constituted retaliation because he had reported to the district president that the personnel director had unfairly disciplined an employee.

A board agent found the charge untimely. The B.A. also concluded that the charging party had not been terminated because termination is a complete severance of the employer-employee relationship. Here, the charging party had been offered continued employment with the district as a probationary teacher.

On appeal, the charging party argued that the B.A. had misapplied the statute of limitations. The charging party contended that the limitations period began to run on June 30, 2006, the date his contract terminated, not on February 28, 2006, the date he was told his contract would not be renewed. In choosing the earlier date, the B.A. relied on

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*Gavilan Joint CCD* (1996) No. 1177, 122 CPER 88, which established that the limitations period begins to run when the charging party knows, or should have known, of the conduct underlying the charge. The charging party argued that the B.A. should have relied on *Regents of the University of California* (2004) No. 1585-H, 165 CPER 77, where the board held that the effective date of termination triggers the statute of limitations, not the date the charging party is informed of his termination.

The board agreed that under *Regents*, the charging party's claim would be timely if he had been terminated on June 30. However, the board held, the February notice of non-renewal of the charging party's administration contract was not a termination and the relationship with the district was not severed because he was offered the option of reassignment to a faculty position under Ed. Code 87458, which he rejected. Thus, the board concluded the charge was untimely because, as the B.A. calculated, it began to run when the charging party received notice in February that his contract as an administrator would not be renewed.

In response to the district's argument that the charging party lacked standing to file the charge because he was a confidential or management employee not protected by EERA, the board relied on the charging party's allegation that his administrative duties were supervisory, deemed true for purposes of establishing a prima facie case, and therefore covered by Sec. 3540.1(b).

**No duty to bargain over 'contracting out' when rights waived in MOU: Long Beach CCD.**

(*Long Beach Community College District Police Officers Assn. v. Long Beach Community College Dist.*, No. 1941, 1-30-08; 23 pp. dec. By Chairperson Neuwald, with Members Wesley and McKeag.)

**Holding:** By the terms of the managerial rights clause, the association waived its right to bargain over the employer's decision to contract out bargaining unit work. However, the employer failed to negotiate over the effects of that decision.

**Case summary:** In 2000, the college district and the association negotiated a collective bargaining agreement that

contained a management rights clause which stated, "It is understood and agreed that the District retains all of its powers and authority to direct, manage and control to the full extent of the law. Included in but not limited to those duties and powers are the exclusive right to...contract out work."

A dispute arose in 2002, when the district informed the association that it was considering the option of contracting out its police services to the City of Long Beach, which would result in the layoff of all 13 members of a bargaining unit. In June 2003, the district entered into a contract authorizing the city to perform police and security services for the district. As a consequence, all bargaining unit members were laid off. The association filed an unfair practice charge alleging that the district failed to negotiate over the decision to contract out police services and the effects of that decision.

This was not the board's first opportunity to examine the terms of the parties' contract. In *Long Beach CCD* (2003) No. 1568, 164 CPER 110, the board reversed the board agent's dismissal of the charge because it found that the phrase "contract out work" in the management rights clause was ambiguous and did not constitute an express waiver by the association of its right to bargain over the decision to contract out work. There, the board relied on the rule that a waiver of bargaining rights under EERA must be clear and unmistakable, and concluded that the phrase "contract out work" referred only to contracting decisions that traditionally have not been within the scope of representation.

Following that ruling, an administrative law judge issued a proposed decision concluding that the association had not clearly waived its right to bargain. Consequently, the ALJ held that the district violated EERA by unilaterally contracting out the work of association unit members. The district filed exceptions to the ALJ's proposed decision.

Citing *Lucia Mar USD* (2001) No. 1440, 149 CPER 67, the board explained the decision to contract out bargaining unit work and the effects of that decision are squarely within the scope of bargaining. However, a decision that involves "a core restructuring of services" falls outside of the scope. A core restructuring means a fundamental change in

the nature and direction of the enterprise, and is a management prerogative.

Here, the board dismissed the district's contention that the additional services provided by the city police department amounted to a core restructuring or fundamental change in the basic operation of the district's police services. As the board observed, the district had not eliminated campus police, but rather hired out the same work to the city. There was no change in the police services provided at the district campuses.

The board next considered whether, by operation of the management rights clause, the union had waived its right to bargain over the decision to contract out bargaining unit work. In the first *Long Beach* decision, the board reasoned that because 13 other items enumerated in the management rights clause concerned matters "traditionally reserved for management," the association only intended to waive its right to bargain over those forms of contracting out that likewise fall within traditional management rights. Here, the board rejected that interpretation and pointed to the reference in the management rights clause referring to matters that most likely fall within the scope of representation. Thus, the board found that its first *Long Beach* decision had incorrectly interpreted the contract language.

The board reaffirmed its holding in *Barstow USD* (1996) No. 1138, 117 CPER 83, which it overruled in the first *Long Beach* decision. In *Barstow*, the board held that a management rights clause giving the employer the right to "contract out work, which may lawfully be contracted for," exempted the employer from its obligation to bargain over the employer's decision to contract out work.

Applying the reinstated *Barstow* rule, the board held that the language in the present case was an unequivocal and unmistakable waiver by the association of its right to negotiate over the district's decision to contract out police services. This interpretation, the board said, properly gives effect to the entire contract taken together by interpreting the management rights clause as giving the district the exclusive right to determine the level of services and to contract out work.

The board brushed aside the association's claim that it understood the phrase "contract out work" to be limited to contracting for armed services for special events. The parties' intent is expressed in the contract, and there are no terms limiting the contracting-out waiver to special events.

While the board concluded that the district was exempt from bargaining with the association over its decision to contract out police services, the board found that the contract contained no waiver of the right to bargain over the effects of the contracting-out decision. Citing the express contractual waiver of the right to bargain over the effects of layoffs, the board concluded that the parties clearly understood the distinction between decisional bargaining and effects bargaining, and viewed this as strong evidence that the association had not waived its right to bargain over the effects of the decision to contract out bargaining unit work.

Finally, the board dismissed the district's contention that the association, by its conduct, had waived its right to bargain over the effects. The board found that the association demanded to bargain over numerous effects that might result from the decision to contract out bargaining unit work, such as transfer of vacation time and unit members' employment with the city. Accordingly, since the association consistently maintained its right to negotiate over effects, and communicated its demand to negotiate to the district, the board found that the association did not waive the right to bargain over the effects of the contracting out of police services.

Notwithstanding the district's attempts to facilitate discussions between the city and the association concerning possible employment with the city, the board concluded that the district failed to bargain with the association over the effects of contracting out in violation of EERA. The district was ordered to pay the laid-off bargaining unit members their salary and benefits at the rate they were paid prior to their layoff, until the date the district bargained to agreement with the association regarding the effects of the decision to contract out their work.

## HEERA Cases

### *Unfair Practice Rulings*

#### **PERB decision overturned by Court of Appeal: Trustees of CSU.**

(*California Faculty Assn. v. Trustees of California State University*, No. 1823a-H, 2-14-08; 2 pp. By Chairperson Neuwald, with Members McKeag and Rystrom.)

**Holding:** Because the Court of Appeal overturned PERB's original decision, on remand, pursuant to the court's ruling, the board vacated its original decision and dismissed CFA's unfair practice charge.

**Case summary:** On February 23, 2006, in *Trustees of the California State University* (2006) No. 1823-H, 177 CPER 84, the board found that CSU violated HEERA by conditioning agreement of the parties' memorandum of understanding on the waiver of a statutory right. Specifically, the board held that because supersession language added to HEERA established a minimum right to a final arbitration decision that the parties could not waive in their contract, the university's insistence to impasse on a limitation on the arbitrator's authority interfered with employee rights and constituted a refusal to participate in impasse procedures in good faith.

CSU appealed the board's decision, and in *Board of Trustees of California State University v. Public Employment Relations Board* (2007) 155 Cal.App.4th 866, 187 CPER 45, the Court of Appeal directed the board to vacate its decision and to enter a new and different order denying CFA's charge. CFA filed a petition for review with the California Supreme Court seeking to overturn the Court of Appeal's decision, but the petition was denied.

On January 24, 2008, the Court of Appeal decision became final, and accordingly, the board vacated its original decision and dismissed CFA's unfair practice charge.

## MMBA Cases

### *Unfair Practice Rulings*

#### **Insufficient facts to show unilateral change leads to dismissal: City of Commerce.**

(*Commerce City Employees Assn. v. City of Commerce*, No. 1937-M, 1-11-08; 3 pp. + 6 pp. R.A. dec. By Member Rystrom, with Chairperson Neuwald and Member Shek.)

**Holding:** The unfair practice charge was dismissed because it failed to include sufficient facts to establish a unilateral change in the terms of the parties' memorandum of understanding or in a past practice.

**Case summary:** The union alleged that the city violated the MMBA by unilaterally changing the contractual grievance procedure in place between it and the city, and by violating the city's local personnel rules regarding grievances.

A city department head wrote a letter giving a poor performance evaluation to a bargaining unit member. In response, the employee presented an informal verbal grievance relating to the evaluation, to which the city did not respond.

A union officer informed the city's human resources director that the union disagreed with "virtually everything" in the employee's evaluation. The union officer also told the director that the city had not made a timely response to the grievance under its personnel rules, and demanded that the evaluation letter be deemed null and void. The city claimed it was not aware that a grievance had been filed.

The union alleged that the city unilaterally changed the grievance procedure by not responding to the grievant's informal verbal grievance or written rebuttal. However, the regional attorney found that the union failed to provide facts showing a breach of the parties' written agreement because the union referenced the grievance procedure but did not establish what the terms or past practices of this procedure were. Also, the R.A. found that even if such a unilateral change were shown, the union failed to establish that the violation had a generalized effect or continuing impact on unit members.

The union also alleged a violation of the city's personnel rules. The R.A. explained that although PERB has authority to review as an unfair practice charge the violation of local rules and regulations, the union failed to establish how the city violated its local rules. For these reasons, the R.A. dismissed the charge.

On appeal, the union characterized its charge as a simple case of an employer refusing to process a grievance and alleged that the charge should not have been dismissed due to lack of documentation. The union provided the board with the relevant portions of the parties' negotiated grievance procedure and argued that the city's failure to respond to the grievance was an unfair practice because it violated these local rules.

The board held that on appeal it could not consider either the new allegations regarding the MOU grievance procedures or the union's new evidence in the form of the MOU provisions. PERB Reg. 32635(b) provides that absent good cause, new charge allegations and new evidence may not be presented on appeal. The union made no attempt to argue good cause to consider these allegations or evidence.

The board also found that PERB Reg. 32615(a)(4) requires that a charge under the MMBA alleging a violation of an employer's local rule must be accompanied by the local rule said to have been violated, which the union here did not do.

### **Charge dismissed due to insufficient facts: County of Plumas.**

(*Wilson v. County of Plumas*, No. 1938-M, 1-11-08; 2 pp. + 8 pp. R.A. dec. By Member Shek, with Chairperson Neuwald and Member McKeag.)

**Holding:** The unfair practice charge was dismissed because the charging party did not allege specific facts necessary to determine whether the county violated the MMBA.

**Case summary:** The County of Plumas has a memorandum of understanding with the association and with Plumas County Superior Court, under which the county agreed to provide the court with two full-time bailiffs for the 2005 fiscal year. The charging party provided bailiff ser-

vices to the court pursuant to the MOU between the county and the court.

The charging party alleged that the county violated the Trial Court Employment Protection and Governance Act and the MMBA by entering into illegal contracts with the Plumas Superior Court and the Plumas County Sheriff's Department concerning a state-funded position, failing to provide representation for the correctional officer position, and engaging in unfair labor practices since the administrative office of the courts assumed trial court funding.

The R.A. explained that Trial Court Act Sec. 71601(1) defines a trial court employee as a person paid from the trial court's budget and subject to the trial court's right to control the manner and means of his or her work because of the trial court's authority to hire, supervise, discipline, and terminate employment. Because the charging party was paid by the county, not the court, the R.A. concluded he was employed by the county. Concerning the alleged violation of the Trial Court Act, the R.A. explained that because the charging party was not a court employee, he lacked standing. The R.A. concluded that the charge did not provide the specific facts necessary to determine whether the county violated the MMBA. The R.A. also noted that, even if the charging party is a peace officer under Penal Code Sec. 830.1, PERB's MMBA jurisdiction does not extend to peace officers.

The board found the R.A.'s dismissal free of prejudicial error and adopted it as the decision of the board itself.

### **No unilateral change where newly assigned duties were part of position's job description: Sacramento Housing and Redevelopment Agency.**

(*AFSCME Council 57, Loc. 146 v. Sacramento Housing and Redevelopment Agency*, No. 1939-M, 1-11-08; 15 pp. dec. By Member Shek, with Chairperson Neuwald and Member McKeag.)

**Holding:** The union's unfair practice charge was dismissed because the reassigned employees' duties were reasonably comprehended within their job descriptions, and thus there was no unilateral reclassification.

**Case summary:** The union alleged that the Sacramento Housing and Redevelopment Agency violated the MMBA by unilaterally assigning new or different duties to bargaining unit members without meeting and conferring in good faith. Specifically, the unfair practice charge alleged that since November 6, 2006, the agency attempted to require employees classified in the maintenance worker and the maintenance technician classifications to perform work outside their job descriptions, assigning them work normally done by dispatchers, electricians, carpenters, inspectors, HVAC, locksmiths, painters, and plumbers. The union relied on testimony from over a dozen employees who asserted that they were required to perform work outside the scope of their job descriptions.

The union argued that in contract negotiations it agreed to demote and promote only certain employees, not to change job descriptions for the classifications, explaining that specialist positions involved more complex work. Also, the union alleged that it did not agree to contract out any service.

In response, the agency explained it was required to make organizational changes that involved the decentralization and reassignment of staff in order to comply with HUD's 2005 financial reporting requirements. The agency contended that the union knew about this and actively had participated in the meet and confer discussions in 2006, before a new contract was reached.

The agency pointed to the contract, which specified that eight employees in specialized classifications voluntarily accepted demotion to the maintenance technician classification, and one dispatcher accepted demotion to the housing technician classification, with respective salary adjustments. The agency asserted that the parties engaged in a thorough discussion of the new duties assigned to each classification and an understanding was reached that, as a result of the HUD-mandated changes, job duties would move from the specialist to the generalist classifications.

A board agent found that the union had agreed to the reclassification of certain positions and, thus, the allegations failed to demonstrate that the employer unilaterally re-

defined those positions. As to other allegations of unilateral reclassification, the B.A. found that the union failed to provide enough detail to state a violation. There was a lack of specific information as to what duties and classifications the employees in question held before the reassignments and why their new duties were not reasonably comprehended within their existing classifications. For a final group of employees, the B.A. found that the allegations failed to identify any changes in the specific duties they performed.

Finally, the B.A. found insufficient facts to support the union's allegation regarding contracting out. Thus, the B.A. dismissed seven of the ten allegations in the charge.

On appeal, the union argued that the B.A. erroneously interpreted the contract, did not properly review the exhibits and additional information it provided, and held the union to an improper standard by requiring it to prove its case, rather than simply establish a prima facie case.

The board explained that in order to prevail on a theory of transfer of job responsibilities, the charging party must demonstrate actual changes in the employee's job duties. Citing *Rio Honda CCD* (1982) No. 279, 56 CPER 82, the board added, if the changes are "reasonably comprehended within existing job duties," an assignment of such duties, even if never performed before, is not a violation.

The board disagreed with the B.A.'s characterization of the contract as an agreement to reclassify the maintenance specialist positions. The agreement authorized the promotion and demotion of numerous employees, with many accepting demotion to the maintenance technician classification. The contract, however, did not demonstrate that the parties agreed to the reclassification of the maintenance technician position, the board explained.

Despite this interpretation, the board concurred with the B.A.'s partial dismissal of the charge and found that the union had failed to establish a prima facie case of a unilateral change based on the alleged facts.

The board found insufficient evidence to support the union's allegation that employees within the maintenance worker and maintenance technician classifications were required to perform work outside their job descriptions, spe-



cifically, the work of maintenance specialists in the positions of electrician, carpenter, inspector, locksmith, painter, or plumber. Also, the board found the union did not specify who, in particular, was required to perform work outside their job descriptions. The board held that if the union was referring to the eight employees who voluntarily agreed to accept a demotion, the allegation failed because of the terms of the contract. As to other employees, the allegation failed because it was unclear what positions the employees held and why their new duties were not reasonably comprehended within their existing duties.

The board found that the job descriptions for maintenance workers and technicians included inspection, plumbing, HVAC, electrical, carpentry, painting, and locksmith work. Relying on *Rio Honda*, the board concluded that the assignment of formerly specialized maintenance duties to employees within the maintenance worker and maintenance technician classifications was closely enough related to their existing duties as not to be an unlawful policy change. Similarly, the board found that the reassignment of employees who previously held the dispatcher position to the maintenance worker and maintenance technician classifications was not a unilateral change because duties like processing work orders, using computers to input data, and tracking invoices were reasonably comprehended within the existing job duties of the maintenance worker and maintenance technician positions.

**Rescission of a policy does not cure unilateral change: County of Sacramento.**

(*Sacramento County Attorneys Assn. v. County of Sacramento*; *Sacramento County Professional Accountants Assn. v. County of Sacramento*, No. 1943-M, 2-14-08; 14 pp. dec. By Chairperson Neuwald, with Members McKeag and Wesley.)

**Holding:** The county violated the MMBA by unilaterally modifying a policy regarding the eligibility criteria for future retirees' access to health insurance benefits even though the county eventually rescinded the change.

**Case summary:** The charging parties, the Sacramento County Attorneys Association and the Sacramento County

Professional Accountants Association, brought unfair practice charges against the County of Sacramento, alleging that the county unilaterally changed the eligibility criteria for future retirees' participation in the Retiree Health Insurance Program in violation of the MMBA.

The county had maintained the Retiree Health Insurance Program since 1980. Based on the annual determinations of the county board of supervisors, eligible county retirees have been provided an offset payment to assist with the purchase of health insurance.

The associations each had a memorandum of understanding with the county; both contracts expired on June 30, 2006. Under the MOUs, employees were eligible to participate in the RHIP for 2006 if they were retiring from active employment after at least 10 years of service or if they were leaving due to disability, regardless of years of service.

In January 2006, the county informed the associations that it would hold a public hearing to consider changes to the RHIP for 2007. While the county proposed to maintain the existing level of medical offset payments to existing retirees for 2007, it proposed to limit the number of current employees who could participate in RHIP after January 1, 2007.

Upon receiving the county's proposal, the associations asserted that such changes to the RHIP were within the scope of representation and could not be implemented unilaterally. Nevertheless, in March 2006, the county notified the associations that it would consider the proposed RHIP changes at its March hearing. The county sought to limit eligibility for current county employees to those who had worked for at least 10 years, had attained at least "60 years of combined age and service prior to January 1, 2007," or to those retiring due to a "service-connected disability." On March 22, 2006, the associations notified the county that they wanted to meet and confer over the matter. Despite the request, six days later, the county approved and implemented the proposed eligibility changes to the RHIP. In response to the associations' request, the county asserted that the RHIP was related to benefits peculiar to retirees, and thus was not subject to bargaining and had never been made the subject of permissive bargaining.

During the summer of 2006, the associations engaged in collective bargaining with the county on successor agreements. A specific proposal addressing retiree health benefits was presented. The county rejected it. However, on September 12, 2006, prior to the effective date of the eligibility changes to the RHIP for 2007, the board of supervisors approved a revised RHIP, which returned to the 2006 eligibility requirements and deleted the provisions that affected current employees who would retire on or after January 1, 2007.

An administrative law judge dismissed the charging parties' complaint, finding the issue moot because the county had rescinded the policy change. On appeal, the association argued that the issue was not moot because, although the county did rescind its unilateral implementation, it never changed its position that it was not obligated to bargain, and thus it could improperly make similar unlawful modifications in the future.

The board addressed the issue of future retirement benefits for current employees in *Madera Unified School Dist.* (2007) No. 1907, 185 CPER 96. In *Madera*, the board held that "the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining." It explained that "future retirement benefits for employees are within the scope of bargaining because they are part of an employee's compensation package and therefore related to wages."

The board noted that modification of the eligibility criteria directly impacts whether a current employee will receive the future retirement benefit. Therefore, under *Madera*, the board held that such modifications fall within the scope of representation. It found that the county implemented the policy change without giving the associations an opportunity to bargain, and thus the county unilaterally changed a policy within the scope of bargaining without fulfilling its obligation to bargain.

Addressing the county's argument that by rescinding the ordinance there was no policy change and thus no unilateral change violation, the board cited *Amador Valley Joint Union High School Dist.* (1978) No. 74, 38 CPER 7. In that case, it held, "the later reversal or rescission of a unilateral

action or subsequent negotiation on the subject of a unilateral action does not excuse the violation." Accordingly, the board held that the fact the county reversed its position and restored the status quo before the new policy went into effect did not cure the unlawful unilateral change. The board ordered the county to meet and negotiate in good faith with the associations in future negotiations regarding possible modifications of retiree health benefits.

### ***Duty of Fair Representation Rulings***

#### **Charge dismissed as untimely: Stationary Engineers Loc. 39.**

(*Fisher v. Stationary Engineers Loc. 39*, No. 1940-M, 1-18-08; 5 pp. dec. By Member Wesley, with Members Rystrom and McKeag.)

**Holding:** The charging party's duty of fair representation charge was dismissed because it was untimely filed.

**Case summary:** The charging party was employed by the City and County of San Francisco as a stationary engineer assigned to the Port of San Francisco. He was exclusively represented by Local 39. The charging party alleged that the union breached its duty of fair representation in violation of the MMBA by refusing to submit his grievance to arbitration and by failing to inform him of his civil service commission appeal rights.

On March 14, 2006, at 10:30 a.m., during work hours, port officials observed and photographed a city work truck assigned to the charging party parked on a street several miles from the charging party's worksite. The vehicle was unlocked and the keys were in the ignition. The charging party's supervisor attempted to contact him on his work radio. The charging party did not respond until 1:15 p.m., at which point he denied leaving the vehicle on a city street, claiming he had been on port property with the vehicle all morning.

Several days later, the charging party met with a union representative to discuss possible disciplinary action he would face. The representative told him that the city had photos of the truck off port property. In light of this evidence, and that

five supervisors were prepared to testify that they saw the truck on a city street, it was unlikely the charging party could prevail on his claim in arbitration. The representative advised the charging party to immediately retire to preserve his pension and health care benefits.

On July 18, the city notified the charging party that he was terminated and was banned from future employment with the city. The notice advised the charging party of his right to appeal the ban to the civil service commission.

The union filed a grievance challenging the charging party's termination and represented him at a meeting with the city. The city denied the grievance and upheld the termination. Subsequently, on October 16, the union advised the charging party that it would not take his grievance to arbitration because, based on the opinion of the union's attorneys, it could not prevail before an arbitrator.

A board agent found the charging party's charge untimely filed because it was filed on June 25, 2007, more than six months after October 16, 2006. Additionally, the B.A. concluded that even if the charge were timely filed, it did not demonstrate that the union's decision declining to take his grievance to arbitration was arbitrary or discriminatory. Also, the B.A. explained that the union did not have a duty of fair representation over extra-contractual matters, such as the civil service commission appeal.

On appeal, the charging party complained that the union did not provide adequate representation or notify him of his right to appeal future employment restrictions with the civil service commission.

Citing *Los Rios College Federation of Teachers, CFT/AFT* (1991) No. 889, 90 CPER 66, the board explained that in cases alleging a breach of the duty of fair representation, the six-month statutory limitations period begins to run on the date when the charging party, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely. The board found that the charging party knew or should have known on October 16, 2006, that further assistance from the union was unlikely, and that this date was more than two months outside the

statutory limitations period. Accordingly, the board dismissed the charge.

### ***TCEPGA Rulings***

#### **Unilateral change in policy excluded from scope of bargaining: Fresno County Superior Court.**

(*Service Employees International Union, Loc. 535 v. Fresno County Superior Court*, No. 1942-C, 1-31-08; 27 pp. By Chairperson Neuwald, with Members McKeag and Rystom.)

**Holding:** The board dismissed the union's unfair practice charge because the unilateral change in the Fresno court policy regarding court reporter position qualifications was excluded from the scope of bargaining by the act, and the union failed to demand to bargain over the effects of the change. (For the complete story on the board's first significant decision applying the Trial Court Act, see story in the new Trial Court section of this issue of *CPER*, pp. 83-85.)

## Activity Reports

### ALJ Proposed Decisions

#### Sacramento Regional Office — Final Decisions

*Stillwaggon v. Mono County Office of Education, Case SA-CE-2405-E.* ALJ Shawn P. Cloughesy. (Issued 11-9-07; final 12-7-07; HO-U-926.) No violation was found. Facing a fiscal crisis, the county superintendent of schools properly laid off the employee. The 2005 settlement discussion between the employee and the previous superintendent was admissible only to show the previous superintendent had unlawful animus during the second layoff. The current superintendent, who fired the employee in September 2006, had no knowledge of the settlement discussion; the previous superintendent retired in August 2006, taking no part in the layoff. Retaliation will not be found where the decisionmaker taking the adverse action against an individual who has engaged in protected activity has no knowledge of it.

*Rio Linda/Elverta Community Water District Employees Assn. v. Rio Linda/Elverta Community Water Dist., Case SA-CE-358-M.* ALJ Shawn P. Cloughesy. (Issued 11-19-07; final 12-17-07; HO-U-927-M.) A violation was found. The district unlawfully prohibited organizing by the association during employee non-work break times. The district issued a blanket prohibition of organizing on district time including break periods, without giving the association a justification or legitimate business reason. The rule was overbroad, interfered with employee rights, denied the association the right to represent employees, and was unreasonable and in conflict with the intent of the MMBA. No violation was found where local rules did not allow for negotiations regarding revision of the health plan. No violation was found where the request for recognition was not unreasonably delayed. There was no violation of the duty to meet and discuss where the district provided written notice and opportunity to non-exclusive employee organization. There was no violation where reprimand was not motivated by anti-union animus. Evidence showed that the district was legitimately concerned about the supervisor misusing her responsibilities. The district counsel's statement to the association's counsel was protected by litigation privilege.

*Los Rios College Federation of Teachers, Loc. 2279 v. Los Rios Community College Dist., Case SA-CE-2408-E.* ALJ Christine A. Bologna. (Issued 12-17-07; final 1-16-08; HO-U-931.) A violation was found. The union alleged failure to provide the requested information after a unit member accused the district of discrimination. The issue was not moot by virtue of the unit member's receipt of the information. The district's privacy and confidentiality defenses were rejected. The district was ordered to provide the requested information.

*Ceres Unified Teachers Assn. v. Ceres Unified School Dist., Case SA-CE-2332-E.* ALJ Christine Bologna. (Issued 12-28-07; final 1-24-08; HO-U-932.) No violation was found. The district did not commit an unfair practice in moving staff meetings from before school to after school, lengthening the meetings, or discussing teacher development. The contract with the association did not restrict the duration, frequency, or subjects to be covered in staff meetings. No change in past practice was established since the 2002 meetings were held after school and more frequently, and were of a longer in duration. The contract provides that the structure and scope of staff meetings are the district's prerogative.

#### San Francisco Regional Office — Final Decisions

*Haynes v. SEIU Loc. 790, Case SF-CO-148-M.* ALJ Donn Ginoza. (Issued 11-27-07; final 12-28-07; HO-U-928-M.) The complaint and underlying unfair practice charge were dismissed. The city groundskeeper was fired after smoking marijuana at work with a 15-year-old coworker. The employee failed to appear at the first scheduled day of the hearing, and refused to submit to cross-examination on the second scheduled day. The lack of diligent prosecution coupled with the election to pursue "other remedies" were cited as reasons for dismissal of the employee's complaint and the underlying charge.

#### Los Angeles Regional Office — Final Decisions

*Alhambra Firefighters Assn., Loc. 1578 v. City of Alhambra, Case LA-CE-310-M.* ALJ Ann L. Weinman. (Issued 11-15-07; final 1-2-08; HO-U-930-M.) No violation was found. The procedures for conducting appeals hearings

are within the scope of representation. New rules formalized and codified terms and practices of old rules without any reasonably foreseeable adverse effect on terms and conditions of employment. New rules are not a change in policy; the city did not fail to satisfy its bargaining obligation when it instituted new hearing procedures.

*California School Employees Assn. and Its Chap. 777 v. Pasadena Area Community College Dist.*, Case LA-CE-5038-E. ALJ Ann L. Weinman. (Issued 11-28-07; final 12-28-07; HO-U-929.) No violation was found. The union charged that by using non-custodial school employees to move furniture, the district unilaterally changed the policy reflected in the custodians' job descriptions. The ALJ found no actual changes in job duties. The work was not completely taken from the custodians and is not cited in the job description as an "essential function." The district provided several recent examples where non-custodial employees assisted in moving furniture.

*Orange County Employees Assn. v. County of Orange*, Case LA-CE-319-M. ALJ Shawn P. Cloughesy. (Issued 1-25-08; final 2-26-08; HO-U-933-M.) The workload of county employees is within the scope of representation; production standards used for employee evaluations cannot be set or modified without meeting and conferring. The association did not waive its right to meet and confer with the county; evidence tended to show that the association was unaware of a production standard. The expansive management rights clause was not a "clear and unmistakable" waiver. No violation was found regarding the use of coaching and feedback review forms to establish production standards.

*Santa Monica Municipal Employees Assn. v. City of Santa Monica*, Case LA-CE-125-M. ALJ Thomas J. Allen. (Issued 1-30-08; final 2-26-08; HO-U-934-M.) The complaint was dismissed as untimely filed. The alleged violation took place on October 16, 2000; however, the association did not file the charge until April 24, 2003. PERB is prohibited from issuing a complaint under the MMBA with respect to any charges based on an unfair practice occurring more than six months prior to the charge being filed.

### **Sacramento Regional Office — Decisions not Final**

*Coalition of University Employees et al. v. Regents of the University of California*, Cases SA-CE-246-H; SA-CE-247-H; SA-CE-251-H; SF-CE-760-H; SF-CE-795-H. ALJ Donn Ginoza. (Issued 1-22-08; time running for appeal.) Violations were found for unilateral change and refusals to provide information. The university unilaterally changed the MOU recognition clause policy when it failed to provide notice to CUE before filling vacant bargaining unit positions with non-unit employees. Notice was required by the operative 2003-04 MOU before reclassification of a "major portion" of a bargaining unit position to a non-unit position. The university failed to provide CUE with necessary and relevant information or adequate justification. Mediaworks' unfair practice charge (SA-CE-246-H) and the U.C. Davis Information and Electronic Technology Department charge (SA-CE-251-H) were dismissed for lack of timeliness. Evidence derived from testimony related to the U.C. Davis IET case was not barred from consideration in determining the unilateral change.

*Carrillo, Jr. v. Sacramento City Unified School Dist.*, Case SA-CE-2436-E. ALJ Shawn P. Cloughesy. (Issued 2-28-08; time running for appeal.) The complaint was dismissed and deferred to arbitration. The grievance pending arbitration was amended to include the second allegation. The charging party's arguments regarding his poor relationship with the exclusive representative and failure to provide an attorney for representation were rejected.

### **San Francisco Regional Office — Decisions Not Final**

*Santa Clara County Correctional Peace Officers Assn. v. County of Santa Clara*, Case SF-CE-228-M. ALJ Bernard McMonigle. (Issued 1-10-08; exceptions filed 2-29-08.) A violation was found. The county committed a unilateral change by placing proposed charter amendments on the ballot without meeting the obligation to negotiate under *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591. The charter proposals, including an amendment to a union-backed interest arbitration initiative and a change in prevailing wage criteria, are mandatory subjects of bargaining. Arguments that the meetings met the duty to

negotiate and that the union engaged in bad faith stalling tactics were rejected. The union was not obligated to bargain when it was presented with a *fait accompli*. The suspicion that the union violated the MMBA by submitting the interest arbitration initiative to voters did not entitle the county to self-help by a unilateral change. The duty to bargain was not excused by a desire to place the amendment on the same ballot as the union's proposal.

#### Los Angeles Regional Office — Decisions Not Final

*AFSCME Loc. 1117 v. City of Torrance, City of Torrance v. AFSCME Loc. 1117*, Cases LA-CE-316-M, LA-CO-43-M. ALJ Thomas J. Allen. (Issued 11-21-07; exceptions filed 12-12-07.) Violations were found. Where the union president was allowed three days a week for union activities in an extra-contractual agreement without a termination date, the city acted in retaliation when, after performing only limited investigation of the president's released time, it asked for reimbursement for alleged unauthorized time off. The city interfered with protected union activity when the mayor stated to the union president, "[I] will have a hard time working with [you]." The union violated its obligation to bargain released time; the extra-contractual agreement was subject to renegotiation at any time.

*Union of American Physicians and Dentists v. County of Ventura*, Case LA-CE-337-M. ALJ Shawn P. Cloughesy. (Issued 1-10-08; exceptions filed 2-13-08.) A violation was found when the county denied a request for recognition on the basis that signatories are not county employees. The county was under contract with various private corporations to operate county clinics, and alleged that the physicians were corporation employees. Significant control over the clinics' budget, individual physician agreements, revenues to be collected, fees, and restrictions on use of facilities established the county as a joint employer. The refusal to process the appeal of the commission's decision did not violate the MMBA, as a unit determination had not yet been made.

## Report of the Office of the General Counsel

### Injunctive Relief Cases

Eight requests for injunctive relief were filed in the period from November 1, 2007, through February 29, 2008. Six of these were denied by the board; one was withdrawn; and one, as of this report, is pending. (Another request, made during the previous reporting period, is also pending.)

#### Requests Denied

*Hernandez v. SEIU Loc. 1000*, IR. No. 534, Case SA-CO-369-S. On December 6, 2007, Hernandez filed a request for injunctive relief against the union alleging it violated the Dills Act by commencing disciplinary procedures against him in retaliation for his protected activity. On December 14, the board denied this request.

*Amalgamated Transit Union Loc. 1277 v. Riverside Transit Agency*, IR. No. 535, Case LA-CE-429-M. On January 9, 2008, the union filed a request for injunctive relief against the agency alleging it violated the MMBA by terminating a union steward in retaliation for his protected activity. On January 15, the board denied this request.

*Los Angeles Unified School Dist. v. United Teachers Los Angeles*, IR No. 536, Case LA-CO-1328-E. On January 17, 2008, the district filed a request for injunctive relief against the union alleging it violated EERA by condoning unit members' participation in certain activities to protest the district's payroll problems. On January 22, the board denied this request.

*Sonoma County Law Enforcement Assn. v. County of Sonoma*, IR. No. 537, Case SF-CE-523-M. On January 24, 2008, the union filed a request for injunctive relief against the county alleging it violated the MMBA by failing to negotiate in good faith on an array of issues, including health care benefits. On January 31, the board denied this request.

*Hernandez v. SEIU Loc. 1000*, IR. No. 538, Case SA-CO-371-S. On January 24, 2008, Hernandez filed a request for injunctive relief against the union alleging it violated the Dills Act by suspending his union membership in retalia-

tion for his protected activity. On January 31, the board denied this request.

*SEIU Loc. 1000 v. State of California (Dept. of Developmental Services; Office of Protective Services)*, IR. No. 540, Case SA-CE-1660-S. On February 20, 2008, the union filed a request for injunctive relief against the state alleging it violated the Dills Act by making a unilateral change concerning the dismantling of security towers at one of the state's secure treatment facilities. On February 27, the board denied this request.

### Requests Withdrawn

*SEIU Loc. 1000 v. State of California (Dept. of Developmental Services; Office of Protective Services)*, IR. No. 539, Case SA-CE-1660-S. On February 13, 2008, the union filed a request for injunctive relief against the state alleging it violated the Dills Act by making a unilateral change concerning the dismantling of security towers at one of the state's secure treatment facilities. On February 16, the union withdrew its request.

### Requests Pending

*California Federation of Interpreters, Loc. 39521 v. Los Angeles County Superior Court*, IR. No. 541, Case LA-CE-23-I. On February 25, 2008, the union filed a request for injunctive relief against the court alleging it violated the Court Interpreter Act by interfering with the union's right to released time and by retaliating against a union officer for her protected activity.

*Sacramento County Deputy Sheriffs Assn. v. County of Sacramento*, IR. No. 526, Case SA-CE-485-M. On August 7, 2007, the union filed a request for injunctive relief against the county alleging it violated the MMBA by interfering with and dominating the union's ability to conduct business. On August 15, the board directed PERB staff to expeditiously process the underlying unfair practice charge and reserved its decisionmaking authority with respect to the request for injunctive relief pending the conduct of a prompt informal settlement conference and, if appropriate, formal hearing before a PERB administrative law judge.

### Litigation Activity

Three new cases were opened in the period from November 1, 2007, through February 29, 2008.

*Doherty et al. v. PERB; San Jose/Evergreen Community College Dist.*, California Court of Appeal, Sixth Appellate District, Case No. H032364. (No. 1928; Cases SF-CE-2312-E and SF-CE-2313-E.) In December 2007, the petitioner filed a writ petition with the appellate court alleging the board erred in No. 1928 (reversing the ALJ's proposed decision [which imputed liability to the district under a joint-employer theory and found retaliation under EERA] and dismissing the case.) In January 2008, PERB filed the administrative record. In February, the petitioner filed its opening brief.

*International Union of Operating Engineers, Stationary Engineers, Loc. 39 v. Sacramento Police Officers Assn., City of Sacramento, PERB*, Sacramento County Superior Court, Case No. 34-2008-00001129. (Case SA-SV-164-M.) In January 2008, the union filed a petition to correct or, in the alternative, vacate an arbitrator's decision severing a particular job classification from a bargaining unit. In February, PERB filed its response to the petition.

*Schoessler v. PERB; Yuba Community College Dist.*, California Court of Appeal, Third Appellate District, Case No. C058004. (No. 1936; Case SA-CE-2396-E.) In January 2008, the petitioner filed a writ petition with the appellate court alleging the board erred in No. 1936 (adopting a board agent's dismissal of the petitioner's charge that the district's refusal to renew his employment contract constituted retaliation in violation of EERA). PERB sought and was granted an extension of time to file the administrative record and, in February, filed a motion to dismiss with the appellate court.

### Regulation Adoption and Modification

Regulation changes approved by the board at its August 2007 meeting were approved by the Office of Administrative Law on November 29, and filed with the Secretary of State. The changes, including clarifying and technical amendments to proof of support, unit modification, and other sections, took effect on December 29.