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# letter from the editor

Dear *CPER* Readers:

As part of the extended U.C. Berkeley community, *CPER* often gets transported by the currents of the educational community culture. That means that, around here, this time of year is viewed as the conclusion of a life phase and the end of a four-year educational odyssey.

At the same time, of course, these new graduates are on the cusp of another adventure, maybe getting their first “real” job or moving on to attain a higher degree, maybe about to attend law school.

High school seniors must feel this confusion between beginnings and endings more profoundly. Excited about the celebratory events that are part and parcel of their senior year, but already looking ahead — with both excitement and some trepidation — to the independent life of a college student.

This issue of *CPER* has a bit of both worlds about it, too. The courts have put to rest some issues that have percolated unanswered in the lower courts. Negotiations that got underway months ago have concluded with signed collective bargaining agreements. Political efforts have been resolved through compromise and persuasion or tabled for another day.

But, as these matters are resolved, new uncertainties are just now emerging. How will the state budget deficit play out in Sacramento? Will the governor hold fast to across-the-board cuts, or light on another means to address the problem? How will the PERB jurisdictional debate be resolved? Will employers seek to enjoin MMBA strikes in the courts or ask PERB to do so on their behalf? Will family responsibility protections forge ahead under new statutory protections, or will longstanding legal doctrines be expanded to create new applications of existing laws?

The goal of *CPER*, as I see it, is to inform the public sector community how some of the questions have been answered and, at the same time, prime you for what’s next on the horizon. Or, how about a summertime surfing allusion? We’re about catching that wave and riding it all the way into shore and, at the same time, paddling out to get set up for the next big one.

So, “hang ten” with *CPER* and enjoy the ride.

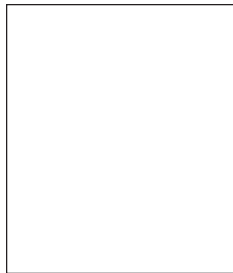
Sincerely yours,



Carol Vendrillo,  
Editor

# Family Responsibility Discrimination and Public Agencies: No Employer Left Behind

*Consuela A. Pinto*



*Consuela Pinto is Senior Counsel at the Center for WorkLife Law where she is primarily responsible for educating employers and their attorneys about the developing law of family responsibilities discrimination.*

NO EMPLOYER, public or private, is immune from claims of family responsibilities discrimination — allegations that employees have been discriminated against because of their caregiving responsibilities for children, elderly parents, or ill relatives. Consider the following verdicts in the public sector:

<i>Alversa v. City of New York</i> (multiple plaintiffs)	\$2,200,000
<i>Butner v. Commonwealth of Massachusetts</i> (multiple plaintiffs)	\$1,041,000
<i>Dalrymple v. Town of Winthrop</i>	\$ 875,000
<i>Lubke v. City of Arlington</i>	\$ 695,394
<i>Glenn-Davis v. City of Oakland</i>	\$ 550,000
<i>NY Transit Authority v. State Div. of Human Rights</i>	\$ 450,000
<i>Akers v. County of San Diego</i>	\$ 250,000

FRD cases have grown nearly 400 percent in the last decade,<sup>1</sup> suggesting that every employer, regardless of industry or geographical location, is accountable. Even employers on “best places to work” lists have been defendants.<sup>2</sup> The explosive growth in these cases has not gone unnoticed in California, one of a handful of states that has or is considering laws that expressly prohibit employment discrimination based on “family responsibilities,” “familial status,” or “parenthood.”<sup>3</sup> In February 2007, California Senator Sheila Kuehl introduced Senate Bill 836, which would have amended California’s Fair Employment and Housing Act<sup>4</sup> to include “familial status” as a protected category in its employment provisions.<sup>5</sup> After approval by both houses of the state legislature, the bill was vetoed in October by Governor Schwarzenegger.

That veto does not signal an end to FRD litigation in California, however. Public employees were filing FRD lawsuits — and prevailing — long before S.B. 836 was proposed, and will continue to do so under a variety of existing legal theories founded in state and federal law. Despite the lack of a clear protected category of “family responsibilities” or “familial status” in employment anti-discrimination laws, public agencies must be aware of this growing trend in employment law and its root cause, hidden gender bias. Through a discussion of the most common types of FRD claims, this article describes typical workplace scenarios that can lead to actionable claims.

### ***An Overview of FRD***

FRD is well established in case law. In hundreds of cases across the country, courts have ruled that taking adverse employment actions against employees because of their caregiving responsibilities is unlawful under a variety of legal theories and factual contexts.<sup>6</sup> “Caregivers” in FRD cases is defined broadly to include not only mothers but also fathers, grandparents who care for grandchildren, and workers who provide care for elderly parents or disabled family members.<sup>7</sup>

FRD cases encompass a wide range of claims, including failure to hire, failure to promote, denial of benefits, denial of or interference with Family and Medical Leave Act rights, retaliation for exercising FMLA rights, hostile work environment, retaliation for complaining about discrimination, and wrongful termination. Examples of FRD include:

- firing a pregnant employee because the employer assumes she can no longer satisfactorily perform her job;
- giving promotions to fathers or women without children rather than to more-qualified mothers based on the stereotype that mothers are less competent;

- giving parents work schedules that they cannot meet for childcare reasons while giving nonparents flexible schedules;
- harassing and penalizing workers who take time off to care for their aging parents or sick spouses or partners; and
- fabricating work violations or performance deficiencies to justify dismissal of employees with family responsibilities.

*‘Caregivers’ include  
mothers, fathers,  
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or disabled family  
members.*

While no federal statute expressly protects workers from adverse employment actions based on their family caregiving responsibilities, several federal statutes cover these workers in both the public and private sector. The most common basis for protecting family caregivers is Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of sex, race, color, religion, and national origin.<sup>8</sup> In 1978, Title VII was amended by the Pregnancy Discrimination Act, which expanded Title VII’s protections to cover discrimination on the basis of pregnancy.<sup>9</sup> The PDA has provided important protections to women while

pregnant, and in a few cases, even when intending to become pregnant. Finally, the FMLA<sup>10</sup> and the Americans with Disabilities Act<sup>11</sup> also have been successfully used to protect family caregivers in the workplace.

In addition to these federal statutes, state and municipal employees with caregiving responsibilities can seek redress under Section 1983,<sup>12</sup> which prohibits anyone acting “under color of state law” from depriving citizens of the rights and privileges guaranteed by the U.S. Constitution. In the employment context, state or municipal employees may bring a Section 1983 claim alleging that their employers’ discriminatory actions deprived them of equal protection or due process rights guaranteed by the Constitution. In addition to federal statutes, plaintiffs also have successfully proven FRD claims under state anti-discrimination and leave laws.<sup>13</sup>

### ***Gender and Pregnancy Discrimination: The Most Common FRD Causes of Action***

Federal employees must bring FRD gender or pregnancy discrimination claims under Title VII.<sup>14</sup> However, California state and municipal employees with such claims may pursue allegations under three statutes — the FEHA, Title VII, and Section 1983.<sup>15</sup> Generally, the same methods of proof and legal standards apply to all three types of claims. Section 1983, however, also requires proof that the discrimination was the result of “state action,” usually an abuse of authority granted to the alleged discriminator because of his or her position with a state or municipal government.<sup>16</sup>

***Sex-based disparate treatment of caregivers.*** A disparate treatment claim under the FEHA, Title VII, or Section 1983 can be brought if an employer treats applicants or workers differently or less favorably on the basis of sex. In the caregiver context, a disparate treatment case can arise where a man with children is hired or promoted but a woman with children is not, or where a woman who is on maternity leave is laid off but a male employee in the same or similar position with poorer performance is retained. In these cases, the plaintiff must prove not only different treatment, but also that the different treatment was because of the employee’s sex. Disparate treatment claims are by far the most common type of FRD action.

*Trezza v. Hartford, Inc.*,<sup>17</sup> is a landmark FRD disparate treatment case. Trezza, an attorney and mother of two young children, claimed that she was passed over for promotions because she was a mother. Despite her consistently excellent job evaluations, she was never offered a promotion while less-qualified men with children and a woman without children were promoted. The plaintiff was told that she was not considered for the promotion because the new management position required extensive traveling and it was presumed she would not be interested in the job because of her family responsibilities. Trezza claimed she never said she was unwilling to travel.

In addition, the senior vice-president of the company complained to her about the “incompetence and laziness of women who are also working mothers.” He also said that women are not good planners, especially women with kids, and that Trezza would be home “eating bon bons” if her husband, also an attorney, won another big verdict. The company’s general counsel said that working mothers cannot be both good mothers and good workers, remarking, “I don’t see how you can do either job well.”<sup>18</sup> Only 7 of the 46 managing

attorneys were females and none were mothers with school-age children; many of the male managing attorneys were fathers. Based on this evidence, the court denied Hartford’s motion to dismiss.<sup>19</sup> Hartford ultimately settled this case for an undisclosed amount.

A small amount, approximately 8 percent, of FRD claims are brought by men.<sup>20</sup> A subset of that figure is gender discrimination claims. FRD disparate treatment claims brought by men generally assert the denial of family leave. For example, *Schafer v. Board of Public Education*<sup>21</sup> involved a Title VII

claim by a man against his employer and union alleging that the collective bargaining agreement’s one-year child rearing leave policy that applied only to women discriminated against men.<sup>22</sup> Schafer requested a one-year unpaid leave to care for his son. The employer denied his request because the leave provision applied only to females.<sup>23</sup>

The Court of Appeals’ decision turned on whether the leave provided was disability leave for women recovering from childbirth or time off to care for a child. There was no evidence that “normal maternity disability due to pregnancy, childbirth, or a related medical condition, extends to one year.”<sup>24</sup> Therefore, the court reasoned, the leave provision was not intended to provide disability leave for conditions related to childbirth, which would apply only to women. Accordingly, the court held the contract violated Title VII and “is thus *per se* void for any leave granted beyond the period of disability on account of pregnancy, childbirth or a related medical condition.”<sup>25</sup> A policy that gives pregnant employees preferential treatment beyond the period of actual

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physical disability due to childbirth violates Title VII.<sup>26</sup> In other words, employers may give female employees generous maternity leave. However, they must provide fathers leave equal to the period of non-disability leave given to women.<sup>27</sup>

*Knussman v. Maryland*<sup>28</sup> is an Equal Protection case brought by a man. Knussman, a Maryland state trooper, sought leave afforded to primary caregivers of newborn children pursuant to a Maryland statute. At the time, Knussman was performing essential duties, caring for his newborn daughter: changing diapers, feeding, bathing, and taking her to doctor visits, while his wife recovered from complications resulting from childbirth.

Knussman's request was denied by the human resources department because the state police department interpreted the definition of a "primary caregiver" to include women only. The human resources manager stated, "God made women to have babies and, unless [the plaintiff] could have a baby, there is no way [he] could be a primary care [giver]." Knussman was told that his wife needed to be "in a coma or dead" in order for him to qualify for extended leave.

Knussman sued under Sec. 1983, claiming that his leave request was denied as a result of gender discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. The Fourth Circuit Court of Appeals upheld the lower court's decision stating that "[g]overnment classifications drawn on the basis of gender have been viewed with suspicion for decades."<sup>29</sup> "[A] gender classification is subject to heightened scrutiny and will fail unless it serves an important government objective and [is] substantially related to achievement of those objectives."<sup>30</sup> The Fourth Circuit held that the department's interpretation of "primary caregiver" did not serve an important government interest, but was simply an invalid gender classification based on stereotypes.<sup>31</sup>

**Pregnancy discrimination.** Pregnancy discrimination complaints, which have risen sharply over the past decade, are a large subset of FRD cases. These cases may be brought

under Sec. 1983 as well as under the FEHA and the PDA of Title VII.<sup>32</sup> All three statutes prohibit an employer from treating pregnant employees less favorably than non-pregnant employees because of their status as pregnant women. This prohibition addresses the stereotype that women are less-desirable employees because they are pregnant or may become pregnant in the future.

Consider the case of *Glenn-Davis v. City of Oakland*.<sup>33</sup> Glenn-Davis, a lieutenant in the Oakland Police Department, qualified for a captain position and was placed on an eligibility list for promotion. The list was set to expire in January 2002. In the spring of 2001, Glenn-Davis informed her supervisors she was pregnant. The city later decided that no candidate from the eligibility list would be promoted and implemented a freeze on all captain positions. Glenn-Davis was not promoted and her eligibility expired. She filed suit claiming she was discriminated against based on her gender and pregnancy in violation of Sec. 1983, Title VII, and the FEHA.

At trial, the plaintiff proved that the city had promoted another officer during the hiring freeze. Additionally, the deputy chief expressed concern regarding Glenn-Davis' "commitment" to the department after she became pregnant and encouraged her "to join various work-related committees and groups to demonstrate her 'commitment.'"<sup>34</sup> The city offered no evidence to support the legitimacy of the hiring freeze. The jury ruled in favor of Glenn-Davis and awarded her \$150,000 in back pay and \$1.85 million in emotional distress damages, which ultimately was reduced to \$400,000.

In *Kiolbassa v. Dr. Donald C. Winter, Secretary, Department of the Navy*,<sup>35</sup> the complainant, a firefighter, claimed that she was involuntarily transferred in violation of the PDA after she told her supervisor that she was pregnant. In her new position, Kiolbassa's wages decreased because she no longer received premium pay. Two male coworkers who were recovering from heart surgery were allowed to continue in their original positions and receive premium

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pay. The court also said testimony by one of the decisionmakers was “riddled with stereotypical treatment of pregnant women.” Accordingly, Kiolbassa prevailed on her pregnancy discrimination claim before the Equal Employment Opportunity Commission.

An example of a less-obvious FRD PDA case is one where the employer takes adverse action because an employee may become pregnant.<sup>36</sup> In *Walsh v. National Computer Systems*,<sup>37</sup> the plaintiff alleged that she was subjected to a hostile work environment because she was a woman who had been pregnant, taken maternity leave, and may become pregnant again.

When she returned from maternity leave, Walsh’s supervisor allegedly told her, “You better not get pregnant again,” threw a telephone book at her with instructions to find a pediatrician that was open after hours, scrutinized her work time, refused to allow her to leave to pick up her sick child, increased her workload without additional pay, and posted notes on her cubicle when she was absent stating, “Child was sick.” The supervisor denied Walsh’s request for flexible scheduling so that she could pick up her child before the childcare center closed. Other employees were given flexible schedules that allowed them to leave even earlier.<sup>38</sup>

The court affirmed the jury’s verdict and award of \$625,000 in damages.<sup>39</sup>

**Retaliation.** Retaliation occurs when employees suffer negative consequences as a result of enforcing their rights under antidiscrimination laws, such as filing a charge of discrimination, opposing a discriminatory practice, or participating in these types of claims.<sup>40</sup> Family caregivers can pursue retaliation claims under Title VII, Section 1983, or the FEHA.

*Akers v. County of San Diego*<sup>41</sup> is a typical FRD retaliation case. The plaintiff, a former county deputy district attorney, claimed the county retaliated against her in violation of the FEHA after she complained about gender and pregnancy discrimination. A jury found in favor of Akers on her

retaliation claim. The county appealed the jury’s verdict to no avail.

The evidence showed that Akers consistently received positive performance evaluations until her supervisor learned she was pregnant. Akers was transferred to a less-desirable division after she returned from maternity leave. Shortly thereafter, Akers’ attorney wrote a letter to the district attorney, claiming that Akers had been forced out of the unit because she was pregnant. An investigation was launched, and the investigator found no evidence to substantiate Akers’ claims

of discrimination. Rather, he determined that Akers was transferred because of performance deficiencies. When Akers expressed her disagreement with the findings, she was given a poor performance evaluation and issued a written counseling memorandum.

The *Akers* case turned on whether the negative evaluation and counseling memorandum constituted an adverse action. Based on the law at the time, the court held that “[a]n unfavorable employee evaluation may be actionable where the employee proves the ‘employer subsequently used the evaluation as a basis to detrimentally

alter the terms or conditions of the recipient’s employment.’”<sup>42</sup> Given the evidence, the court found a jury could reasonably conclude that the negative evaluation and counseling memorandum were undeserved and retaliatory, that the county acted with the intent “to substantially and materially obstruct Akers’ prosecutorial career,” and that Akers was no longer promotable because she complained about discrimination. “Thus, although written criticisms alone are inadequate to support a retaliation claim, where the employer wrongfully uses the negative evaluation to substantially and materially change the terms and conditions of employment, this conduct is actionable.”

*Akers* was decided before the Supreme Court’s decision in *Burlington Northern and Santa Fe Railway Co. v. White*.<sup>43</sup> In *Burlington Northern*, the Supreme Court rejected the court’s position in *Akers* that plaintiffs claiming retaliation must show the alleged adverse action was related to their

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become pregnant.*

employment. Instead, the court adopted a “context matters” approach.<sup>44</sup> The court held that “a plaintiff must show that a reasonable employee would have found the challenged action materially adverse” in light of the circumstances and would have been dissuaded from filing a charge of discrimination.<sup>45</sup>

To demonstrate how circumstances play a role in retaliation cases, the court relied on the Seventh Circuit’s decision in *Washington v. Illinois Department of Revenue*,<sup>46</sup> involving the mother of a disabled child whose alternative work schedule was revoked after she complained of race discrimination. The Supreme Court in *Burlington Northern* adopted the holding in *Washington*. It stated that a schedule change ordinarily matters little to an employee and normally would not be materially adverse. But to a mother such as Washington, with school-age children, a schedule change could “matter enormously,” making the change a materially adverse action.<sup>47</sup> The *Burlington Northern* case will likely have a significant impact on retaliation cases against caregivers. It may be possible that actions such as transferring an employee to an office with a longer commute, placing an employee on a rotating schedule, or terminating an employee’s telecommuting arrangement are materially adverse actions in retaliation cases where the effected employees are caregivers.

### ***Family and Medical Leave***

The Family and Medical Leave Act<sup>48</sup> is the second most-commonly used statute in FRD cases. These cases arise because an employee gives birth or is the caregiver for an ill family member. Employees have been successful in bringing FRD cases under two types of FMLA claims: interference with FMLA rights and retaliation for exercising those rights.

***Interference claims.*** The FMLA makes it “unlawful for any employer to interfere with, restrain, or deny the

exercise of or the attempt to exercise, any right provided under” the FMLA.<sup>49</sup> Under Department of Labor regulations, an employer interferes with an employee’s rights under the FMLA by “refusing to authorize FMLA leave” and “discouraging an employee from using such leave.”<sup>50</sup>

In *Liu v. Amway Corp.*, the Ninth Circuit held that the employer interfered with the plaintiff’s FMLA leave by pressuring Liu to reduce her leave and then using her leave as a negative factor in the decision to terminate her.<sup>51</sup>

*Liu’s employer  
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terminate her.*

The Ninth Circuit found that the evidence showed clear interference with the employee’s FMLA rights. It cited evidence of the defendant’s repeated denial of requests for additional FMLA protected leave as well as her supervisor’s mischaracterization of her leave as “personal leave” rather than as “pregnancy leave.” The supervisor’s hostile attitude toward Liu after she went on leave, his efforts to reduce her leave, and his subjective performance evaluation of Liu was sufficient for a jury to find that Liu’s protected leave was a negative factor in violation of the FMLA.<sup>52</sup>

***Retaliation claims.*** To establish a prima facie case of retaliation under the FMLA, a plaintiff must show that he or she engaged in FMLA-protected activity, that he or she suffered an adverse employment action, and that a causal link exists between the two.<sup>53</sup> The third element, showing of a causal link, was the key issue in *Wells v. City of Montgomery, Ohio*.<sup>54</sup> Wells claimed he was discriminated against in retaliation for taking protected leave under the FMLA when he was passed over for a promotion. Wells took FMLA leave for the birth of all three of his children in 1999, 2000, and 2002.

Wells had applied for promotion in 2002, 2003, and 2004. In all three instances, he was ranked first on the eligibility list, and all three times another applicant was selected. The court found no foul play with respect to the

first two promotion decisions because Wells was passed over for more-qualified applicants. However, the third promotion was suspect.

In support of his retaliation claim, Wells demonstrated that the candidate selected for the third promotion was less qualified. Further, a former chief remarked to Wells after returning from FMLA leave, “Congratulations for taking the most time off for having a baby and not actually having the baby.” The second in command “repeatedly shunned Plaintiff in the presence of other subordinates thus giving tacit approval to the harboring of resentment toward Plaintiff for the exercise of federally protected rights.” Taken together, the court held that the evidence showed that the police supervisors considered the plaintiff’s use of protected FMLA when making promotion decisions, creating the necessary causal link between the adverse promotion decision and Wells’ FMLA leave.<sup>55</sup>

### ***Discrimination Against Caregivers Under the ADA***

Title I of the Americans with Disabilities Act<sup>56</sup> prohibits discrimination against employees because of their relationship with an individual with a disability.<sup>57</sup> This is known as the “association clause.” Plaintiffs who bring these claims must prove that the family member needing care is an individual with a “disability” as defined by the ADA.<sup>58</sup> An individual is “disabled” if the person has a “physical or mental impairment that substantially limits one or more of the major life activities,” “a record of such an impairment,” or has been “regarded as having such an impairment.”<sup>59</sup>

In *Padilla v. Buffalo State College Foundation, Inc.*,<sup>60</sup> for example, the plaintiff alleged that the foundation withdrew its offer of employment after it learned that Padilla needed a

week of leave to take her disabled daughter for treatments. The letter withdrawing the offer of employment said, “We regret the necessity to withdraw our offer of employment as family commitments will not allow you to fulfill your job function... the indefinite nature of your circumstances has forced us to withdraw our position.”<sup>61</sup> The foundation cited cases that have found “powerful inference of non-discrimination” where the hirer and firer are the same individual.<sup>62</sup> It also argued that the ADA does not require an employer to provide non-disabled applicants with a reasonable accommodation to care for a disabled family member.<sup>63</sup>

The court rejected both arguments. It noted that the adverse employment action occurred very early in the employment relationship; there was no evidence of unsatisfactory performance or excessive absenteeism to justify the termination; the plaintiff made only one request for time off; and there was no evidence that the plaintiff could not fulfill her work obligations because of her caregiving responsibilities.<sup>64</sup>

Other plaintiffs have relied on the association clause to challenge adverse employment actions allegedly taken because of the significant medical costs related to the family members’ disabilities. For example, in *LeCompte v. Freeport-McMoran*,<sup>65</sup> the plaintiff, terminated in a reduction in force, had a daughter with Treacher-Collins Syndrome. LeCompte claimed he was terminated because of the significant medical costs associated with his daughter’s condition. He showed that his employer was aware of his daughter’s disability and the cost of her care. He also pointed to his positive performance evaluations and the fact that a new employee was hired six months after the plaintiff was terminated. In the face of this evidence, the court denied the employer’s motion for summary judgment.<sup>66</sup>

### ***The ‘association clause’ prohibits discrimination against employees because of their relationship with an individual with a disability.***

### ***The Root Cause of FRD: Gender Bias in the Workplace***

These cases, despite their many differences, share a common characteristic. Each is the result of hidden gender bias or assumptions about how employees with family caregiving responsibilities will or should act. Common gender biases include the misconceptions that mothers are less committed to their job; a woman cannot be both a good mother and a good worker; mothers are not willing to travel or work long hours; mothers are not as competent as non-mothers; fathers and men should focus on work and let their wives handle the responsibilities of the family; and caregivers are easily distracted and unreliable.

Employment decisions are influenced by gender bias when they are based on assumptions about how a group of employees will or should behave because of their gender. Basing employment decisions on biases rather than actual performance, skills, and interests, leads to unwarranted adverse actions and inconsistent applications of employment policies. The result is that an employer often cannot demonstrate a legitimate lawful reason for its actions.

Gender bias long ago was declared unlawful by the courts. In 1989, the Supreme Court in *Price Waterhouse v. Hopkins*<sup>67</sup> recognized that illegal stereotyping can be based on an assumption either that a woman will act a certain way or that she should act in a certain way: "In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."<sup>68</sup> In the *Price Waterhouse* case, Hopkins was denied a promotion because she was perceived negatively for lacking stereotypical feminine character traits.

The Supreme Court specifically addressed caregiving stereotypes in *Nevada Department of Human Resources v. Hibbs*,

a case brought under the FMLA.<sup>69</sup> In *Hibbs*, the Supreme Court explained how gender stereotypes about caregiving lead to discrimination in the workplace: "The fault line between work and family [is] precisely where sex-based generalization has been and remains strongest.... Stereotypes about women's domestic responsibilities are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. These mutually reinforcing stereotypes create[] a self-fulfilling cycle of discrimination...."<sup>70</sup>

The Second Circuit Court of Appeals took *Hopkins* and *Hibbs* one step further. In *Back v. Hastings on Hudson Union Free School Dist.*,<sup>71</sup> the Second District found that an employment action based on stereotypes about motherhood is a form of gender discrimination.<sup>72</sup> Elana Back, a school psychologist, was denied tenure by supervisors who allegedly said it was "not possible for [her] to be a good mother and have this job," and they "did not know how she could perform her job with little ones." The court ruled that "stereotypical remarks about the incompatibility of motherhood and employment 'can certainly be evidence that gender played a part' in an employment decision.... As a result,

stereotyping of women as caregivers can by itself be evidence of an impermissible, sex-based motive."<sup>73</sup> Accordingly, when plaintiffs have evidence of gender stereotyping, they do not need to put forth comparator evidence, i.e., proof that men with children were treated differently.

The Equal Employment Opportunity Commission mentioned *Back* in its *Guidance on Caregiver Discrimination* issued in May 2007. It explained that "[a]ll evidence [in a caregiver discrimination claim] should be examined in context. The presence or absence of any particular kind of evidence is not dispositive."<sup>74</sup> Relying on *Back*, the EEOC reaffirmed that comparative evidence is not necessary to establish a violation because employment decisions based on stereotypes violate federal antidiscrimination statutes.<sup>75</sup> When an employer relies on unsupported sex-based

*Each of these cases is the result of hidden gender bias or assumptions about how an employee with family caregiving responsibilities will or should act.*

assumptions or speculation instead of an employee's actual work performance, it has violated Title VII.<sup>76</sup>

### Conclusion

FRD is not a new cause of action. Over the last several decades, plaintiffs' attorneys, thinking outside the box, have successfully used a number of state and federal employment laws to redress acts of discrimination against caregivers. A review of the breadth of these cases indicates that no employer is immune from FRD claims, thereby placing a premium on education and prevention measures. \*

1 Mary C. Still, Center for WorkLife Law, University of California Hastings College of the Law, *Litigating the Maternal Wall: U.S. Lawsuits Charging Discrimination Against Workers with Family Responsibilities* (June 6, 2006), <http://www.worklifelaw.org/pubs/FRDreport.pdf>.

2 *Id.* at 12. These include the publishing companies for *Working Mother* and *Fortune* magazines.

3 See Center for WorkLife Law, U.C. Hastings College of the Law, *Public Policy; Family Responsibilities Discrimination*, <http://www.worklifelaw.org/FRD.html>.

4 Gov. Code Secs. 12900-12996 (West 2008).

5 Housing discrimination based on "familial status" is already prohibited under the FEHA.

6 See Joan C. Williams and Cynthia Calvert Thomas, Center for WorkLife Law, *WorkLife Law's Guide to Family Responsibilities Discrimination* (2006).

Region 15 of the National Academy of Arbitrators, California State Mediation & Conciliation Service, Federal Mediation and Conciliation Service, and IRRA San Francisco Bay Area Chapter

*present*

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# Meet the Labor Arbitrator

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7 EEOC, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, available at [www.eeoc.gov/policy/docs/caregiving.html](http://www.eeoc.gov/policy/docs/caregiving.html) [hereinafter "Enforcement Guidance"].

8 Title VII of the Civil Rights Act of 1964, 42 USC Secs. 2000e-2000e-16 (West 2008).

9 Pregnancy Discrimination Act, 42 USC Sec. 2000e(k) (West 2008).

10 Family and Medical Leave Act of 1993, 29 USC Secs. 2601-2654 (West 2008).

11 Americans with Disabilities Act of 1990, 42 USC Secs. 12101-12300. (West 2008).

12 41 USC Sec. 1983 (West 2008).

13 Common-law actions, such as wrongful discharge, breach of contract, tortious interference, and intentional infliction of emotional distress, have also been used to challenge adverse job actions based on an employee's family responsibilities. Some courts have held that common-law actions are precluded if a plaintiff can bring a statutory claim for the same harm. Also, common-law claims that can be brought by public employees may vary by jurisdiction. A full discussion of these claims is outside the scope of this article. A sample of such cases is provided. However, employers faced with and employees considering such claims should seek advice from local counsel. See *Buenrostro v. Guckenheimer Enters.* (11-13-03) 2003 Cal.App. Unpub. LEXIS 10625; *Wrynski v. Agilent Techs.* (9-27-06) 2006 Cal.App. Unpub. LEXIS 8597; *Williams v. Housing Authority of Los Angeles* (2004) 121 Cal.App.4th 708; *Murray v. Oceanside Unified School Dist.* (2000) 79 Cal.App.4th 1338; *Rulon-Miller v. International Business Machines Corp.* (1984) 162 Cal.App.3d 241 (upholding a jury award of intentional infliction of emotional distress because the employer's behavior towards the employee, based on her conduct outside of work "tend[ed] to humiliate and degrade [her]"), partially overruled on other grounds by *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 351; *Edwards v. Unimin Corp.* (Super. Ct. Conn. 1995) 1995 Conn. Super. LEXIS 3126; *Hollingsworth v. Time Warner, Inc.* (Ct. App. Ohio 2004) 2004 Ohio App. LEXIS 2810; *Theroux v. Singer* (Mass. Dist. 2006) 2006 Mass. Super. LEXIS 277; *Zimmerman v. Direct Federal Credit Union* (1st Cir. 2001) 262 F.3d 70; *Skaggs v Subway Real Estate Corp.* (D. Conn. 2006) 2006 WL 1042337; *Sura v. Stearns Bank* (D.Minn. Dec. 18, 2002) 2002 WL 31898167; *Toussaint v. Blue Cross and Blue Shield of Mich.* (Mich. 1980) 292 N.W. 2d 880; *Wilson v. Monarch Paper Co.* (5th Cir. 1991) 939 F.2d 1138; *Schultz v. Advocate Health* (N.D. Ill. 2002) WL 1067256.

14 Executive Order 13152, signed by President Clinton in 2000, amends the Equal Employment Opportunity in the Federal

Government provision created by Executive Order 11478 to prohibit employment discrimination against federal employees based on their "status as a parent." Unlike other anti-discrimination statutes discussed here, Executive Order 13152 does not provide federal employees with a private right of action. In other words, they may not file a complaint with a state human rights agency, the EEOC, or a court. Federal employees who seek redress for parental discrimination under the Executive Order are limited to pursuing a complaint through the agency's administrative EEO process.

15 California state employees, unlike federal employees, may file complaints directly with the Department of Fair Employment and Housing or the U.S. Equal Employment Opportunity Commission without exhausting an internal administrative remedial process. See *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1092 (This court...has never held that exhaustion of an internal employer procedure was required where an employee made a claim under FEHA or another statutory scheme containing its own exhaustion prerequisite). If a state employee chooses to bring a complaint pursuant to internal administrative procedures, the decision will be binding unless vacated. If the decision is vacated, the employee may be time barred from filing a charge with DFEH or the EEOC. See *Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477 (applying issue preclusion in FEHA action after civil service commission decision on merits). See also *Page v. Los Angeles County Probation Dept.* (2004) 123 Cal.App.4th 1135.

16 *Monroe v. Pape* (1961) 365 U.S. 167, 172, overruled on other grounds by *Monell v. Department of Social Services* (1978) 436 U.S. 658; *Back v. Hastings on Hudson Union Free School Dist.* (2d Cir. 2004) 365 F.3d 107,122-23.

17 (SDNY, 12-30-98) No. 98 Civ. 2205, 1998 WL 912101.

18 *Id.* at \*2.

19 *Id.* at \*1. See also *Stern v. Cintas Corp.* (N.D. Ill. 2004) 319 F.Supp.2d 841.

20 Still, *supra*, note 1.

21 (3d Cir. 1990) 903 F.2d 243.

22 *Id.* at 246.

23 *Ibid.*

24 *Id.* at 248.

25 *Ibid.*

26 *Ibid.*

27 Compare *Johnson v. University of Iowa* (8th Cir. 2005) 431 F.3d 325, 326-27 The *Johnson* court held that the paid leave was granted to biological mothers due to the physical trauma they sustain while giving birth. Accordingly, it is a form of disability leave and not a ground for sex discrimination. *Id.*

28 (D. Md. 1999) 65 F.Supp.2d 353, (4th Cir. 2001) 272 F.3d 625.

29 *Id.* at 635.

30 *Ibid.*

31 *Id.* at 636.

32 Pregnancy Discrimination Act, 42 USC Sec. 2000e(k) (West 2008).

33 (9th Cir. 3-5-07) 126 Fed. Appx. 375, 2005 U.S. App. LEXIS 4281.

34 *Id.* at \*4.

35 (7-12-07) 2007 EEOPUB LEXIS 2725.

36 *International Union v. Johnson Controls, Inc.* (1991) 499 U.S. 187, 206 (The PDA prohibits an employer from discriminating against a woman “because of her capacity to become pregnant”).

37 (8th Cir. 2003) 332 F.3d 1150, 1157.

38 *Id.* at 1155.

39 *Id.* at 1160.

40 See 42 USC Sec. 2000e-3 (West 2008); Gov. Code Sec. 12940(h) (West 2008).

41 (2002) 95 Cal.App. 4th 1441.

42 *Id.* at 1457.

43 (2006) 126 S.Ct. 2405, 2408.

44 *Ibid.*

45 *Id.* (quoting *Washington v. Ill. Department of Revenue* (7th Cir. 2005) 420 F.3d 658, 662).

46 *Washington, supra*, 420 F.3d at 662.

47 *Burlington Northern and Santa Fe Railway Co. v. White, supra*, 126 S.Ct. at 2415.

48 29 USC Secs. 2601-2654 (2006).

49 Family Medical Leave Act, 29 USC Sec. 2615(a)(1) (West 2008).

50 29 CFR Sec. 825.220(b) (West 2008).

51 (9th Cir. 2003) 347 F.3d 1125.

52 *Id.* at 1135-1136.

53 See *Cline v. Wal-Mart Stores, Inc.* (4th Cir. 1998) 144 F.3d 294, 301.

54 (S.D. Oh. April 25, 2006) 2006 U.S. Dist. LEXIS 23013

55 *Id.* at \*7-8.

56 42 USC Secs. 12101-12300 (West 2008).

57 42 USC Sec. 12112(b)(4) (West 2008).

58 42 USC Sec. 12102(2) (West 2008).

59 *Ibid.*

60 (WDNY 1997) 958 F.Supp 124.

61 *Id.* at 125.

62 *Id.* at 127.

63 *Id.* at 128.

64 *Ibid.*

65 (E.D. La. 1995) 1995 U.S. Dist. Lexis 3509, at \*1.

66 *Id.* at \*2-5.

67 (1989) 490 U.S. 228, superseded by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, as recognized in *Landgraf v. USI Film Products* (1994) 511 U.S. 244.

68 *Hopkins, supra*, 490 U.S. at 250.

69 (2003) 538 U.S. 721.

70 *Id.* at 736.

71 *Supra*, 365 F.3d 107.

72 *Id.* at 113.

73 *Id.* at 122.

74 Enforcement Guidance at 3.

75 *Ibid.*

76 *Id.* at 5.

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# Begging to Differ: *City of San Jose* Clarifies That PERB Has Initial Exclusive Jurisdiction

*Margot Rosenberg and Ari Krantz*

IN THE FIRST of a series of expected decisions, the Sixth District Court of Appeal in *City of San Jose v. Operating Engineers Local No. 3*<sup>1</sup> reached the inexorable conclusion that the Public Employment Relations Board's jurisdiction with regard to strikes under the Meyers-Milias-Brown Act<sup>2</sup> is no different than PERB's jurisdiction with respect to strikes that occur under the other public sector labor relations statutes that the agency administers.

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Although the MMBA has been on the books since 1961, it was not until legislation adopted in 2000, and effective in July 2001, that the legislature brought the MMBA within PERB's jurisdiction.<sup>3</sup> Until that time, cities and counties seeking to enjoin strike activity properly made application directly to the courts. The issue before the court in *City of San Jose*, then, was whether jurisdiction over local government employee strikes now properly lies with PERB or remains with the superior courts. "By vesting the agency with exclusive initial jurisdiction over the MMBA," the Sixth District correctly concluded, "the Legislature entrusted PERB with determining the permissibility of strikes by essential public employees that implicate the MMBA."<sup>4</sup> Accordingly, the court found that, as with every other statute that PERB administers, the agency has exclusive initial jurisdiction over strikes by public employees in MMBA-covered agencies.<sup>5</sup> As a practical matter, local governments seeking to obtain temporary restraining orders to partially enjoin strikes by their employees may not go directly to court, but rather must ask PERB to seek an injunction.

## ***A Rebuttal to Jeffrey Sloan: Jeff, Lighten Up! Your Fears Are Unfounded***

In his recent article in these pages,<sup>6</sup> Jeff Sloan, a former PERB assistant general counsel turned management lawyer, describes his reaction to the *City of San Jose* decision as the visceral one of "angst."<sup>7</sup> Not only, in Sloan's view, is *City of San Jose*

wrongly decided, but the decision, Sloan predicts, “will support and foment surprise strikes against essential public operations and functions.”<sup>8</sup> In voicing these fears, Sloan ignores both long-standing California Supreme Court precedent with regard to PERB’s role in public sector labor relations, as well as the long history of PERB’s involvement with public employee strikes.

A review of Sloan’s criticisms demonstrates that his argument really lies with the California Supreme Court’s decades-old decision greatly expanding public employees’ right to strike and with the legislature’s more recent decision vesting jurisdiction over the MMBA in PERB. The *City of San Jose* decision is the logical — and appropriate — result of these earlier developments. The complete breakdown in municipal services prophesized by Sloan, however, is not grounded in fact. Rather, management’s perspective on the case is characterized by expedience.

### **City of San Jose Harmonizes County Sanitation District and PERB Preemption Principles**

In 1985, the California Supreme Court rejected a long line of cases deeming public employee strikes unlawful, and concluded that “the common law prohibition against all public employee strikes is no longer supportable.”<sup>9</sup> As the *County Sanitation* court held, the MMBA “removed many of the underpinnings of the common law *per se* ban against public employee strikes.”<sup>10</sup> Therefore, the court found, the MMBA’s “implications regarding the traditional common law prohibition [against strikes] are significant.”<sup>11</sup> The court noted that the MMBA specifically extended the right to engage in union activities to city and county employees, and “the right to unionize means little unless it is accorded some degree of protection....A creditable right to strike is one means of doing so.”<sup>12</sup>

The court acknowledged, however “that there are certain ‘essential’ public services, the disruption of which would seriously threaten the public health or safety,” and

thus provided that local government entities could apply to the courts on a case-by-case basis to seek to enjoin from striking those “public employees [who] perform such essential services that a strike would invariably result in imminent danger to public health and safety.”<sup>13</sup> At the time that *County Sanitation* was decided, of course, PERB had yet to be vested with exclusive jurisdiction over local agency labor relations.<sup>14</sup> Thus, in June 2006, when the City of San Jose applied directly to the superior court for a restraining order against a work stoppage by employees whom it identified as “essential,” the question was joined as to whether

the legislative amendments to the MMBA now vest PERB with exclusive initial jurisdiction over requests for such relief.<sup>15</sup>

In parallel developments, beginning in 1979, the California Supreme Court in *San Diego Teachers Assn. v. Superior Court*<sup>16</sup> held that PERB has exclusive initial jurisdiction over a strike injunction action brought by a public employer covered under PERB’s jurisdiction. Subsequently, California Supreme Court and Court of Appeal decisions consistently found that PERB is a specialized, quasi-judicial state agency which has exclusive jurisdiction

over efforts by employers within its jurisdiction to enjoin strike activity. Indeed, since the creation of PERB in 1976, *every single appellate decision has reached the same conclusion*: If an employer that is covered by PERB jurisdiction raises allegations in court regarding strike activity, the matter is referred to PERB’s exclusive initial jurisdiction.<sup>17</sup> Courts have applied this overarching principle of exclusive jurisdiction even when the employer does not allege a violation of any labor relations statute, but rather frames its complaint and allegations so as not to allege a violation of the statute.<sup>18</sup>

Four years after the California Supreme Court’s decision in *San Diego Teachers*, the court reaffirmed and further clarified PERB’s exclusive jurisdiction in *El Rancho Unified School Dist. v. National Education Assn.*<sup>19</sup> In *El Rancho*, the trial court, following *San Diego Teachers*, sustained the defendant

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unions' demurrers to a lawsuit alleging a tort cause of action against the unions' strike.

The Court of Appeal, in contrast, found that PERB had no jurisdiction because the lawsuit was premised on a tort cause of action, and there was no arguable basis on which the strike could be found to constitute an unfair practice under the Educational Employment Relations Act.<sup>20</sup>

The California Supreme Court reversed, adopting the rule developed by the U.S. Supreme Court in determining whether the National Labor Relations Board has exclusive jurisdiction over a private sector labor dispute. Thus, exclusive jurisdiction in PERB exists where the *conduct* at issue is “*arguably protected or prohibited*” by the statute.<sup>21</sup> In *El Rancho*, the court concluded that the issues raised by the strike activity qualified under both prongs — the conduct was both “arguably protected” and “arguably prohibited.”<sup>22</sup> It was with this backdrop that the court in *City of San Jose* considered whether the legislature’s recent grant to PERB of jurisdiction over employers and unions operating under the MMBA likewise vested PERB with jurisdiction over strike injunctions arising in MMBA-covered entities.

A fourth California Supreme Court case, *Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.*,<sup>23</sup> signals the answer to this question. In that case, the court considered the legislature’s intent in vesting PERB with jurisdiction over the MMBA, and found that by extending PERB’s jurisdiction to cover the MMBA, the legislature intended to create a “coherent and harmonious system of public employment relations laws” in the public sector in California.<sup>24</sup> The Supreme Court’s determination was well supported, since the legislature, in vesting PERB with jurisdiction over the MMBA, defined PERB’s jurisdiction solely by reference to PERB’s already existing jurisdiction under EERA.<sup>25</sup>

Accordingly, now that it is established that PERB’s jurisdiction with regard to the MMBA is identical to that of

the other public sector labor relations statutes under its jurisdiction, the court must find that the *San Diego Teachers* holding that PERB’s exclusive jurisdiction extends to claims that a strike will cause irreparable harm to the public, no matter what legal theory or allegation the employer claims it is asserting, applies equally to such claims under the MMBA. It is instructive to note that Sloan does not cite to *Coachella* in his analysis.<sup>26</sup>

Rather, Sloan — and the public employers in these cases — contends that a strike by assertedly “essential” local government employees constitutes *only* a violation of the

common law, and does not implicate the MMBA.<sup>27</sup> In *City of San Jose*, however, the Sixth District agreed with the union’s position that *San Diego Teachers* is entirely dispositive on this point. The Sixth District noted that in *San Diego Teachers*, the court found that an employer’s allegation that strike activity violates the common law also can be framed as an unfair practice, specifically, the failure to negotiate in good faith in violation of EERA, and that such a strike was therefore at least “arguably prohibited” by EERA.<sup>28</sup>

As the union pointed out, in *San Diego Teachers*, the trial court had enjoined the union from striking based on a series of appellate decisions from

the late 1960s and early 1970s finding public employee strikes to be illegal under the common law.<sup>29</sup> Thus, the very cause of action which the Supreme Court found to be preempted by PERB’s exclusive jurisdiction was in fact a claim that the strike activity should be enjoined based on a *common law rule regarding strikes*. As the *San Diego Teachers* court found, if a union’s strike “were held legal it would not constitute a failure to negotiate in good faith. As an illegal pressure tactic, however, its happening could support a finding that good faith was lacking.”<sup>30</sup> *City of San Jose* adopts this long-standing reasoning in holding that “[d]espite its label as a common law claim, the underlying activity — an allegedly illegal strike — may run afoul of the MMBA. The ‘arguably prohibited’ branch of the preemption doctrine thus is satisfied.”<sup>31</sup>

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the MMBA.*

The *City of San Jose* court likewise found that the union's strike conduct was arguably protected because "public employees covered by the MMBA enjoy a general right to strike."<sup>32</sup> Regardless of whether the MMBA is the source of the general right to strike, following *County Sanitation*, the *City of San Jose* court found "the statute's 'implications' concerning that right 'are significant.'"<sup>33</sup> The court accordingly concluded, "[t]he threatened strike activity thus is arguably protected under the MMBA."<sup>34</sup> In this sense, the situation here is strikingly parallel to the situation facing school employers in 1979, when the California Supreme Court held that injunctive relief requests to enjoin strikes illegal at common law should be brought before the then-fledgling agency, PERB.

***The Legislature Already Made the Policy Decisions With Which Sloan Takes Issue When it Placed the MMBA Under PERB's Jurisdiction***

A review of the case law, then, demonstrates that *City of San Jose* was correctly decided. Indeed, as Sloan concedes, "a confluence of many factors" led to the not-unexpected Court of Appeal decision. And, as Sloan's commentary displays, the decision itself is in accord with legal precedent; rather, it is the policy implications of the decision — and of the legislative and judicial decisions on which it rests — with which Sloan takes issue. Each of these policy decisions, however, has been considered — and discarded — by the legislature and the courts, and need not be subject to reconsideration by either body.

Sloan's premise that the courts, rather than PERB, should have exclusive initial jurisdiction over strike injunctions rests not on the law or on the facts, but rather on expedience. Thus, Sloan writes, "[r]equiring this extra layer of bureaucracy just to arrive at the same destination serves no purpose except delay."<sup>35</sup> We beg to differ. Conferring exclusive initial jurisdiction on PERB not only does not unduly delay the issuance of strike injunctions but moreover,

ensures a result that better effectuates the purposes of the MMBA, even if less expedient for employers.

In upholding the adequacy of PERB's remedies, the *City of San Jose* panel rejected the city's argument that PERB is "incapable of providing the kind of immediate relief" sought by the city.<sup>36</sup> Indeed, in *San Diego Teachers*, the California Supreme Court rejected a similar attack on PERB's processes at a time when PERB was in its nascent stages and had not yet written regulations guiding injunctive relief requests.<sup>37</sup> In keeping with this precedent, the Sixth District found that

PERB *does* have broad remedial powers, including the right to seek injunctive relief on the request of a local government employer.<sup>38</sup>

Moreover, PERB can — and does — act quickly. Although Sloan states that the facts of the *City of San Jose* case are "extremely odd" and "*sui generis*" in terms of timing,<sup>39</sup> notice of possible strike actions is actually the *norm*, rather than the oddity. Thus, in each of the six cases that went up on appeal, the union provided advance notice of the possible work stoppage, sometimes as much as *weeks* in advance.<sup>40</sup> Further, the court explicitly "[m]oved beyond the facts before [it]," to find that the agency's

processes in general are adequate.<sup>41</sup> Indeed, as former PERB General Counsel Robert Thompson related, as a practical matter, in his more than 15 years of supervising the injunction requests, there has not been "a case where parties have sought injunctive relief from our board and gone away wanting. Now, they may have disagreed with what the board's decision was. But we did not grant a request and then find ourselves going to court too late. It never happened."<sup>42</sup> And, tellingly, Sloan did not cite a single instance in which PERB, having made the decision to seek an injunction, arrived at the court too late.

In these circumstances, there could hardly be cause to upset the "adequacy of relief" determination first made by the Supreme Court in 1979, or to impose new and unprecedented restrictions on unions' ability to strike in the guise of protecting the public health and welfare.

*Conferring exclusive initial jurisdiction on PERB ensures a result that better effectuates the purposes of the MMBA.*

Not only are PERB's remedies adequate, but PERB review serves to promote the purposes of the MMBA. First and perhaps foremost, as those of us who practice regularly before PERB know, once PERB personnel are involved, they can often serve to mediate disputes and effect compromises short of seeking court orders.<sup>43</sup>

If PERB does determine to seek a court order, PERB involvement will promote statewide uniformity, and frankly, better-quality decisions. As the *City of San Jose* court recognized, “[a]cknowledging the agency’s jurisdiction helps promote the Legislature’s purpose in creating an expert administrative body whose responsibility it is to develop and apply a comprehensive, consistent scheme regulating public employer-employee relations.”<sup>44</sup>

“More fundamentally,” the court continued, it does not “serve public policy to have numerous superior courts throughout the state interpreting and implementing statewide labor policy inevitably with conflicting results.”<sup>45</sup> Indeed, this has been our abiding experience in litigating these cases. Thus, even judges who seriously apply themselves to determining which putatively “essential” employees to enjoin, often arrive at irrational decisions.<sup>46</sup> In the *Contra Costa* cases, for instance, the superior court enjoined *each and every* nurse working at county facilities from engaging in a work stoppage.<sup>47</sup> The same judge, after earnestly attempting to craft an order based on the paltry information before him, enjoined as essential employees the fellows who clean up after the animals in the animal shelter, the cooks in the detention facility, and the clericals who make the identification bracelets for incoming patients to the hospital, rejecting arguments that those duties could be performed by supervisors or others during the one-day strike.<sup>48</sup>

In Sacramento, the initial judge assigned to the case simply signed the county’s proposed order, and enjoined from

striking each and every employee designated by the county as “essential.”<sup>49</sup> When the case was quickly assigned to a second judge of that court, the order was reconsidered and more narrowly tailored based largely on the same facts and circumstances, demonstrating that there is no uniformity even among judges of the same bench.<sup>50</sup> Moreover, the vagaries of these orders demonstrate that far from being burdensome “bureaucracy,” the PERB investigatory process, including collecting declarations regarding employee functions, is itself essential to assisting judges to ultimately make well-reasoned decisions.

Finally, it makes sense for PERB — rather than individual employers — to determine the efficacy of seeking an injunction. Under the *City of San Jose* decision, PERB, which is charged with acting broadly “in the public interest” with respect to municipal services, may, in the first instance, make “the determination of how best to avoid public harm.”<sup>51</sup> Thus, as the California Supreme Court held nearly 30 years ago, “PERB may conclude in a particular case that a restraining order or injunction would not hasten the end of a strike...and,

on the contrary, would impair the success of the statutorily mandated negotiations between union and employer.”<sup>52</sup> Perhaps it is this check on unfettered employer power to which Sloan most objects.

In the end, Sloan does not address the ultimate question of why there should be a different procedure with regard to strike remedies under the MMBA than under EERA, the Dills Act, the Higher Education Employer-Employee Relations Act, or the other statutes that PERB administers. We submit that case law, legislative determinations, and our practical experience with both PERB and the courts, strongly support the Sixth District’s finding that PERB, and not the courts, has exclusive initial jurisdiction over strike remedies in MMBA jurisdictions. \*

*PERB involvement  
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and better-quality  
decisions .*

1 *City of San Jose v. Operating Engineers Local No. 3* (2008)  
 160 Cal.App.4th 951. The decision became final on April 4, 2008,  
 and the City of San Jose filed a Petition for Review in the California  
 Supreme Court on April 14. The authors are counsel of record  
 for the unions in the other cases pending in the First and Third  
 Appellate Districts that involve the same issue. *County of Contra*  
*Costa v. Public Employees Union Local One*, A115095 and A11518  
 (pending before the First District on PERB's and the unions'  
 appeals from the superior court order finding that PERB does not  
 have exclusive initial jurisdiction; case orally argued on February  
 6, 2008, and on March 10, 2008, the court requested further  
 briefing on the issue of the effect of *City of San Jose* on the matter  
 before it), and *County of Sacramento v. AFSCME Local 146*,  
 C054060 and C054233 (pending in Third District; oral argument  
 is scheduled for June 16, 2008). *County of Santa Clara v. SEIU*  
*Local 535*, H030937, the companion case to *City of San Jose* was  
 dismissed as moot in an unpublished decision by the Sixth District  
 in light of the same panel's *City of San Jose* decision issued that day.

2 Gov. Code Secs. 3500-3511.

3 Senate Bill No. 739, enacted in 2000, placed the MMBA  
 under PERB's jurisdiction. See *Coachella Valley Mosquito and Vector*  
*Control Dist. v. California Public Employment Relations Bd.* (2005)  
 35 Cal.4th 1072, 1083-1085.

4 *City of San Jose, supra*, 160 Cal.App.4th at 972.

5 The court explained, "[w]here PERB has exclusive initial  
 jurisdiction, 'the courts have only appellate, as opposed to original,  
 jurisdiction to review PERB's decisions.'" *City of San Jose, supra*,  
 160 Cal.App.4th at 964, citing *International Federation of Professional*  
*and Technical Engineers v. Bunch* (1995) 40 Cal.App.4th 670, 677.

6 Jeffrey Sloan, "*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*," *CPER* No. 189, pp.  
 13-19 (April 2008).

7 Sloan, at 13.

8 *Id.* at 17.

9 *County Sanitation Dist. No. 2 v. Los Angeles County*  
*Employees Assn.* (1985) 38 Cal.3d 564, 567.

10 *Id.* at 576.

11 *Ibid.*

12 *Id.* at 588. The *County Sanitation* court specifically  
 recognized the importance of the right to strike in the public  
 sector, just as in the private sector: "In the absence of some means  
 of equalizing the parties' respective bargaining positions, such as a  
 credible strike threat, both sides are less likely to bargain in good  
 faith." *Id.* at 583; see also *id.* at 589 (noting that "[a] union that  
 never strikes, or which can make no credible threat to strike, may  
 wither away in ineffectiveness" and that "the right to strike is  
 fundamental to the existence of a labor union").

13 *Id.* at 585 (fn. omitted).

14 See note 3, above.

15 On May 30, 2006, the union gave the city 72 hours'  
 notice that job actions could occur any time after June 2, and on  
 June 2, the city appeared in court seeking a TRO. Both the union  
 and PERB appeared at the hearing to oppose the city's request for  
 injunctive relief. *City of San Jose, supra*, 160 Cal.App.4th at 958.

16 (1979) 24 Cal.3d 1.

17 See *El Rancho Unified School Dist. v. National Education*  
*Assn.* (1983) 33 Cal.3d 946; *San Diego Teachers Assn. v. Superior*  
*Court* (1979) 24 Cal.3d 1; *Public Employee Relations Bd. v. Modesto*  
*City School Dist.* (1982) 136 Cal.App.3d 881; *Fresno Unified School*  
*Dist. v. National Education Assn.* (1981) 125 Cal.App.3d 259.

18 See e.g. *Fresno, supra*, 125 Cal.App.3d 259 (in a lawsuit  
 by an employer challenging strike activity by three labor unions,  
 appellate court held that PERB has exclusive jurisdiction over tort  
 causes of action for conspiracy and interference with contract,  
 and that third cause of action for breach of contract should also be  
 stayed pending PERB's processes).

19 *El Rancho, supra*, 33 Cal.3d 946.

20 *Id.* at 952. EERA, like the MMBA, does not expressly  
 mention strikes, but rather generally protects the right of  
 employees to participate in union activities. See Gov. Code Sec.  
 3543 (EERA provides protection of the rights of employees) and  
 Gov. Code sec. 3502 (where the MMBA provides similar  
 protection).

21 *El Rancho, supra*, 33 Cal.3d at 953 (emphasis added).

22 *Id.* at 957, 960.

23 (2005) 35 Cal.4th 1072.

24 *Id.* at 1089-1090.

25 See Gov. Code Sec. 3509(a), incorporating by reference  
 EERA, Gov. Code Sec. 3541.3.

26 This omission is particularly glaring in light of the fact  
 that the *City of San Jose* court relied on the Supreme Court's  
 finding in *Coachella* that the 2001 statutory changes constituted a  
 "fundamental change" with respect to jurisdiction over MMBA-  
 related unfair practice charges. *City of San Jose, supra*, 160  
 Cal.App.4th at 972.

27 Sloan, at 15.

28 *City of San Jose, supra*, 160 Cal.App.4th at 969, citing  
*San Diego Teachers, supra*, 24 Cal.3d at 8.

29 *Id.* at 6-8.

30 *Id.* at 8.

31 *City of San Jose, supra*, 160 Cal.App.4th at 970.

32 *Id.* at 971, citing *County Sanitation, supra*, 38 Cal.3d at  
 567.

33 *Id.*, citing *County Sanitation, supra*, 38 Cal.3d at 576.

34 *Id.*

35 Sloan, at 17. The public agency employers use the same refrain. Thus, in its supplemental brief to the First District as to why, in its view, *City of San Jose* should not be relied on in deciding the identical issue pending before that court, Contra Costa County argued that:

“[t]o determine [that PERB has exclusive initial jurisdiction] would hold the public hostage to the bureaucratic whims of PERB and exacerbate the risk to the public’s health and safety that is already threatened in a strike situation. Expediency over bureaucracy is the only way to protect the public interest when health and safety are implicated in a labor crisis.”

Respondent Contra Costa County’s Supplemental Brief, *County of Contra Costa v. Public Employees Union Local 1*, Court of Appeal Case Nos. A115095 and A115118, at 7-8, filed March 24, 2008.

36 *City of San Jose, supra*, 160 Cal.App.4th at 974.

37 *San Diego Teachers, supra*, 24 Cal.3d at 9.

38 *City of San Jose, supra*, 160 Cal.App.4th at 974.

39 Sloan, at 19, n. 24.

40 *County of Sacramento, supra*, Case Nos. C054060 and C054233 (unions gave more than six weeks notice of planned commencement of strike); *see also City of San Jose, supra*, 160 Cal.App.4th at 958 (union gave 72 hours notice); *County of Santa Clara v. SEIU Local 535, supra*, Case No. H030937 (unpub. opn. filed March 4, 2008) (six-day advance notice of strike); *Contra Costa County v. Public Employee Union Local No. 1, supra*, Case Nos. A115095 and A115118 (more than seven days advance notice).

41 *City of San Jose, supra*, 160 Cal.App.4th at 974, citing Cal. Code of Regs., tit. 8, sections 32450-32465.

42 *Contra Costa County v. Public Employee Union Local No. 1*, Reporter’s Transcript of Hearing Before Hon. Terence L. Bruiniers, at 29:15-22 (June 23, 2006).

43 In these authors’ experience, unions often seek to enter agreements with MMBA employers with regard to the identity or classification of employees who the parties agree are “essential” and may be prohibited from striking. Such was the case in Contra Costa County. It is when these negotiations break down that employers race to the courts, often seeking overbroad injunctions.

44 *City of San Jose, supra*, 160 Cal.App.4th at 972 (citations omitted).

45 *Id.* at 974, quoting *Modesto, supra*, 136 Cal.App.3d at 895.

46 This is partially the case because these matters, if brought directly by the local government agency, are *ex parte*, and the judge has little factual information to go by. Indeed, Sloan highlights the summary nature of the review in his commentary,

at page 16. This factor again strongly militates *in favor of* administrative review.

47 *Contra Costa County v. California Nurses Assn., supra*, TRO and OSC issued June 23, 2006, by Judge Terence Bruiniers.

48 *Contra Costa County v. Public Employees Union Local No. 1, supra*, TRO and OSC issued June 23, 2006 (Exhibit A, enjoining animal center technicians, head cooks, and registration clerks from striking). Whether certain employees were properly designated as “essential” is not raised as an issue in any of the matters on appeal, largely because there is not enough evidence in the appellate records for the appellate panels to base their findings.

49 *County of Sacramento, supra*, TRO and OSC issued September 1, 2006, by Judge Shelleyanne Chang.

50 *County of Sacramento, supra*, Order Granting Preliminary Injunction issued September 15, 2006, by Judge Loren McMaster.

51 *City of San Jose, supra*, 160 Cal.App.4th at 975.

52 *Id.*, quoting *San Diego Teachers, supra*, 24 Cal.3d at 13.

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## Recent Developments

# Public Schools

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### CTA Appeals PERB Dismissal of Retaliation Charge

PERB recently dismissed an unfair practice charge filed by the California Teachers Association on behalf of three former charter school teachers because the evidence failed to establish that the discharges were based on protected conduct. In doing so, the board rejected a proposed decision from an administrative law judge that determined the decision not to renew the teachers' contracts was motivated by their union activity.

*Schouten informed a JCS council member that the teachers were going to organize.*

CTA has appealed the board's decision to the Fourth District Court of Appeal.

#### Background

CTA alleged the Journey Charter School violated the Educational Employment Relations Act, Secs. 3543.5(a) and (b), when it refused to renew the contracts of three teachers — Stephanie Edwards, Paola Schouten, and Marlene Nicholas — for their in-

volvement with the association.

Edwards and Schouten, who founded the school, had been critical of its governing council. From the school's inception, the two served as classroom teachers, lead teachers/directors, and teacher representatives on the council. However, in April 2004, JCS was informed that its charter was in jeopardy due to concern over the education system, lack of sufficient student supervision, and a projected budget deficit. The council gave Edwards and Schouten complaints from parents regarding their administration of the school and voted to oust them as directors but retain them as teachers.

After an incident involving a parent protest outside the school grounds, a council meeting was held, at which Nicholas, the third teacher eventually fired, made an inflammatory statement that referenced the Columbine shooting. Nicholas later wrote a letter of apology to the council, parents, and staff for her reference.

At a subsequent council meeting, Edwards and Schouten were reinstated as directors, conditioned on their participation in mediation with the council.

In light of these events, Edwards contacted CTA, and the association met with the JCS teachers to discuss pos-

sible union representation. Several teachers expressed an interest in joining the association. Meanwhile, mediation sessions were conducted to address the climate of distrust at JCS and to "re-imagine" the school's structure. According to Schouten, after one of these meetings, she informed a JCS council member that the teachers were going to organize.

By the end of the school year, Edwards and Schouten had resigned as directors. A fellow teacher, Dana Ware, replaced them as director and teacher representative on the council. On the last day of school, Ware told the council members that mediation had increased workload, and concern over this

*Ware told council members that increased workload was the reason teachers needed a union.*

change was the reason the teachers needed a union. After Ware was refused access to a closed council session, she told the council that until the teachers joined the union, she was the only voice for them on the council.

Meanwhile, the teachers drafted a letter to JCS parents. It communicated their concerns over the financial and executive management of the school,

non-renewal of the school's charter, violations of the Brown Act, the council's access of confidential student files, and the ongoing "power struggle." The letter listed the names of all JCS teachers. According to the teachers, the letter was sent because there was a general sense of mismanagement within the school and a need for the teachers to speak with a collective voice. Ware told a council member that when the teachers joined the union, they would not have such problems.

During the summer, the teachers met with CTA again and voted to become part of the district's faculty bargaining unit. Seven days after the council learned of the meeting, it voted unanimously not to renew the contracts of Edwards, Schouten, and Nicholas.

CTA filed a charge with PERB, and an administrative law judge found the teachers' expressed interest in joining CTA and the letter to the parents both were protected activities. The ALJ further determined that the letter was the motivating factor in the decision not to renew their contracts. JCS filed exceptions to the ALJ's proposed decision, and the case was reviewed by the board.

### **PERB Decision**

First, citing *Novato Unified School Dist.* (1982) No. 210, 54 CPER 43, the board explained that the charging party bears the burden of showing that the employee engaged in protected activity, the employer knew of the activity, and there was an adverse employment action taken because of the protected

activity. *Novato* requires that the employer's actions be motivated by the employee's participation in protected conduct, the board noted, but, where direct evidence of unlawful motivation is unavailable, the board can review the record as a whole to determine whether an inference of unlawful motive exists.

The board began by considering whether the teachers' letter to parents was protected activity. The ALJ relied on *Rancho Santiago Community College Dist.* (1986) No. 602, 71 CPER 12, in which the board explained, "the speech

## *The board concluded that the letter did not directly address teachers' interests as employees.*

must be related to matters of legitimate concern to the employees as employees so as to come within the right to participate in the activities of an employee organization for the purpose of representation on matters of employer-employee relations." In this case, the ALJ found the letter related to matters of concern to the employees as employees and was protected activity.

However, the board rejected the ALJ's analysis and concluded that the letter did not directly address any issues relating to the teachers' interests

as employees. The board recognized that the teachers expressed concern for the operation of the school, the welfare of the children, and the executive and financial management of the school. However, because the teachers did not relate these concerns to their working conditions or interests as employees, the board did not find the letter to be protected activity.

Next, PERB considered whether the teachers' union organizing was a basis for their termination. It was undisputed that the teachers engaged in protected conduct when they sought the assistance of CTA and voted to join the union. But, the issue was whether JCS knew of this conduct and whether it was a motivating factor in its decision not to renew the contracts.

The board deferred to the ALJ's determination that the JCS council was aware of the teachers' organizing efforts. And since it was undisputed that the decision not to renew the teachers' contracts was an adverse employment action, PERB focused on whether the action was motivated by knowledge of the protected activities. The board disagreed with the ALJ's proposed decision and found insufficient evidence to support an inference that JCS was unlawfully motivated by the teachers' union activities when it decided to terminate their employment.

The board noted that the decision not to renew the contracts followed closely on the heels of learning that the teachers were engaging in protected activity. However, citing *Moreland El-*

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*ementary School Dist.* (1982) No. 227, 55 CPER 67, the board noted that timing alone does not demonstrate the necessary nexus between the protected act and the adverse action. Nor, when examining the totality of the circumstances, did PERB find evidence of additional factors that may show unlawful motivation — animosity toward the union or inconsistent or contradictory justifications. Thus, without more than temporal proximity, the board found that the decision not to renew the teachers' contracts was not motivated by their organizing efforts.

In agreement with the ALJ, the board found that the decision not to renew the teachers' contract was in response to the letter to JCS parents. However, because the board found that the letter was not protected activity, it concluded that JCS did not violate EERA when it terminated the teachers.

Chair Karen Neuwald concurred and dissented with the board's decision. She agreed that the teachers' letter to

parents was not protected activity. However, she disagreed with the board with respect to the motivation behind the decision not to renew the contracts. Neuwald quoted at length from the ALJ's finding, noting that because the JCS council's primary concern was one of control, it had a motive to keep the union out and to remove those teachers who "instigated and controlled all teacher actions." Therefore, according to Neuwald, there was a nexus between the teachers' interest in CTA and the decision not to renew their contracts, and she concluded, the teachers were retaliated against in violation of EERA.

**CTA Appeal**

CTA will appeal the board's determination that the teachers' letter was JCS' sole motivation for not renewing their contracts, in exclusion of the teachers' organizing efforts, and that the letter was not protected activity.

With respect to the letter, CTA at-

torney Rosalind Wolf told *CPER* that the association's appeal will cite case law that makes it clear this was protected activity. She explained that because the letter related to educational policy, it necessarily related to their employment.

Wolf also stressed that CTA feels the board's determination that the letter was the sole motivating factor in the decision not to renew the teachers' contracts contradicts the facts. She pointed to the ALJ's "well-reasoned" decision that found JCS terminated the teachers because of their endeavor to join CTA. "There was hostility there," Wolf said, "they didn't want to have the union there."

She also suggested CTA will assert on appeal that the board failed to shift the burden of proof to JCS after CTA made its prima facie case that the decision not to renew the teachers' contracts was motivated by the organizing efforts. \*

## Study Concludes Most Teacher Agreements Are Ambiguous, Not Rigid

A recent study by the Thomas B. Fordham Institute found that more than one-half of the agreements between teachers and the 50 largest school districts in the nation include provisions that could allow district leaders “substantial leeway to manage assertively, should they so choose.”

The study, entitled “The Leadership Limbo: Teacher Labor Agreements in America’s Fifty Largest School Districts,” was conducted by Frederick

*The report’s analysis ‘unapologetically proceeds’ from the premise that flexibility is desirable.*

M. Hess, director of education policies at the American Enterprise Institute. It sought to examine the question of whether collective bargaining agreements between teachers unions and school districts make it more difficult for leaders to run effective schools. To do so, researchers used a number of indicators from a collective bargaining database maintained by the National Council on Teacher Quality. Researchers identified 12 components to mea-

sure how restrictive the agreements are in terms of teacher compensation, personnel policies, and work rules. Each school district’s degree of flexibility was graded on a scale of A to F, “permitting comparisons that allow policymakers, voters, and reformers to identify the most and least management-friendly contract language on a variety of important issues.” Each district was also given an overall grade-point average and rating, from highly flexible to highly restrictive, to assess whether the actions or inactions of the district “can fairly be blamed on its labor agreement.”

In its report on the study, the institute reveals that its analysis “unapologetically proceeds” from the premise that flexibility is desirable. More particularly, it specifies that “teacher compensation should acknowledge and promote professionalism by reflecting the scarcity and value of teachers’ skills, the difficulty of assignments, the extent of their responsibilities, and the caliber of their work.” Further, “administrators should be able readily to identify and support or terminate ineffective educators as appropriate.”

The report emphasizes as “most telling” the study’s finding that 30 of the districts have labor agreements which are “considerably ambiguous.” It is in those districts where leaders have

the power to “manage assertively,” it concludes. “In these communities, labor agreements may represent a less substantial barrier to school improvement than critics have suggested, making it essential for school leaders to take advantage of the autonomy they enjoy.”

The study found that none of the 50 school districts had “highly flexible” teacher agreements and only five had “flexible” agreements: Guilford County, North Carolina; Austin, Dallas, and San Antonio, Texas; and Fairfax County, Virginia. Fifteen had “restrictive” or “highly restrictive” agree-

*None of the 50 school districts had ‘highly flexible’ teacher agreements.*

ments. “Nearly 10 percent of the nation’s African-American K-12 student population attend school in these lowest-scoring districts — making these contracts major barriers to more equal educational opportunity,” said the report.

The agreements were most restrictive in the area of work rules, the study found.

“For example,” the report said, “twenty-eight agreements mandate that teachers be paid extra for professional activities that take place outside the school

day, including conferences...and *twenty-four* agreements require principals to allow teachers to leave their classroom to participate in union activities.”

The agreements in 31 of the districts restricted schools from rewarding teachers for working in hard-to-staff areas such as math and science. The report notes that “this finding implies that union contracts will likely be a major obstacle for policymakers” trying to improve education in science, technology, engineering, and mathematics.

### *The agreements were most restrictive in the area of work rules.*

The report makes a number of recommendations. It urges “policymakers, scholars, and reformers” to “promote transparency regarding the actual provisions of labor agreements, boost awareness of the problems that restrictive provisions cause, and highlight examples of flexible language that superintendents and school boards need to fight for when negotiating new labor agreements.” Superintendents and school boards should negotiate better, meaning “more leader-friendly” agreements, it advises, either by removing provisions that restrict “effective management” or by “winning explicit rec-

ognition of managerial discretion as part of a twenty-first century labor agreement.”

Further, it advises superintendents to push principals “to lead more aggressively with the authority they already possess” and encourages school boards to ask superintendents “to lead more creatively within the parameters of existing agreements.”

The report’s final recommendation is that “*advocates, policymakers, and funders* should keep pressing *American Federation of Teachers* and *National Education Association* locals to embrace the kind of rethinking and flexibility that the United Auto Workers accepted last year in its negotiations with General Motors, Ford, and Chrysler.” The report explains that in the 2007 contract negotiations between the UAW and the big three automakers, the parties agreed to “up-end” the 1957 Treaty of Detroit and negotiate new contracts “that leave the automakers more agile, efficient, and competitive.” While the UAW “finally accepted a changed world of labor,” according to the report’s authors, “the NEA and the AFT are among the few unions still adamantly opposed to the kind of operational agility” needed today.

All of the five districts rated “flexible” are in either North Carolina, Texas, or Virginia, three states that prohibit school districts from engaging in collective bargaining, the report remarks. “Of course, such correlation cannot prove that collective bargaining

per se ‘causes’ restrictive management policy, but it should at least direct the attention of would-be reformers toward these nonbargaining states,” the report advises.

The researchers note that the sample of districts studied is skewed to the South, “a region historically averse to union activity,” because of the practice in southern states to organize their school districts on a county-wide basis. “This means that even the relatively dismal results reported here might potentially underestimate the restrictiveness of contracts across the land, especially in urban districts, and particularly in the Northeast and Midwest,” the report cautions.

Of the four California school districts included in the study, the Long Beach Unified School District and the Los Angeles Unified School District fall within the “somewhat restrictive” category, whereas the San Diego Unified School District and the Fresno Unified School District are both categorized as “highly restrictive.” In the overall ratings, where the study lists all 50 districts from “first to worst,” Long Beach USD is 16th, Los Angeles USD is 35th, San Diego is 47th, and Fresno USD is last at number 50.

The full report can be found at [http://www.edexcellence.net/doc/leadership\\_limbo/the\\_leadership\\_limbo.pdf](http://www.edexcellence.net/doc/leadership_limbo/the_leadership_limbo.pdf). \*

## PERB Holds That EERA Preempts City Charter's Interest Arbitration Provisions

The Public Employment Relations Board has upheld the dismissal of an unfair practice charge brought by the International Federation of Professional and Technical Engineers, Loc. 21, AFL-CIO, against the San Francisco Unified School District. The charge alleged that the district violated the Educational Employment Relations Act by failing to negotiate in good faith, by unilaterally repudiating an obligation to participate in binding arbitration, and by failing to give classified employees wages determined for the same classifications through city interest arbitration proceedings. The board held that EERA's impasse resolution provisions preempt the binding

interest arbitration provisions contained in the city charter.

An appeal of the decision is pending before the First District Court of Appeal.

### Background

Prior to passage of EERA, district employees were covered by the Meyers-Milias-Brown Act and the district was considered a department of the City of San Francisco. Now, according to the city charter, the district is under the control and management of the board of education. The charter also provides that the district's governing board has the power to employ teachers and other staff, and to "fix, al-

ter and approve their salaries and compensations, except as in this charter otherwise provided."

The district has recognized two bargaining units of employees represented by Local 21. These units have been certified by PERB, and no city employees are included in the units.

The non-certificated employees of both the district and the community college district are covered by the city's merit system. The merit system performs traditional functions including matters of classification, recruitment, examination, creation of eligible lists, appointment, employment status, layoffs and reductions in force, and disciplinary actions. The functions are discharged through the city's Department of Human Resources and its Civil Service Commission. Under the merit system, seniority for purposes of layoffs

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and bumping rights within common classifications operates so that city employees can bump district employees and vice versa.

Wages and benefits originally were excluded from the scope of representation for MMBA-covered employees under the city's salary standardization ordinance, contained in the charter. It gave the board of supervisors the responsibility for setting salaries in all cases where compensation was paid by the city. Wages were determined by

*The district advised Local 21 that the city had no authority to negotiate on behalf of the school district.*

means of a salary survey. Local 21 contracts incorporated the results of the salary standardization ordinance process even though wages and other civil service regulations were excluded from the scope of bargaining, "presumably for purposes of enforcement through the contract's grievance machinery," concluded PERB.

A city initiative, Proposition B, was passed in 1991. It amended the charter to allow unions representing the city's "miscellaneous employees," including Local 21, to opt either to remain under the existing prevailing wage formulas

or to collectively bargain with the city over pay and benefits. The proposition provided for binding interest arbitration in the event of impasse. It applied to miscellaneous employees of the district and the community college district "to the extent authorized by law."

With respect to the impasse procedures, the proposition provided that bargaining disputes are to be submitted to a three-member "mediation/arbitration board" following declaration of impasse. The board is directed by the charter to take into consideration "those factors traditionally taken into consideration in the determination of wages, hours, benefits and terms and conditions of public and private employment," including the city's financial resources, other demands on those resources, revenue projections, the power to raise revenue through taxes or other means, budgetary reserves, and the city's ability to meet the costs of the arbitration board's decision.

In 1994, city voters enacted Proposition F. It eliminated Prop. B's option of remaining under the charter's prevailing wage procedure.

#### **Factual Background to the Unfair Practice Charge**

When negotiations began over 1993-94 compensation issues, Local 21 notified the board of supervisors and the district that it was opting into collective bargaining pursuant to Prop. B. On April 8, 1993, the district advised Local 21 that the city had no authority to negotiate on behalf of the school dis-

trict and that the union's bargaining proposals should be presented to the district. The district also asked the mayor to instruct his staff not to negotiate with Local 21 over district employee compensation. The city agreed with the district that it had no authority to negotiate on behalf of district employees.

At the same time, the city was engaged in interest arbitration over compensation issues involving other city bargaining units. The arbitration board

*The court found that the entire dispute fell within PERB's exclusive jurisdiction.*

concluded that the city lacked the ability to pay an immediate wage increase, but it ordered a wage adjustment for Class 1650 accountants, a classification that includes some district employees.

On July 15, 1993, the district informed Local 21 that, because the union had failed to submit proposals to the district, the district would begin bargaining under EERA. The local responded by asking the district to implement the new wage rates for accountants retroactive to July 1. The district refused, maintaining that it was not bound by the interest arbitration award between the city and Local 21. On Au-

gust 12, 1993, the union filed a grievance against the district under the interest arbitration grievance procedure, demanding the accountants' wage adjustment. The city referred the matter to the district's human resources department.

The union filed a petition for writ of mandate in superior court, asking the court to enforce the wage adjustment. The court denied the petition, ruling that Prop. B violated the district's right to autonomy in school governance matters guaranteed by the California Con-

### *Local 21 continued to bargain with the district.*

stitution. The court also found that the entire dispute fell within PERB's exclusive jurisdiction. The union appealed the trial court's order.

On October 18, 1994, the union advised the district that it was willing to proceed with negotiations. Due to the pending litigation, the parties settled on wages for an agreement effective July 1, 1996, through June 30, 1999, without prejudice with respect to the outcome of the lawsuit. The agreement was signed in the spring of 1995.

On October 30, 1995, the Court of Appeal issued its decision on Local 21's appeal in *International Federation of Professional and Technical Engineers v.*

*Bunch* (1995) 40 Cal.App.4th 670, 116 CPER 44. The appellate court upheld the trial court's finding that PERB had initial exclusive jurisdiction, but rejected as superfluous its ruling on the constitutional question.

Despite the court's ruling, Local 21 did not file an unfair practice charge with PERB, but rather continued to bargain with the district. The parties negotiated a wage agreement for 1999-2002, and agreed to compensation reopeners in the final year. In March 2002, the parties began negotiations for a 2001-02 agreement. But, two months later, Local 21 called a halt to talks, pending resolution of an unfair practice charge that it intended to file with PERB. In a letter to the district, the union explained that it had not previously invoked PERB's jurisdiction "because the District has kept wages for classified employees at the District at about the same level as the wages established by collective bargaining and arbitration for city Employees in the same classifications." However, because there no longer was salary parity, it would bring the matter to PERB.

The district reiterated its position that it, not the city, was the employer for purposes of collective bargaining. And, by entering into collective bargaining agreements with the district over wages, the union had waived its right to demand that wages of classified district employees be set at the levels established through the charter's interest arbitration process rather than through negotiations with the district.

Local 21 filed an unfair practice charge against the district on August 15, 2002. It argued that the classified employees it represented were entitled to the same salary and wage increases that were received by city employees in the same classifications through the arbitration proceedings between Local 21, while representing city employees, and the city.

PERB's general counsel dismissed the charge, concluding that the district is not under the jurisdiction of the

### *The district's classified employees were entitled to the same salary and wage increases.*

MMBA and that the charge was untimely filed. Local 21 appealed and, in *San Francisco Unified School Dist. and City and County of San Francisco* (2004) No. 1721, 173 CPER 74, the board reversed the dismissal and remanded the matter for issuance of a complaint under EERA, not the MMBA, under which the charge originally was filed.

As directed, the general counsel issued a complaint on March 9, 2005, charging the district with unilaterally repudiating a policy of affording wage parity to employees in comparable city classifications as required by its char-



ter, a violation of EERA Secs. 3543.5 (a), (b), and (c). Those sections make it unlawful for a public school employer to retaliate or discriminate against employees because of the exercise of their rights, to deny rights conveyed to the union, and to refuse or fail to meet and negotiate in good faith.

After a hearing, an administrative law judge issued a proposed decision holding that the binding interest arbitration provisions set out in the city charter were preempted by the impasse resolution procedures required by EERA. He found that EERA's stated purpose of providing a uniform basis for managing employer-employee relations demonstrated an intent to occupy the field with regard to impasse resolution procedures. The ALJ also reasoned that because the legislature gave PERB exclusive initial jurisdiction over matters covered by EERA, that statute should prevail over contradictory local regulations. Because the ALJ determined the charter provisions were preempted by EERA, he concluded that there had been no unilateral change when the district refused to confer on district classified employees the wages determined through the city interest arbitration proceedings for city employees in the same classifications.

Local 21 filed exceptions to the ALJ's proposed decision. The district responded, supporting the ALJ's reasoning.

### PERB Decision

Chairperson Karen Neuwald wrote the board's decision, in which she was joined by Members Sally McKeag and Robin Wesley. Under EERA, she wrote, "a public school employer is required to meet and negotiate in good faith with the exclusive representative of its employees concerning matters within the scope of representation." "An employer's unilateral implementation of a change as to a negotiable subject, absent a valid defense, consti-

### *Neuwald looked first to the language of Prop. B.*

tutes a per se violation of its duty to meet and negotiate in good faith." In *Grant Joint Union High School Dist.* (1982) No. 196, 53 CPER 26, she noted, the board set out the elements of a unilateral change violation, which are that the employer breached or altered the parties' written agreement or its own established past practice; such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; the change is not merely an isolated departure from the policy, but amounts to a change of policy, and; the change in policy concerns a matter within the scope of representation.

Neuwald looked first to the language of Prop. B. It contained the following statement regarding its applicability to district employees: "These Sections 8.409 through 8.409-6, inclusive, shall apply to all miscellaneous officers and employees and including employees of San Francisco Unified School District and San Francisco Community College District to the extent authorized by state law."

"The parties agree that the collective bargaining requirements of Propositions B and F apply to both City and District employees," noted Neuwald. "They disagree over whether the requirement of binding interest arbitration applies to District employees, or whether that Charter provision is preempted by EERA."

Local 21 argued that prior to the enactment of Prop. B, the salaries of district classified employees were fixed at the same levels as comparable city employees under the salary standardization ordinance. The history of the subsequent initiative indicates that voters were led to believe the employees' rights under the prior wage parity system would not change with passage of the proposition. Further, because the collective bargaining provisions of the propositions apply to the district, the voters arguably intended that the binding arbitration provisions were to apply as well.

The district argued that, because Prop. B applies only to the extent "authorized by state law," and because there is no separate state law authoriz-

ing the use of binding interest arbitration for school employees, it does not apply. In addition, it contended that EERA preempts the charter's binding interest arbitration procedure with respect to district employees. EERA specifically refers to other impasse procedures for bargaining disputes — mediation and factfinding — that directly conflict with the interest arbitration requirement of the city charter.

*The board agreed that EERA preempts the charter's binding interest arbitration procedure.*

The board agreed with the ALJ's conclusion that EERA preempts the charter's binding interest arbitration procedure, and adopted the ALJ's preemption analysis in his proposed decision. The ALJ recognized that the California Constitution allows the adoption and enforcement of local regulations "not in conflict with general laws," and gives greater deference to charter cities like San Francisco under the concept of "home rule," exempting such cities from the "conflict with general laws." However, as to matters of statewide concern, "home rule charter cities remain subject to and controlled by applicable general state laws regardless

of the provisions of their charters, if it is the intent and purpose of such general laws to occupy the field to the exclusion of municipal regulation," he wrote.

The ALJ found that the charter's interest arbitration procedure conflicts with EERA's impasse procedure, which requires mediation followed by factfinding. He also found the legislature's requisite intent to occupy the field for resolving bargaining disputes in Sec. 3540. That section states that it is the purpose of EERA "to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice, to be represented by the organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit...." The ALJ added that "this preemptive intent is also expressed in the granting of initial exclusive jurisdiction to PERB, the quasi-judicial agency administering the EERA, to decide both unfair practice violations and representation issues arising under the Act."

The board found further support for its conclusion in *Wishman v. San Francisco Unified School Dist.* (1978) 86 Cal.App.3d 782. There, the court ruled that "the school system has been held to be a matter of general concern rather

than a municipal affair." "Charter provisions, ordinances and regulations relating to schools are therefore subject to preemption by conflicting general laws."

The board noted that the parties in this case did not use the EERA impasse resolution procedures. "Instead, Local 21 simply argues that the interest arbitration award for the City units should also apply to the District's classified

*Parties may not waive the impasse procedures set forth under EERA, either individually or by agreement.*

employees," it said. The board was not receptive to Local 21's suggestion that the district be required to participate in binding interest arbitration "presumably without first exhausting bargaining and impasse resolution procedures under the EERA." "Such a remedy or requirement would conflict with the EERA."

At the center of the board's decision is its holding that "parties may not waive the impasse procedures set forth under the EERA, either individually or by agreement." The impasse procedures were enacted to head off strikes and to protect the public from the

disruption of public employee strikes “by providing a method other than a work stoppage for solving a deadlock in bargaining.” “Because the procedures were designed primarily for the benefit of the public,” the board reasoned, “employers and employee organizations subject to the EERA cannot waive the EERA impasse procedures by agreement, or create contradictory impasse procedures by rule or regulation.”

The board added that its decision did not preclude parties from using binding interest arbitration procedures “that do not conflict with EERA.” The board advised that it would be permissible to enact procedures that supplement but do not conflict with the impasse procedures under EERA.

In its exceptions to the ALJ decision, Local 21 argued that EERA expressly does not supersede employers’ rules and regulations governing employer-employee relations, pointing to Sec. 3540. That section reads:

This chapter shall not supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements.

The board interpreted the language differently, finding support in case law “that 3540 should be construed

in a limited fashion.” In *Sonoma County Board of Education v. PERB* (1980) 102 Cal.App.3d 689, 45 CPER 35, the court rejected the argument that the collective bargaining provisions of EERA were subordinate to the existing merit system rules. The court found the language intended to require parties to bargain over compensation despite the existence of related merit system rules.

A similar non-supersession provision in the MMBA was construed narrowly by the court in *Los Angeles County Civil Service Comm. v. Superior Court* (1978) 23 Cal.3d 55, CPER SRS 7. In that case, the Supreme Court considered MMBA Sec. 3500, which states, “Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances, and rules of local public agencies that establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations....” The high court ruled that Sec. 3500 “reserves to local agencies the right to pass ordinances and promulgate regulations consistent with the purposes of the MMBA. To extend a broader insulation from MMBA’s requirements would allow local rules to undercut the minimum rights that the MMBA guarantees.”

The board found that the argument in favor of preemption of local rules is even stronger under EERA than under the MMBA. Section 3507 of the MMBA “explicitly provides for local agencies to adopt “reasonable rules and

regulations...whereas EERA does not provide for such local regulation.” In fact, allowing the city to replace EERA’s impasse resolution provisions with the charter’s binding arbitration process would undermine the purpose of EERA of “providing a uniform basis for recognizing the right of public employees to join organizations of their own choice,” and “to be represented by the organizations in their professional and employment relationships with public

## *Replacing EERA’s impasse resolution provisions would undermine the purpose of EERA.*

school employers....” said the board, quoting from EERA Sec. 3540. “Thus,” concluded the board, “while Section 3540 should be read to allow local regulations that supplement EERA’s statutory scheme, or do not conflict with the purposes of EERA, we agree with the ALJ that Section 3540 does not allow the District or City to enact a Charter provision with impasse resolution procedures that contradict those found in EERA.”

Local 21 also argued that Education Code Sec. 45318 “confirms that SFUSD’s classified employees are to

continue to have the same civil service employment rights as other members of the City's civil service system." That section provides that district employees "shall be employed pursuant to the provisions of [the Charter providing for a merit system of employment] and shall, in all respects, be subject to, and have all the rights granted by, those provisions...."

*Civil service  
employment rights do  
not include the right  
to binding interest  
arbitration.*

The board disagreed, stating that "civil service employment rights do not include the right to binding interest arbitration of collective bargaining disputes." It found support for this conclusion in *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, CPER SRS 16. Concluding that the Dills Act did not conflict with the constitutionally established merit principle of civil service, the Supreme Court said that "although the power to classify positions has frequently been lodged in civil service commissions or personnel boards, the actual authority to set salaries had traditionally been viewed as a legislative function, with ultimate authority residing in the legislative body."

Just as the SPB's authority to establish position classifications does not carry with it the constitutional authority to set salaries, the civil service system rights guaranteed by the Education Code do not include matters like the interest arbitration provision under the city charter.

The board also disagreed with Local 21's argument that because charter provisions regulate wages and benefits of district employees, the provision requiring binding interest arbitration should also apply to district employees. "Courts have distinguished between local regulation of substantive benefits, and local regulations of procedure, with the former subject to local control, while the latter is preempted by applicable state-wide law." It referred to *United Public Employees v. City and County of San Francisco* (1987) 190 Cal.App.3d 419, 72X CPER 6, where the court recognized that the California Constitution grants charter cities the power to set the compensation of their officers and employees, "while the amount of compensation is considered strictly a local affair and not preempted by the general law..., the procedure by which such compensation is determined is subject to the provisions of the MMBA." From this, the board concluded that "the fact that the Charter contains provisions governing the substantive benefits of District employees is consistent with the principle that such benefits are a matter of local concern." "On the other hand, local *procedures*, such as the impasse resolution proce-

dures at issue here,...are subject to pre-emption by a conflicting state law."

Because EERA preempts the charter's binding interest arbitration provisions, the board affirmed the ALJ's finding that the district did not commit an unlawful unilateral change by refusing to participate in those procedures or refusing to give to employees the wages as they were determined through the city interest arbitration proceedings for the same classifications.

*Local 21 filed a  
petition for review  
with the First District  
Court of Appeal.*

Local 21 filed a petition for review with the First District Court of Appeal. Duane W. Reno, attorney for Local 21, told *CPER* the union maintains that the city and the district are joint employers, and that the wages and benefits for non-certificated district employees are controlled by the city. In its petition, Local 21 argues that the board's decision that salaries for classified district employees are set through collective bargaining with the district rather than the city "is clearly erroneous." That decision "is squarely contrary" to a number of cited cases holding that while the district is a separate legal entity from the city with regard to educational issues, it is a department of the

city when it comes to the employment of its classified district employees, “who are therefore entitled to the same compensation and benefits that are provided to City and County employees in the same civil service classifications” pursuant to the city charter.

The petition was granted, and the appeal is now pending. (*International Federation of Professional and Technical Engineers, Loc. 21, AFL-CIO v. San Francisco Unified School Dist.*, PERB Dec. No. 1948, 3-13-08; 34 pp. By Chairperson Neuwald, with Members McKeag and Wesley.) \*

No new money would be allocated for the bonuses. Instead, the districts could use up to 20 percent of certain specified allocated funds, and any general purpose funds. The bill prohibits the use of funds authorized for services pursuant to the Individuals with Disabilities Education Act, state or local funds used to meet any federal maintenance of effort requirements, and funds used to implement the settlement in *Williams v. State of California*. (See CPER No. 168, pp. 32-34, for a discussion of this lawsuit and settlement.)

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## Legislation Allows for Bonuses to Science and Math Teachers

The California Senate has passed legislation that would permit school districts to pay additional bonuses to experienced and credentialed science and math teachers who take assignments at poor performing schools.

S.B. 1660, introduced by Senator Gloria Romero (D-Los Angeles), recognizes that “California’s public

particularly in low-performing schools, are increasingly being staffed by educators who are underprepared to teach the academic content in the state’s rigorous content standards and to prepare pupils to receive a high-quality mathematics and science education so that they can participate in the state’s science, technology, engineering, and mathematics workforce.”

The bill would allow school districts to negotiate with the teachers’ unions to provide bonuses to educators who take assignments at the approximately 2,500 schools ranked in the lowest three deciles of the Academic Performance Index. Noting that students at these schools are disproportionately Latino and African-American, Senator Romero said, “if we ignore the shortage of math and science teachers in these schools, where they are needed most, we are essentially telling these young people that they cannot be engineers, scientists, nurses, and doctors. This is just simply wrong.”

The legislation is opposed by the California Federation of Teachers and the California Teachers Association. “SB 1660... would create a two-tier pay structure that would undermine morale and undercut the effectiveness of all teachers at a particular site,” reads a statement on CTA’s website, [www.cta.org](http://www.cta.org). The bill does not deal with the specific source of the problem, “too few teacher-candidates in these disciplines in the ‘credentialing pipeline,’” notes CTA. “The measure also does not focus on the larger problem: the chronic underfunding of public education. As a result of this underfunding, beginning teacher salaries lag significantly behind the starting salaries of many competing professions.”

The bill passed the Senate by a vote of 28 to 1. It is now pending in the Assembly. \*

### *California’s public schools face a severe shortage of mathematics and science teachers.*

schools face an existing and projected severe shortage of mathematics and science teachers,” and that recent reports “reveal a shortfall of approximately 33,000 new mathematics and science teachers over the next decade.” “Mathematics and science classrooms, par-

## Delaware Enacts Binding Arbitration Law to Resolve School Bargaining Impasses

The State of Delaware has enacted legislation requiring that contract disputes between unions representing school employees and public school employers that have reached impasse be resolved through binding interest arbitration.

The legislation, H.R. 283, was drafted by the Delaware State Education Association, an affiliate of the National Education Association. Pamela

*Prior to passage of the bill, there was no way to bring bargaining to a close.*

Nichols, director of Communications for DSEA, told *CPEr* the issue had been on the union's priority list for a number of years. She explained that, prior to passage of the bill, there was no way to bring bargaining to a close. Previously, the Delaware Public School Employment Relations Act provided for factfinding to resolve disputes, but the factfinders' recommendations were advisory and could be ignored by either party. "We had several situations where bargaining went on for three or four years without being resolved," said

Nichols. "If the parties could not reach agreement, there was no procedure in place for a final step."

The synopsis of the bill explains the rationale for the legislation:

Without a final and binding dispute resolution procedure, negotiations become a matter of who can hold out the longest. As public school employees are prohibited from striking, they do not have an effective way to combat the public employer's tactic of ignoring the recommendations of the factfinder. This does not serve the public interest in having the terms and conditions of employment resolved in an efficient and fair manner and allow collective bargaining to affect the morale and level of service to the public.

The new law amends the DPSERA and requires Delaware's Public Employment Relations Board to appoint its executive director or a designee to act as the binding interest arbitrator. The board first must determine that despite a good faith effort to resolve their labor dispute through negotiation and mediation, the parties have reached impasse. The arbitrator, after a hearing, is only permitted to select either the employer's or the union's last, best, and final offer in its entirety. The arbitrator's written decision must specify the basis for factfinding. It is binding on both parties but can be ap-

pealed to the Court of Chancery on grounds that it is contrary to law or not supported by substantial evidence.

The new law applies to any collective bargaining process in which mediation has not been initiated to resolve the impasse as of March 20, 2008, the date the legislation was enacted.

H.R. 283 was sponsored by Speaker of the House Terry Spence (R-New Castle). It passed the House by a vote of 40 to 0 and the Senate by a vote of 19 to 1. Nichols surmised that the lack of opposition to the bill, both in and out of the legislature, was because the DSEA did a very good job of reaching

*It is binding on both parties but can be appealed.*

out to the state school board association, school administrators, and school superintendents, and getting their input while drafting the legislation.

Passage was also eased by the fact that in 2000, Delaware enacted legislation providing for binding interest arbitration for police, firefighters, and non-uniformed public employees and their state or local government employers.

Delaware joins just 17 other states and the District of Columbia that have binding interest arbitration for public school employees, though in some cases only non-economic matters are subject

to the arbitration process. The states are Alaska, Connecticut, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, and Vermont.

### *Delaware joins just 17 other states and the District of Columbia.*

In California, the impasse procedures in the Educational Employment Relations Act, which covers employer-employee relations in the public schools, requires parties that reach impasse to participate in mediation. If unsuccessful, the next step is factfinding. But, as was the case in Delaware before the new law, the factfinders' report is advisory only, not binding. According to caselaw developed by the California Public Employment Relations Board, public school employee strikes are permitted under certain circumstances once the mediation and factfinding process has been exhausted.

Binding interest arbitration has been enacted by approximately 25 local public agencies in the state. Typically, these local laws address economic issues only and call for issue-by-issue resolution by the arbitrator, not a se-

lection between the parties' final offers. The binding arbitration process also is used to resolve bargaining impasses between employers and organizations representing firefighters and law enforcement officers. This law also is limited to economic issues and is resolved on an issue-by-issue basis unless the parties mutually agree to submit a last, best package proposal to the arbitrator. \*

# Local Government

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## High Court Defines PSOPBRA Notice Requirement

The California Supreme Court has put to rest ambiguity about the nature of the notice required to be provided a peace officer who is facing disciplinary action. The Public Safety Officers Procedural Bill of Rights Act provides that an agency inform a public safety officer of its proposed disciplinary action within one year of the discovery of the alleged misconduct. In *Mays v. City of Los Angeles*, the Supreme Court clarified that notice advising the officer that misconduct charges would be “adjudicated by a Board of Rights” is sufficient. Contrary to an earlier case interpreting the language of Gov. Code Sec. 3304(d), the court announced that the notice need not inform the officer of the specific punishment or discipline contemplated. It is sufficient, the court unanimously ruled, that the notice inform the officer that disciplinary action *may* be taken after an investigation into the alleged misconduct.

Officer Jon Mays was charged with failing to secure confidential internal affairs documents in his automobile or promptly reporting their loss and with making false statements during an official investigation. He was provided notice advising him that he faced disciplinary charges for this misconduct. The notice also informed Mays that the

matter would be adjudicated by a board of rights. The Los Angeles city charter sets out the possible punishment that may be prescribed by the board of rights for misconduct.

*The purpose of this provision is to place a one-year limitation on investigations of officer misconduct.*

The chief of police sustained two of the charges against Mays and issued a letter of reprimand, which he challenged based on the assertion that the notice was inadequate because no specific penalty was mentioned.

The trial court disagreed with Mays, but the Court of Appeal reversed, finding fault with the notice because it only informed Mays that the matter would be adjudicated by a board of rights.

Writing for the high court, Chief Justice Ronald George described the Bill of Rights Act as setting forth a list

of “basic rights and protections” that must be afforded all peace officers by the public entities that employ them. It is “a catalog of the minimum rights” deemed necessary by the legislature to secure stable employer-employee relations. The act, George wrote, extends procedural protections to “balance the public interest in maintaining the efficiency and integrity of the police force with the police officer’s interest in receiving fair treatment.”

Turning to Sec. 3304(d), the court recounted that the act provides a statute of limitations period, precluding the imposition of discipline if the investigation is not completed within one year of the agency’s discovery of the misconduct. If the agency determines that discipline may be taken, it then must “notify the officer of its proposed disciplinary action within that year....” The meaning of this language was at the core of the case.

Searching for the legislative intent, Chief Justice George first announced that, “as a whole, it appears clear that the fundamental purpose of this provision is to place a one-year limitation on *investigations* of officer misconduct” and that the one-year period begins to run from the time the misconduct is discovered. “In this context,” said the court, “it seems most reasonable to interpret the language ‘proposed disciplinary action’ as referring to the agency’s determination that ‘discipline may be taken.’” The court emphasized the scope of its ruling:



Not only completion of the investigation, but also the requisite notification to the officer, must be accomplished within a year of discovery of the misconduct. This interpretation is consistent with the apparent purpose of the subdivision, which is to ensure that an officer will not be faced with the uncertainty of a lingering investigation, but will know within one year of the agency's discovery of the officer's act or omission that it may be necessary for the officer to respond in the event he or she wishes to defend against possible discipline.

Given the timing of the notice, the court reasoned that a requirement that the notice include the specific discipline contemplated by the agency would be premature. First, said the court, the statute speaks in terms of discipline that "may be taken." "It would be anomalous to require the public agency to reach a conclusion regarding potential discipline prior to any predisciplinary proceedings or response on the part of the officer." And, said George, it would encourage the agency to propose the maximum punishment in order to retain the full range of options in the subsequent disciplinary proceedings.

To support its conclusion, the court also looked to the language of Sec. 3304(f), which affords the agency 30 days to notify the officer of its decision to impose discipline "after investigation and any predisciplinary response." The court read this 30-day notice requirement as the time when the agency is to inform the officer of the specific discipline it intends to impose. Said the court:

When the two subdivisions are read together, it is evident that section 3304(d) limits the duration of the investigation and provides, through its notice requirement that discipline *may* be imposed, a *starting* point for predisciplinary responses or procedures, whereas subdivision (f) is directed at providing the officer with written notice of the discipline that the agency — after considering the officer's predisciplinary response — has *decided* to impose.

The court also relied on Sec. 3304(b), which sets out an officer's right to an administrative appeal of the contemplated punitive action. Observing that the subdivision does not provide a mechanism for the administrative appeal and allows the local public agency to create an appeal procedure in a collective bargaining agreement, the court found "no indication in the statute that the local mechanism cannot provide for a determination of the precise discipline at a hearing occurring subsequent to the notification envisioned by section 3304(d)."

Citing numerous PSOPBRA cases, the court underscored that Sec. 3304(d) operates as a limitations period, establishing the period in which an action must be *initiated*. But, the outcome of the charges remains to be adjudicated in a separate subsequent procedure. "It would be inconsistent with the general function of limitations statutes," wrote the chief justice, "to treat the limitations period contained in section 3304(d) as requiring the public agency to reach a firm conclusion with respect to the discipline or punishment actually intended to be

imposed at a point ordinarily viewed as the *commencement* of an action."

The legislative history of the act did nothing to dislodge the court of its reading of Sec. 3304(d). It was intended to function "primarily as a limitation upon *investigations* of misconduct" that "*may* lead to punitive actions," said the court. Finding no discussion of the specific content of the notice required to be provided to the officer, the court concluded that the legislature was focused

### *Sec. 3304(d) establishes the period in which an action must be initiated.*

on preventing "a perceived lack of fairness caused by a drawn-out investigatory process — and *not* with requiring that officers receive notice of specific intended discipline at that early stage of the process."

Observing that the legislature could have required public agencies to propose precise disciplinary consequences, the court reiterated that "section 3304(d) is concerned primarily with setting a one-year deadline for the completion of the public agency's investigation of allegations of officer misconduct." Therefore, said the court, "it is more reasonable to conclude that the notice it contemplates is intended only to inform the officer that the agency has found the allegations to be sufficiently

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

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

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

By Bonnie Bogue, Carol Vendrillo, Marla Taylor and Eric Borgerson  
13th edition (2006) • \$15 • <http://cper.berkeley.edu>

serious that they may subject the officer to discipline.”

Turning to facts in the present case, the court found the notice of proposed adjudication by a board of rights “not only fulfills the statutory requirement of section 3304(d) by notifying the officer that ‘discipline may be taken’ for the alleged misconduct, but also informs him or her of the intended procedural mechanism under which it is proposed that any potential punishment be determined.”

The Court of Appeal had relied on *Sanchez v. City of Los Angeles* (2006) 140 Cal.App.4th 1069, 179 CPER 37, which construed Sec. 3304(d) to require the public agency to inform the officer of the specific discipline being proposed, not merely that *some* disciplinary action was contemplated. While Chief Justice

George narrowly read *Sanchez* to sanction the agency for misleading the officer of the specific disciplinary action it ultimately took, the court disapproved of any interpretation of Sec. 3304(d) that would require notice of specific discipline rather than notice that disciplinary action may be taken. Mindful of that purpose, the court found that the notice to Mays that allegations of misconduct would be adjudicated by a board of rights was sufficient. (*Mays v. City of Los Angeles* [4-17-08] Supreme Ct. S149455, \_\_\_ Cal.4th \_\_\_, 2008 DJDAR 5469.)

As a result of the high court's decision, several cases pending in San Francisco and Los Angeles, which have similar unique procedures for imposing police discipline, will now go forward and be resolved on the merits, rather

than being dismissed based on inadequate notice. According to Diane Marchant, the attorney who represented Mays, as many as 12 fired officers could have been reinstated had the Supreme Court upheld the Court of Appeal.

Marchant also told *CPER* that, while she lost on the argument that the notice must specify the contemplated discipline, the court's ruling clarifies that law enforcement agencies must complete their investigations into officer misconduct within one year. That has not always been the practice, she said. In one case, the agency tried to schedule more investigatory interviews after the board of rights was convened. Consistent with the intent of the statute of limitations, she said, this will bring an end to investigations. \*

## Lawsuit Challenging Orange County Retirement Benefits Goes Forward

The Orange County Board of Supervisors has moved ahead with its lawsuit seeking to eliminate the pension benefits extended by the county to sheriff deputies and law enforcement investigators. Filed back in February, the lawsuit initiated by county lawmakers targets the “3 percent at 50” formula the board approved in December 2001. The resolution amended the memorandum of understanding between the county and the Association of Orange County Deputy Sheriffs, and granted the increased retirement benefits for “all years of service,” awarding the 1 percent enhancement retroactively to current county employees.

The effort to challenge the new formula and its application was initiated last summer by Supervisor John Moorlach, who called the pension system “overly generous” and “an unconstitutional gift of public funds.” At that point, approximately 500 county employees had retired since 2002 under the terms of the formula in place at the time they left county service. But, the county also has its eye on 2,000 employees who are near retirement age.

During this debate the deputy sheriff’s association has maintained that the pension benefit increase cannot be revoked or annulled by the board of supervisors because it was obtained through lawful collective bargaining with the county and made part of their MOU.

Tensions between the union and Supervisor Moorlach have elevated since he was elected to the board in 2006 and beat out a union-backed candidate. Moorlach has called union leaders “thugs” and, in response, the association sought to bar him from attending the funerals of officers killed in the line of duty. Even the Los Angeles Police Protective League got in the fray, calling Moorlach “an enemy of law enforcement.”

### *Several legal opinions concluded that the suit lacked merit.*

On July 31, over objections from the association, as well as the county sheriff and the district attorney, the board voiced concern over the fact that, by adding 1 percent to the pension calculation formula, it created an immediate funding shortfall because money had not been set aside to cover the retroactive component of the plan.

Lawyers consulted by the union have repeatedly expressed skepticism over the effort to dismantle the agreement that was fully considered and approved by the board of supervisors. It also has underscored that any rollback would affect current retirees who left

county service in reliance on the enhanced pension payout.

In September, the board again unanimously voted to go forward with the lawsuit despite having gotten several legal opinions which concluded that the suit lacked merit. The board kept those legal opinions confidential, asserting an attorney-client privilege. But, the association made a formal records request, and was provided the county’s billing records connected to the lawsuit. According to those figures, the county has hired four different law firms and has spent more than \$500,000 on legal fees.

On January 29, 2008, the board of supervisors adopted a resolution proclaiming the “retroactive compensation awarded in December 2001 to be unconstitutional.” The county filed suit in Orange County superior court on February 1, naming the Board of Retirement of the Orange County Employees Retirement System as the defendant.

The complaint makes the argument that because county citizens were not permitted to vote on the pension changes, the board of supervisor’s decision committed to spending future tax revenues in violation of Article XVI, Sec. 18(a), of the California Constitution. That provision requires a two-thirds vote of the electorate before a county can “incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year...”

Additionally, the lawsuit asserts that the board's action amounted to an award of extra compensation for work already completed and, as such, conveyed a gift of public funds in violation of Article XI, Sec. 10(a), of the state Constitution. That section prohibits a local government body from "granting extra compensation or extra allowance to a public employee after service has been rendered or a contract has been entered into and performed in whole or in part."

The complaint seeks a judgment from the court that the retroactive portion of the "3 percent at 50" benefit enhancement violates the constitutional debt limit and the prohibition on "extra compensation." The lawsuit also seeks an injunction prohibiting the re-

tirement board from collecting further contributions to fund the retroactive portion of the benefit enhancement and from continuing to pay that portion of the pension payments to retired members.

In April, a superior court judge in Orange County agreed with the argument advanced by the retirement board that the lawsuit be moved to Los Angeles County because the case involves a dispute between two public agencies within the county.

Because of the potentially far-reaching impact of this battle, local public agencies across the state are keenly interested in the viability of this lawsuit and closely tracking its progress through the judicial system. \*

advised by the county that he was required to deposit one-half of the estimated costs for the appeal prior to arbitration. Soto paid the costs "under protest" because he believed the requirement was unconstitutional.

After the arbitrator issued a ruling favorable to Soto, he filed a complaint for damages and challenged the rule. The county argued that because em-

*The county argued  
that electing to go  
forward with retained  
counsel was a  
voluntary choice.*

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## Cost-Sharing Provision of MOU Is Unconstitutional

The County of Riverside unconstitutionally insisted that an employee who elected to contest his termination using a private attorney, rather than an attorney provided by the union, must pay one-half of anticipated arbitration costs prior to the hearing, ruled the Court of Appeal in *Soto v. County of Riverside*. Relying on *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, the court ruled that the county has a constitutional obligation to provide the employee with a due process hearing concerning his termina-

tion without requiring that he pay a share of the costs, even if he voluntarily elects to forego union representation.

The case was brought by Jose Soto, a supervising deputy coroner in Riverside County. Following his termination, the Riverside Sheriff's Association filed an appeal on his behalf and requested binding arbitration under the terms of the memorandum of understanding between the association and the county. Soto elected to pursue his appeal using a private attorney, rather than through the association. As a result, Soto was

employees like Soto have the *option* of having the union represent them in the administrative appeal, electing to go forward with retained counsel was a *voluntary choice* and permissibly outside of the free hearing procedures.

The trial court sided with Soto and the county appealed, arguing that the MOU allows disciplined employees to have a hearing paid for by the union if they choose to have the union represent them in the administrative appeal. The contract merely gives employees represented by the union an additional option to be represented by private counsel at the disciplinary appeal hearing.

The appellate court was not convinced by the county's argument and

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

## **Pocket Guide to Public Safety Officers Procedural Bill of Rights Act**

By Cecil Marr and Diane Marchant  
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(12th edition, 2007)

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turned to the Supreme Court's decision in *CTA*. There, the court found unconstitutional a provision of the Education Code that required a teacher challenging a suspension or dismissal to pay one-half the cost of the administrative hearing if the teacher was unsuccessful. The *CTA* court was guided by the test it had established in *Coleman v.*

*The restriction of employees' due process rights must have a real relation to a proper goal.*

*Department of Personnel Administration* (1991) 52 Cal.3d 1102. In order to satisfy procedural due process requirements, *Coleman* said, the imposition of a cost on the exercise of the right to a hearing must have a "real and substantial relation to a proper legislative goal."

In *CTA*, the goal identified by the state was to conserve public resources by discouraging meritless or groundless administrative appeals. The high court read that statement of the statutory purpose as intending to discourage hearing requests in which the employee happens not to prevail or whose position is, in the end, without merit. The court in *CTA* concluded that a legislative goal of discouraging administrative appeals only is proper if it ap-

plies to "patently meritless" or "frivolous" appeals. It defined those to be appeals prosecuted for an improper purpose or when "any reasonable attorney would agree that the appeal is totally and completely without merit," rather than simply appeals involving "colorable claims" that are ultimately found to be without merit.

In this light, the court in *Soto* reviewed the county's assertions that the cost-sharing rule was meant to encourage public employees to allow their unions to represent them in order to effectively maintain the grievance and arbitration process between the parties to the MOU. It also cited the important interest of maintaining an effective system of settling disputes. And, the county said, the purpose of the cost-sharing provision was to discourage all hearings where the employee is not represented by the union.

First, the Court of Appeal rejected the county's reliance on two cases that upheld the constitutionality of contract provisions which give the exclusive representative the sole authority to determine whether to pursue arbitration. In those cases — *Armstrong v. Meyers* (9th Cir. 1992) 964 F.2d 948, 94 CPER 43, and *Jones v. Omnitrans* (2004) 125 Cal.App.4th 273, 170 CPER 18 — the courts relied on the union's duty of fair representation in deciding whether to take a case to arbitration. Under those circumstances, where the duty of fair representation precludes decisions that are arbitrary, discriminatory, or made in bad faith, the courts have found a

strong public and private interest in maintaining an effective grievance process.

In this case, the court noted that the union is not the exclusive representative with respect to whether to pursue an administrative appeal to arbitration and, therefore, is not bound by a duty of fair representation. Citing *CTA* and *Florio v. City of Ontario* (2005) 130 Cal.App.4th 1462, 174 CPER 68, the court said that the restriction of employees' due process rights must have a real relation to a proper goal. The cost-sharing provision of the MOU imposes a disincentive to an employee in the exercise of a due process right, said the court, at least if not represented by the union. The values of maintaining an effective grievance procedure "are simply not relevant to whether an employee may be required to pay half the costs of arbitration. This is true whether or not the union represents the employee in the arbitration and whether or not that choice is freely made by the employee, i.e., not forced upon the employee when the union declines to pursue the arbitration."

Finding the MOU provision unconstitutional on its face, the court concluded that any time any member of the association chooses to pursue an administrative appeal of a disciplinary action using his or her own attorney, the MOU imposes an unconstitutional cost-sharing requirement. (*Soto v. County of Riverside* [4-2-08] E042725 [4th Dist.] \_\_\_ Cal.App.4th \_\_\_, 2008 DJDAR 5926.\*

## Ninth Circuit: Drug Testing of Library Page is Impermissible

A city's drug testing policy that required a library page to submit to a pre-employment drug and alcohol test was struck down as unconstitutional by the Ninth Circuit Court of Appeals in *Lanier v. City of Woodburn*. While the court did not conclude that the policy could never be constitutionally applied to any city position, as applied to the applicant for a part-time library page position, it amounted to an impermissible suspicionless search.

Janet Lanier hoped to work as a page at Woodburn's public library, retrieving books from the book drop and returning them to the shelves. The city made Lanier a conditional offer of employment contingent on successful completion of a pre-employment drug and alcohol test. When Lanier declined to be tested, the city rescinded the offer. She then filed a lawsuit in federal court charging that the city had infringed on her Fourth Amendment constitutional right by insisting that she take the test.

The city argued that it had a substantial and important interest in screening library pages because drug abuse is a serious problem confronting society, it has an adverse impact on job performance, and children must be protected from those who use drugs or from those who could influence children to use them.

While the court was quick to acknowledge that "these problems are

worthy of concern," it found no special needs of sufficient weight to justify an exception to the rule that searches be based on individualized suspicion. The generalized existence of a societal problem is not enough, the court said, especially where there is no evidence of a drug problem among the targeted population.

### *The generalized existence of a societal problem is not enough.*

The Ninth Circuit added that a demonstrated problem of drug abuse might "shore up" an assertion of a special need, but the city's showing of an impact on job performance lacked specificity and, it said, "one library employee in twenty-three years who had to undergo rehabilitation on a couple of occasions" fell short.

As for the city's assertion that its drug testing policy is justified as a means of protecting children, the court remarked that the link between that interest and a position as a part-time library page "is tenuous at best." A page may staff a youth services desk for an hour when needed and children may be

in the library unattended, said the court, but "there is no indication that the library has any *in loco parentis* responsibility for those children, that children's safety and security is entrusted to a page, or that a page is in a position to exert influence over children by virtue of continuous interaction or supervision."

The court also rejected the city's contention that all library positions are safety sensitive because an appendix to its policy and procedures manual says so. The manual does not define safety sensitive, noted the court, and there is no evidence that a page position *is* safety sensitive. The court reviewed several cases where jobs have been characterized as safety sensitive because they involve work that could pose a great danger to the public — operation of railway cars, armed interdiction of illegal drugs, work in a nuclear power plant or the operation of gas pipelines, work in the aviation industry, and work involving trucks used to transfer hazardous materials. In contrast, said the court, the work of a page "entails nothing of this order of magnitude."

The Ninth Circuit concluded that the city had not articulated any special need to screen Lanier without suspicion. "We discern no substantial risk to public safety posed by Lanier's prospective position as a part-time library page." (*Lanier v. City of Woodburn* [9th Cir. 3-13-08] 06-35262 \_\_\_F.3d\_\_\_, 2008 DJDAR 3570.) \*

## State Employment

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### DPA Recommends Reinstatement of ‘Like Pay’ for Supervisory Scientists and Engineers

Under threat of legal action, the Department of Personnel Administration finally issued recommendations that would restore the historical relationships between salaries of supervisory scientists and supervisory engineers. The California Association of Professional Scientists’ argument — that supervisory scientists’ work was comparable and should be compensated similarly to supervisory engineers’ work — prevailed. CAPS is working on translating the recommendations into paychecks for supervisors.

#### Filed in November 2006

As former Governor Davis left office in 2003, his administration agreed to a memorandum of understanding with the Professional Engineers in California Government that called for four annual raises, beginning July 1, 2005. The result would increase engineer pay to the market rate as determined by annual salary surveys of selected engineering positions in 18 counties and cities and the University of California. The raises are contingent on legislative approval each year. To avoid salary compaction, where supervisors’ pay is little more than the compensation of senior rank-and-file employees, DPA

also has boosted the salaries of engineering supervisors and managers. The MOU resulted from evidence that state engineer pay was lagging the market for engineers in other public sector agencies. By 2005, that lag was 15 to 30 percent, depending on the classification.

*Supervisory scientists in some classifications were paid 22 percent less than comparable state engineers.*

Although state scientist compensation also was 10 to 20 percent below the market rate in 2004, and up to 46 percent below market in one classification, the CAPS MOU had no pay parity provisions. Historically, state scientists had been paid within 5 percent of engineers in similar classifications, with a couple exceptions. But beginning July 2005, when engineers received raises of 4 to 7.7 percent, scientists’ pay also began to fall behind their

engineering coworkers’ compensation. By July 2006, after a 14 percent increase for some supervisory engineers, supervisory scientists in some classifications were paid 22 percent less than comparable state engineers.

In November 2006, CAPS requested that DPA hold quasi-judicial hearings to determine whether it was violating the “like pay for like work” principle of the Government Code. DPA granted the request, but held quasi-legislative hearings instead of a quasi-judicial hearing based on *Lowe v. California Resources Agency* (1991) 1 Cal.App.4th 1140, 92 CPER 36. Hearings were held in April 2007, but a decision was delayed because DPA Director David Gilb requested that the hearing panel obtain more information. (See story in CPER No. 187, pp. 63-64.)

More hearings occurred last November and December, but there still was no decision. In April, CAPS announced that it was ready to petition a court to order DPA to issue its decision. Gilb issued his determination by the end of the month.

#### Comparable, But Not Identical

CAPS’ challenge asserted that employees in 14 supervisory scientist classifications were underpaid when compared to supervising engineers with similar duties and responsibilities. CAPS provided evidence that the duties and responsibilities in the classes had not changed since 2004, and the class specifications had not changed.



The union did not contend that scientists were performing engineering duties. But it did show that some departments used multidisciplinary teams for projects where the duties of engineers and scientists overlapped except for about 5 percent of the work. In other departments, employees hired as scientists were converting to comparable engineering classifications for higher pay, while continuing to perform the

*Gilb recommended salary adjustments to scientist classifications that would restore the historical relationships.*

same work. Vacancy announcements sometimes indicated both engineers and scientists were eligible to apply. Managers testified that supervisory scientists and engineers had similar levels of responsibilities, and errors would generate similarly serious consequences. They testified that the pay disparity between scientists and engineers was destructive to employee morale.

The DPA director's request last fall for additional information indicated he was questioning the need for separate classes of supervisory engineers and supervisory scientists, but he found that scientists and engineers bring different expertise to their jobs despite the over-

all similarity of their responsibilities and duties. As he pointed out, his findings echoed previous determinations by the State Personnel Board that there are differences in the technical expertise and background of supervisory scientists and engineers that require establishment of different classes.

He also found that, although scientist and related engineering classes had not been paid the same, there previously had been an alignment in their salaries. He recommended salary adjustments to scientist classifications that would restore the historical relationships. Seven scientist classifications would receive the same pay as the related engineering classifications, if his recommendations are implemented. Three classifications would be paid 5 percent less, and one would be paid 10 percent less than the comparable engineering title.

DPA found several improper department practices. "Some departments place a premium on supervisory skills and reclass a supervisory position to fit a candidate's existing discipline," the director noted. "This practice skirts the boundaries of existing Civil Service rules and the existing classification system." He also concluded that a multidisciplinary approach to project management was suspect under the classification system. He wrote:

[A] multidisciplinary approach...is inconsistent with the current classification system that assigns responsibility and authority based on supervisor and managements skills built on

and buttressed by technical training and experience in a particular discipline....[It] also leads to a disgruntled work force that sees only wildly differing salaries for what appear to be similar duties and responsibilities.

He observed that the investigation indicated changes might be needed in the personnel classification system and noted that the state's Human Resources

*DPA found several improper department practices.*

Modernization Program is addressing the issue. (For a story on the modernization effort, see *CPER* No. 185, pp. 55-58.)

Director Gilb indicated that he would forward a copy of the report to the Department of Finance for a determination whether the recommended pay adjustments were within existing salary appropriations.

**Appropriations Necessary?**

CAPS Staff Director Christopher Voight told *CPER* that the decision is gratifying and that the union is pleased that Gilb "called it like he saw it." Finding the funding to implement the decision will be the big challenge, he said. He asserts there is sufficient money for salary increases in this year's budget to

fund the scientist supervisors' increases because there are unspent funds for employee compensation due to employee turnover, attrition, and the governor's February executive order imposing a hiring freeze. But the union also is asking for retroactive pay back to July 1, 2005, when scientists' salaries began to diverge from engineer pay.

Another question is how the decision will be implemented in 2008-09. Under the pay parity provision in PECG's MOU, engineers will likely receive another hefty raise that finally

will place their compensation at the level of other engineers in public service. DPA is likely to grant the same raise to engineering supervisors and managers. DPA's decision establishes the salary relationships between supervisory scientists and comparable engineers, but CAPS has no word whether DPA will recommend the same increases for supervisory scientists next year. CAPS has requested that DPA estimate the cost of the recommendation in preparation for legislative budget deliberations. \*

State law protects against erosion of the civil service system by prohibiting personal services contracts where state employees traditionally have done the work and where departments could obtain employees competent to perform it. There are 10 exceptions to the general rule banning contracting out, such as when civil service workers lack the skills for highly technical work. Local 1000 recognizes that the state has, at times, legitimate needs for consultant and contract worker agreements. But, it found that the total value of personal services contracts has increased from \$28 million for contracts awarded in 2003-04 to \$340 million for contracts awarded in just the first eight months of 2007-08. The value of consultant contracts has jumped from \$40 million for contracts awarded in 2003-04 to \$120 million awarded by February of this fiscal year.

A November 2006 report by the California Research Bureau, a research organization of the California State Library, reported that IT managers found it was easier to contract for services to complete projects within tight deadlines than to hire qualified civil service employees. The union doubts claims that IT employees do not have the necessary skills to perform all the work that needs to be accomplished, and the bureau's report lends support to the union's assertion that the contracts cannot be justified by inability to obtain necessary skills in the civil service workforce.

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## SEIU Local 1000 Battles To Keep Information Technology Work In-House

"Outsourcing of IT work has skyrocketed since 2003," announces a report by Service Employees International Union Local 1000. In its report, "IT Contracts with the State of California: Too Many, Too Costly, Too Little Oversight," the union claims the state could save \$100 million a year by employing civil service information technology employees to perform much of the work now done by IT consultants and contract workers. The union asserts that the State Personnel Board has disallowed most of the IT contracts that Local 1000 has challenged. The new Chief Information Officer, Teri Takai, insists the state does not have an agenda to outsource information technology and is committed to developing the civil service IT workforce it needs.

### Numbers Disputed

Local 1000 reports that the total number of contracts for IT workers and IT consultants has tripled from about 1,800 in 2003-04 to approximately 5,500 this fiscal year. Information from the Office of the Chief Information Officer is different. Reporting only those contracts for \$5,000 or more, the OCIO asserts that the number of IT contracts has declined from 2,249 in 2003-04 to 1,595 in this fiscal year after climbing to 2,755 in 2006-07. These contracts include both consultants, who are independent contractors paid to deliver a product, and personal services contract workers, who are hired through an outside agency but are under the control of the state department who assigns them work.



## Pocket Guide to the Ralph C. Dills Act

Last published in 1996, the new edition includes recent developments relating to legislative approval of collective bargaining agreements; a discussion of new Supreme Court cases that recognize civil service law limits; and a new section on PERB procedures, including recent reversals in pre-arbitration deferral law.

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

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

### Contract Compliance

Last fall, IT workers represented by Local 1000 began poring over contracts to determine whether the agreements comply with state law restrictions on contracts for personal services. Within the last six months, the union filed challenges to 17 contracts before the SPB, which reviews the contracts for compliance with state law.

Results from past contract challenges before the SPB validate Local 1000’s claims. Since 2005, the union has requested review of 47 contracts for IT services. Although the SPB has not acted on the 17 recent cases, the board or its executive officer has issued 25 decisions. Eighteen contracts were found invalid, according to the union. In three cases, the board approved the contracts but ordered the agency to increase recruitment and retention efforts. It in-

dicated that it would not approve similar contracts in the future.

Local 1000 asked the SPB to place five contract challenges in abeyance while it worked with the State Compensation Insurance Fund to increase the number of civil service workers in SCIF IT positions. Pressure from the union already had led SCIF to cut contract workers by 32 percent in 2007, when a Department of Insurance audit found that the entity routinely had entered into long-term contracts with IT consultants and contract workers. In October 2007, the entity of 8,000 employees still had 200 IT consultants. The report helped convince SCIF to agree to hire 115 new IT employees during the transition this spring and summer to its new Vacaville data center. The agency agreed with Local 1000 to require outside contractors to train

employees and transfer necessary knowledge of IT systems to them.

### Savings Possible

Not only is contracting out IT work unlawful, says Local 1000, it also is costly. Based on the median rates paid to IT contractors and the median expense for salary and benefits of an IT employee, the typical cost to employ a contractor is over \$218,000 a year, while the state pays about \$99,000 annually for an employee, including payroll taxes. Just filling the current 1,050 IT vacancies, rather than using contract workers, would save the state \$125 million, the union calculates. It points out that the California State Teachers Retirement System decided in 2005 to cut back on contractors and hire IT employees. By February 2006, it had hired 14 civil service employees and was pro-

jecting a savings of \$800,000 for the 2005-06 fiscal year.

Again, a California Research Bureau report, "The State's Information Technology Hiring Process: Suggested Reforms," backs up the union's claim. Most departments acknowledged to the bureau that outside contractors cost 50 percent more than doing the work with civil service employees. If overhead

*IT classifications were established 'before the Internet achieved global importance.'*

costs for contract workers who work on-site were added, the cost of contracting out would be even higher. At the time the report was written, the average rate for an IT contractor was \$65 an hour, while the state paid IT employees \$34 to \$43 hourly including state benefits. Contractors with special skills charged the state at least \$150 an hour, and some more than \$200 hourly.

Local 1000 calls the contract expenditures "hidden government." To ensure that the legislature is aware of the extent and cost of contracting, Local 1000 is sponsoring A.B. 2603 (Eng, D-El Monte). The bill would require the state to report consultant and personal services contract expenditures in a manner similar to the way it now reports wages and salaries. Agencies

would be required to list the duration, category of services, and cost of the contract. Price information would include the number, cost, bill rate, and staffing levels associated with each type of contract employee retained during the most recently completed fiscal year. Agency reports would be sent to the Department of Finance, which would forward the information to the legislature. Another bill, S.B. 1331 (Oropeza, D-Redondo Beach), would require the governor's January budget to include nine items of information on current and proposed contracts for services.

The state Department of General Services has collected some of this information since 2003, but the union claims it is incomplete. Both Local 1000 and the OCIO based their claims on DGS information, but it is difficult to believe they are working from the same data. Whereas Local 1000 found an increase in the value of contracts from \$68 million to \$460 million, OCIO informed *CPER* that — excluding contracts for less than \$5,000 — the total dollar value of contracts has declined from \$1.342 billion in 2003-04 to \$744 million in 2006-07, and to \$439 million so far this fiscal year.

### **Workforce Reorganizing**

Chief Information Officer Teri Takai denies that she or the state employer has an agenda to outsource information technology work. The office, under her predecessor, Clark Kelso, issued a Strategic Plan Roadmap last November that acknowledged prob-

lems with the state's IT classification and hiring system. It pointed out that the classifications were established "before the Internet achieved global importance" and that the skills for an Internet-based service delivery approach are "not widely available in State service today." While knowledge of the old systems is being lost due to an unprecedented number of retirements, new employees are difficult to recruit because the state's hiring practices have placed the state at a competitive disadvantage compared to other employers.

The California Research Bureau report indicates that these problems have caused agencies to claim that they cannot obtain necessary skills from the civil service workforce. Managers complained to the bureau that the state's IT classifications were outdated, and that the recruitment and selection process was too slow to respond to their needs.

The OCIO and Local 1000 have been working together to remedy the situation. DPA and the union supported a 2006 law that allows the SPB to use skill-based certification to create an eligibility list for each vacancy instead of a single eligibility list for an entire IT classification. Applicants now can decide to complete tests for specific functions in the information technology field, such as network administration or customer technical support. Hiring managers can select candidates based on identifiable skills rather than attempt to find the right employee based on an examination of general IT knowledge.

The state and Local 1000 are involved in bargaining over a consolidation from 36 to 12 different classifications. The parties agree on the identification of 13 functional areas of expertise but are at odds over defining the level of work that current classes are performing. While the state claims Staff

Programmer Analysts, System Software Analyst IIs, and Information System Analysts operate at the first journey level, the union claims that they should be viewed and compensated as advanced journey employees. Bargaining on the issue continues this month. \*

fied them of the likely breakdown of the union's expenditures for the coming year. Based on review of the previous year's spending, the union advised that 56.35 percent of the fee was chargeable to fee payers for the costs of bargaining and representation of all employees in the unit. The remainder was for political or other unchargeable expenses. Fee payers had 30 days to object to collection of the full agency fee, in which case only 56.35 percent of the

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## **Inadequate Agency Fee Notice Given by SEIU Local 1000 for Special Election Assessment**

A union's special dues assessment required specific advance notice to agency fee payers and an opportunity for them to object to paying the non-chargeable portion of the assessment, a federal district court has held. Service Employees International Union Local 1000's September 2005 assessment was for such different purposes than its usual dues that its June 2005 annual agency fee notice, which did not announce the upcoming assessment, failed to adequately notify fee payers of the nature of the forthcoming expenditures. Collection of the assessment without a constitutionally adequate notice and opportunity to object violated fee payers' constitutional rights, the court held in *Knox v. Westly*. The union plans to appeal the decision.

### **Special Election Assessment**

In 2005, SEIU Local 1000 decided to assess a special temporary dues in-

crease to fight two initiative measures on the November ballot. One was Proposition 75, which would have required unions to ask their members for permission to spend dues on political campaigns. The union has a fair share agreement that allows it to collect fees from non-members, as well as dues from members, to defray representation and negotiation costs that are incurred for members and non-members alike.

The United States Supreme Court ruled in *Chicago Teachers Union v. Hudson* (1986) 475 U.S. 292, 68X CPER 1, that fee payers' First Amendment rights are violated when the union spends fees on political candidates or causes without giving the fee payers notice and an opportunity to object. In June 2005, Local 1000 issued its annual *Hudson* notice to agency fee payers that announced the fee amount for the following year, which came to 99.1 percent of member dues. It also noti-

## *The union imposed an 'Emergency Temporary Assessment to Build a Political Fight-back Fund.'*

monthly dues amount would be deducted from the objector's paycheck. Objectors also could challenge the union's calculation of chargeable expenses and have their challenge heard by an impartial decisionmaker.

On July 2005, the union proposed an "Emergency Temporary Assessment to Build a Political Fight-back Fund" for a broad range of political expenses "to defend and advance the interests of members of the Union and the important public services they provide." The proposal asserted that the fund would not be used for routine union expenses like rent and salaries. In August, union

delegates voted to impose the temporary dues increase of one-fourth of 1 percent of salary to create the fund. In a letter to members and fee payers, the union explained the assessment would be used to fight Prop. 75, to defeat an expected attack on pensions in June 2006, and to elect officeholders in November 2006 who would support public employees and services.

When one fee payer called to object to the extra amount, a union manager told him that he could not do anything to prevent the fee collection or its use for political purposes. The state controller began the additional deductions in September 2005.

A class action by objectors and non-objecting fee payers was filed against the union and the state controller in

November. The plaintiffs won a temporary restraining order against collection of the fees. But after considering legal briefs on the fee payers' motion for a preliminary injunction banning collection of the special assessment, the judge allowed the fee deductions pending final resolution of the case.

#### **Inadequate Notice**

The dispute between the union and the fee payers boiled down to the question whether the June 2005 agency fee notice provided an adequate explanation of the September assessment to support the collection of the special fees. The court explained that collection from non-union members of agency fees that will be used to fulfill the duties of an exclusive bargaining

representative is constitutionally permissible if the union provides fee payers notice of the basis of the fee, allows an opportunity to object to payment of the fee or to challenge the amount of the fee on the grounds that expenditures are not chargeable, and holds disputed fees in escrow while the fee is being challenged. To make an informed decision whether or not to object or challenge the union's determination of the chargeable amount, fee payers must have enough information to assess whether the fee is appropriate.

Only one other court has considered the *Hudson* obligation in relation to a special assessment. The court examined the rulings of that court when faced with dues and fee increases by the California Teachers Association for

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

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

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similar purposes. After CTA had issued its 2005 *Hudson* notice, it implemented an increase in dues and fair share fees that was earmarked largely to defeat several ballot measures. One measure would have lengthened the period for teachers gaining tenure. (See story in *CPER* No. 174, p. 35.)

The employee plaintiffs were fee payers and union members who had filed a motion for a temporary restraining order asking to have the entire amount of CTA's dues and fee increases placed in escrow. At that early stage of

*The union argued that it had not used the entire amount of the assessment for political purposes.*

the case, the federal court for the Northern District of California found that the burden on the objectors' free speech rights did not outweigh the First Amendment rights of non-objecting members, fee payers, and the union to spend their money for political causes. In addition, that court decided that it was not necessary for CTA to send out another *Hudson* notice because *Hudson* did not require advance detail of proposed expenditures. *Hudson* allowed calculation of fair share fees based on chargeable expenses in the previous year. The *CTA* court held that the in-

crease of about 10 percent was not so extraordinary that it required notice beyond that required in the *Hudson* case.

The *Knox v. Westly* court distinguished the magnitude of SEIU Local 1000's boost in fees from the 10 percent increase implemented by CTA. The union contended that the fee hike was only about 14 percent, comparing the percentage of salary collected from objectors before the increase to the percentage of salary deducted after the fee boost. But the court sided with the plaintiffs' calculation of the actual increase in fair share fees paid by objectors, an increase of at least 25 percent.

More important to the court was the purpose of the special assessment. From the beginning, the purpose was to raise funds for political purposes, the court observed. The union argued that it had not in fact used the entire amount of revenues from the assessment for political purposes, and that the assessment should therefore be treated as an ordinary dues increase. "This argument defies logic," the court admonished. "Following Defendants' reasoning, there could never exist an assessment for purely political purposes because it is quite likely that some small portion of such a fund would, from a practical perspective, always be chargeable." A union would be permitted, without repercussions, to pass an assessment for purely political purposes without notice to fee payers and an opportunity for them to object as long as it used a minute amount for a chargeable expense, the court pointed out. Rather

than look at the assessment "through a lens skewed by the benefit of hindsight," the court focused on the union's intent "to depart drastically from its typical spending regime" and shift its emphasis to political or ideological activities. Such a shift from the usual use of dues rendered the *Hudson* notice inadequate to protect the constitutional rights of objectors.

#### **Advance Notice**

The union protested that it should not be required to give advance notice

*The court focused on the union's intent 'to depart drastically from its typical spending regime.'*

of the chargeable and non-chargeable expenditures because prior cases require the fair share notice to be based on audited or independently verified expenses. It would be impossible to give fee payers a notice based on audited figures before the funds were spent, the union pointed out. The court was not persuaded. Advance notice is what *Hudson* requires, the court reminded the parties. Even though the Supreme Court has recognized that the notices ordinarily may be based on the prior year's financial records, this court's focus on the purpose of the no-

tice — an opportunity to object before one’s money is spent — led it to conclude that the usual method of calculating fair share fees was not the only constitutionally proper manner to prepare a notice. While using a prior year’s expenditures to calculate fees for the next year asks an employee “to compare one year’s apples to the next year’s apples,” the court explained, Local 1000 asked the employees to compare apples to oranges, an assessment that was not intended for the union’s usual operations.

The union emphasized the predicament it would be placed in if required to provide audited or independently verified expenditures to describe expenses that have not yet been made. But the court dismissed the union’s concern. Case law leaves it to the union, not an auditor, to allocate the expenses between the chargeable and non-chargeable categories, the court emphasized. The union could have issued a second notice “without estimating exact future revenue expenditures,” the court asserted. But its description of the method was not well-explained:

[T]he Union could have looked at the purpose of the Assessment and determined which of its major categories of expenses should be allocated to that fund. Those figures had been audited based on the prior year’s information, as is acceptable under *Hudson*. The burden is on the Union to put forth the TYPE of relevant expenditures.

The fundamental concept guiding its analysis, the court said, is adequate

information. Reducing fair share fees for objectors based on the chargeable amount in the 2005 notice does not alter the analysis since use of the prior year’s financial records was not adequate for the special assessment.

Even temporary use of the special fees for impermissible purposes followed by a rebate of the non-chargeable amount is a constitutional violation. Whether the amounts actually collected were less or more than the chargeable percentage of fees is irrelevant, the court said. The issue is whether employees were provided sufficient information to make a “forward-looking decision.”

The court ruled that the union must issue a new notice with an opportunity for fee payers to object and re-

fund fees, with interest, to those who file objections. It turned aside the union’s and controller’s assertion that those who did not object essentially consented to the union’s use of the special assessment. To have consented, the court reasoned, they must have been adequately informed of the facts. Since the notice did not inform them about the special assessment, they did not legally consent to the fees. The court did, however, limit the remedy to refund of the fees collected from September 2005 through June 2006. The plaintiffs had not challenged the 2006 or 2007 notices. (*Knox v. Westly* [3-28-08] 2:05-cv-02198-MCE-KJM, 2008 WL 850128.) \*

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## Legislature Considering Post-Employment Benefits Commission Recommendations

The legislature finally may be forced to create a new crime of disability pension fraud at the urging of the California Public Employee Post-Employment Benefits Commission. The commission’s seven recommendations for legislation are contained in two bills that have passed out of policy committees in the Assembly and Senate. The commission’s overriding advice to prefund retiree health benefits has not gained any traction, however. Since the commission made no recommenda-

tions to reduce these benefits, and the Public Employee Benefits Reform Act failed to qualify for the ballot by January 25, 2008, employee fears about dramatic reductions have subsided.

### Commission Formed

In the face of new accounting rules that apply to retirement health benefits, and a failed attempt to wipe out defined benefit retirement plans for new public employees, Governor Schwarzenegger established a commission last year to



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

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study unfunded liabilities for pension and retirement health benefits. The group was mandated to recommend to the governor and the legislature a plan to address the retirement obligations. "We must seek ways to meet these obligations while not harming other government programs and taxpayers or handing invoices to future generations." Schwarzenegger said at the time he issued his executive order.

Initially, state employee unions feared another attack on retirement benefits, but the inclusion of three union representatives and an officer of the Peace Officers Research Association of California on the 12-member board allayed those concerns. After a dozen meetings around the state to hear testimony from employee representatives, pension experts, and the Califor-

nia Foundation for Fiscal Responsibility — which proposed the most recent retirement benefit reform initiative — the commission issued its recommendations on January 7, 2008.

The commission's suggestions address both public employee pensions and other post-employment benefits (OPEB), such as retirement health care, vision, and long-term care plans. The overarching recommendation is to identify each public entity's financial liability for all retirement benefits, not just defined benefit pensions, and begin to prefund those obligations or decide on an alternative plan to deal with them. A new accountancy rule, Governmental Accounting Standards Board Standard 45, requires that public employers begin accounting for liabilities for post-employment benefits at the

time they are earned rather than when they are paid, as most public employers in California now do. The GASB requirement to identify OPEB liabilities was phased in so that larger entities were required to comply first, but all public entities are required to report their liabilities by December 15, 2008. (For main articles on implementation of GASB 45, see *CPER* No. 178, pp. 5-21; No. 184, pp. 5-14; No. 185, pp. 5-13.)

The commission made suggestions to limit sudden changes in employer contributions by lengthening the period of "asset smoothing" — calculating asset value gains or losses over a period of time — to reduce the effect of unusual rises and falls in market value on contributions. But, warned the commission, retirement systems should not change the asset-smoothing methods

for short-term purposes or allow contributions to fall to zero unless a system is substantially overfunded. The commission recommended certain principles for designing retiree health care plans and advised employers to coordinate plans with Medicare. It made numerous recommendations to improve transparency of benefit changes, increase accountability of fund trustees, and eliminate costly manipulations of retirement systems.

### Legislation Recommended

Seven of the commission's suggestions involved new legislation. In late January, the Senate and the Assembly introduced two bills that encompassed all of them: A.B. 1844, authored principally by the chair of the Assembly Public Employees, Retirement, and Social Security Committee, Edward Hernandez (D-West Covina); and S.B. 1123, authored principally by Patricia Wiggins (D-Santa Rosa), the Senate Public Employment and Retirement Committee chair. In March, the California Public Employees Retirement System voted to support both bills.

Assembly Bill 1844 would require reports of both pension and OPEB liabilities to the State Controller's Office, as well as timely publishing of the data. State law currently requires provision only of annual pension audits and financial reports to the controller's office, and the controller sometimes has delayed publishing the information. A.B. 1844 would require public retirement systems to submit audited

financial statements to the SCO within six months of the end of the fiscal year to avoid fines. It would also require agencies that offer other post-employment benefits to provide the controller with the actuarial valuation report required by GASB 45. The controller would be required to post both pension and OPEB data within 12 months of receiving it, and in no case later than 18 months after the end of the fiscal year.

### *Some local agencies have placed benefit changes on the consent calendar.*

The second bill, S.B. 1123, substantially rewrites an existing law to clarify reporting requirements and increase accountability of public officers for changes to a retirement benefit. The amendment to Government Code Sec. 7507 would not apply to school districts and county offices of education, which already are subject to stringent public notice requirements.

The commission found that, due to the process of collective bargaining, the public often is unaware an agency is considering changes to retirement benefits until a labor agreement is settled and the agency's governing board is ready to approve it. Some local agencies even have placed benefit changes on the consent calendar with-

out engaging in any public discussion of their rationale and the associated costs of the benefits. Many times, those responsible for recommending or approving changes to a retirement system have complained later that they did not understand the costs associated with the change. A major concern of the commission was that none of the existing public notice laws applies to non-pension retirement benefits.

The amended law would cover both pensions and OPEB. It would require that an actuary determine the future costs of a proposed benefit change, including any shift in the value of the accrued benefits and any additional accrued liability. The agency would be required to present the cost information at a public meeting at least two weeks before adoption of the benefit change. At this point, the item could not be placed on the consent calendar, and the actuary would have to attend the governing board's meeting to be able to answer any questions about future costs. As applied to the state legislature, the actuary's projection of future costs would be made public in policy and fiscal committee meetings. Once adopted, the chief executive officer of the governing board or the director of the state Department of Personnel Administration would be required to sign a statement acknowledging that he or she understood the current and future costs of the benefit change "as determined by the actuary."

The panel pointed out that there is no single source from which to obtain

a “second opinion” about actuarial assumptions or practices. To make sure that agencies have an independent source of reliable information on best practices in actuarial methods, the commission recommended formation of a six-member California Actuarial Advisory Panel. Each panel member would be an actuary, with one member appointed by each of the Teachers’ Re-

*The commission recommended formation of a six-member California Actuarial Advisory Panel.*

retirement Board, the Public Employees’ Retirement System, the University of California Board of Regents, the State Association of County Retirement Systems, the governor, and the legislature. If S.B. 1123 is enacted, the panel would be responsible for defining a range of model actuarial policies and best practices for public retirement systems, developing pricing and disclosure standards for benefit improvements, gathering model funding policies and practices, and providing advice and comments to retirement systems and public agencies. Staff of the SCO would provide support to the advisory panel.

**Crime Created**

A.B. 1844 would create a new crime of pension fraud. Sections would be added to the Teachers’ Retirement Law, the Public Employees’ Retirement Law, and the County Employees’ Retirement Law of 1937 to criminalize the provision of knowingly false information or the failure to disclose an important fact, whether to receive or assist another in obtaining a retirement benefit or to oppose an application for a retirement benefit. It would also be a crime to accept payment of a benefit and retain it with knowledge that one is not entitled to it. Violation of the new terms would constitute a misdemeanor punishable by up to a year in jail and/or a fine of up to \$20,000. The criminal court also could require the violator to repay unlawfully obtained benefits to the retirement system or otherwise provide restitution to a victim, in addition to paying a fine.

The bill would strengthen the ability of the retirement systems to investigate cases of suspected fraud by allowing PERS to obtain information from insurers to determine whether an individual is entitled to a benefit. PERS could also use information from the Employment Development Department when seeking remedies for retirement benefit fraud.

The criminal and investigative provisions included in S.B. 1123 were proposed long ago in the California Performance Review report and have been introduced several times since then. (See stories in *CPE* No. 174, pp.

49-50; No. 183, p. 62.) However, despite bipartisan support, they have never been enacted. Both A.B. 36 (Niello, R-Sacramento) and A.B. 545 (Walters, R-Oceanside) were held under submission last year while the commission report was pending. Although their provisions are also included in S.B. 1123, the two bills separately passed the Assembly and are being considered by the Senate.

*The bill would strengthen the ability of the retirement systems to investigate cases of suspected fraud.*

**Mandatory Prefunding Rejected**

Another bill that would have required the state and local agencies that contract with CalPERS for health benefits to begin prefunding OPEB liabilities by 2013 died in the Assembly. A.B. 2350 (Garrick, R-Carlsbad) would have gone beyond the recommendations of the commission. The commission emphasized that prefunding benefits reduces an employer’s long-term total cost because the investment returns on the money can fund future benefits. But the committee recognized that it would not have been practical to require all

public agencies to begin prefunding their non-pension retirement benefits immediately. A consultant for the Assembly PERS committee explained that the committee believed the issue of prefunding should be addressed in collective bargaining.

The governor did not propose prefunding of the state's \$48 billion OPEB liability in his budget. Although

most of the contracts covering the 21 state bargaining units are expiring at the end of this month, none of the public notices available so far mentions prefunding as a proposal for negotiations. If the governor wants to signal that he is serious about the importance of addressing unfunded liabilities, he will have to raise the issue soon. \*

negotiations process and avoided legislative oversight.

Under the Dills Act, economic provisions of collective bargaining agreements must be approved by the legislature before funds are appropriated for salary and benefit expenses. A recent state law, effective in 2006, requires DPA to notify the legislature of any side letters that will cost \$250,000 or more. "Implicit in this requirement is that any such side letter a department negotiates with a bargaining unit must

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## Audit Finds Questionable Union-Leave Side Agreement

Agreements between the Department of Justice and the California Statewide Law Enforcement Association for paid union leave created inefficiency, the Bureau of State Audits charged in its semi-annual report, "Investigations of Improper Activities by State Employees." There was no formal delegation of collective bargaining authority to DOJ by the Department of Personnel Administration, and the current DPA labor relations specialist handling the CSLEA contract was unaware of the leave agreements. The BSA also reported that the Department of Corrections and Rehabilitation has not cleared up a union leave mess that the BSA reported in September 2005.

### Payments Not 'Improper'

The memorandum of understanding between CSLEA and the state provides for two kinds of state-paid released time for union representatives. Currently, the contract allows autho-

rized union representatives to take paid leave totaling 1,700 hours for organizational matters. The MOU also provides full-time release for two union officers. The union does not reimburse the state for either of these categories of leave. Other released time is available, either by using leave from a bank of time donated by employees in the unit or if the union reimburses the state for additional leave.

The BSA revealed that DOJ had side-letter agreements with CSLEA that allowed additional DOJ employees to be released full-time for union work at DOJ's expense. DOJ employs about 700 of the 7,000 employees in the bargaining unit. The BSA indicated that the resulting \$2.37 million salary and benefit expense over 12 years was not improper, since prior DPA staff may have condoned the agreements. But the audit agency charged that the agreements caused inefficiency in the

*DPA did not delegate authority to the department for the purpose of the released time agreements.*

be provided to Personnel Administration so Personnel Administration can satisfy these disclosure and notification requirements," asserted the BSA in its April report.

From 1995 through 2007, DOJ entered several side-letter agreements for union released time even though DPA did not formally delegate authority over collective bargaining to the department for the purpose of the released time agreements. The BSA found no evidence that there was any formal notice to DPA of the agreements, and the current labor relations

specialist in charge of negotiations with CSLEA was unaware of the side letters. She knew only that DOJ had allowed one employee extra released time.

The BSA determined that the failure to notify DPA of the extent of the released time was inefficient. DPA is at a disadvantage in bargaining if it does not know the full range of benefits provided to a bargaining unit and

*The department had to ask the union for its records when the BSA requested an accounting.*

its union under an MOU, the BSA asserted. The audit agency also questioned why DOJ entered into an agreement in 2004 that lasted until 2007, when the collective bargaining agreement was set to expire in July 2005. That arrangement allowed CSLEA to secure a benefit before negotiations were concluded, BSA pointed out.

The side letters allowed full-time release for four employees over the course of 12 years. The employees retained full seniority rights, training, and career advancement opportunities while on released time. The BSA calculated the \$2.37 million cost of the extra released time by adding the sala-

ries of the released employees to a cost for benefit expenses that approximated an additional 32 percent of salary.

The BSA did not recommend demanding reimbursement from the union because DOJ insisted that DPA had known about the side letters. Therefore, said the audit agency, the union would be able to argue that DPA implicitly delegated authority to enter into the agreements. DOJ contended that the agreements did contribute to efficiency as the employees on released time helped to resolve potential labor disputes. The department has indicated it will not enter into similar agreements in the future.

#### **CDCR Still Inept**

The BSA continues to monitor departments where it has found inappropriate activities until improper expenditures are repaid or corrective action is taken. In September 2005, it found that CDCR had not accounted for union representatives' leave which should have been charged to a union released-time bank. The bank contains hours of leave that employees in the bargaining unit donate for use by the California Correctional Peace Officers Association.

The audit agency found at that time that the department did not track the leave hours which had been used. In fact, the department had to ask the union for its records when the BSA requested an accounting. CDCR had charged nearly 56,000 hours to the bank from May 2003 to April 2005, but missed nearly 11,000 additional hours

of leave taken by three employees. The cost to the state payroll was \$395,256. In addition, as at DOJ, the BSA discovered a side agreement that allowed the full-time release of an employee for union work without authority from DPA.

One year later, the Office of Inspector General found little improvement in the leave accounting system.

*Between September 2005 and December 2007, the cost of leave accounting errors totaled \$148,957.*

In a July 2006 report, the OIG found that department staff had yet to be trained in a new coding system which would accurately track different kinds of union leave. Again, there was no evidence that the department had authorized the use of thousands of hours of union leave. In some cases, union representatives on leave had reported that they worked on holidays and never took annual or sick leave, but no supervisor had verified the assertions.

This April, the BSA reported that the department, in 2006 and early 2007, still was not charging all the released hours of two employees to the leave bank, but had overcharged the bank for

another employee when attempting to retroactively correct balances. Between September 2005 and December 2007, the cost of leave accounting errors totaled \$148,957. Since the first investigation in May 2003, CDCR has failed to account for 14,807 hours of union leave at a total cost to the state of \$544,213. Stay tuned for future follow-up reports by the BSA. \*

# Higher Education

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## Employee's Return From Leave of Absence Is Proper Topic of Closed Session

In a case of first impression, the Second District Court of Appeal announced that the personnel exception to the Bagley-Keene Act permits the discussion of an employee's return from a leave of absence in closed session. In *Travis v. Board of Trustees of the California State University*, the appellate court affirmed the lower court's denial of CFA President John Travis's petition to make public the details of a CSU board of trustees' closed session during which the reinstatement of former CSU Chancellor Barry Munitz was discussed.

### Factual Background

Barry Munitz was CSU chancellor from 1991 until his resignation in 1997. When Munitz was hired, there was an executive compensation plan in place that offered certain CSU executives tenured professorship. While it was eliminated shortly after he was hired, the program still applied to Munitz and those hired before 1992. When he resigned as chancellor in 1997, to become president of the J. Paul Getty Trust, Munitz exercised his vested right to become a trustee professor. CSU granted him a yearly unpaid leave of absence that was renewed every year until 2005.

Munitz's career with the Getty was steeped in controversy, leading to his resignation in February 2006. He then informed the current CSU chancellor, Charles B. Reed, that instead of renewing his yearly leave of absence, he intended to return to CSU as a trustee professor. In anticipation of publicity

*Reed felt that a closed session would best facilitate candid questions.*

surrounding Munitz's return, Reed added the topic to the next board of trustees meeting as a closed session item. According to Reed, the purpose was to inform the trustees of Munitz's return before they learned of it in the press, and to advise the board that there would be a press release announcing Munitz's return. Reed felt that a closed session would best facilitate candid questions from the trustees.

One month after the closed session, Munitz gave formal notice that he intended to return to CSU. Reed re-

plied with a letter setting forth Munitz's duties as well as informing him of his \$163,776 salary.

### Bagley-Keene Act

The Bagley-Keene Open Meeting Act, codified at Gov. Code Secs. 11120 et seq., mandates open meetings for California state agencies, boards, and commissions. Its stated purpose is to ensure that Californians are informed of, and maintain control over, the agencies that serve them. Enacted in 1967, the Bagley-Keene Act extended the open meetings requirements set forth in its predecessor, the Ralph M. Brown Act, which applies to local agencies. For this reason, many provisions in Bagley-Keene parallel those in the Brown Act. For example, both acts contain exemptions for meetings regarding personnel matters. Specifically, Sec. 11126(a)(1) of the Bagley-Keene Act states:

Nothing in this article shall be construed to prevent a state body from holding closed session during a regular or special meeting to consider the appointment, employment, evaluation of performance, or dismissal of a public employee or to hear complaints or charges brought against that employee by another person or employee unless the employee requests a public hearing.

### Appellate Court Discussion

There was no dispute that the CSU board of trustees is a state body, or that it held a "meeting" for purposes of the act. Ordinarily, then, the trustees are

required to hold open meetings unless an exception applies. At issue here, the court explained, was whether the closed session was proper under the act's personnel exception.

Travis contended that the term "employment" should be narrowly construed to mean only the initial decision to employ someone. Because Munitz's employment was determined when he achieved the vested right to the trustee professorship, Travis insisted that the board had no need to reach a decision on whether to employ him. However, the trial court agreed with CSU and found that the term "employment" included matters related to Munitz's employment.

The Court of Appeal observed that while the personnel exception in Bagley-Keene has not been addressed

in any reported court decisions, the Brown Act includes virtually identical provisions, and several court decisions have construed other aspects of its personnel exception. While none has directly addressed what it means to "consider employment" of a public employee, the court noted that prior analysis of the statute's other language was helpful.

Citing *Pasadena Metro Blue Line Construction Authority v. Pacific Bell Telephone Co.* (2006) 140 Cal.App.4th 658, the court noted that the fundamental rule of statutory construction is to ascertain the intent of the legislature in order to effectuate the purpose of the law. The court explained that it must first look to the words of the statute to give effect to the usual, ordinary import of the language, while taking care

not to render any language mere surplusage. With respect to the personnel exception in both acts, the court cited *San Diego Union v. City Council* (1983) 146 Cal.App.3d 947. In that case, the Third District Court of Appeal advised that the exception should be "strictly and narrowly construed and will not be extended beyond the import of [its] terms."

Travis contended that a strict and narrow reading of the personnel exception, in context with other Bagley-Keene provisions, requires one to construe the phrase "to consider the appointment [or] employment" of a public employee as nothing more than the initial act of hiring. In support of his assertion, Travis compared the personnel exception to Sec. 11125.2, which requires a state agency that has met in

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closed session to report publicly any action taken to appoint, employ, or dismiss a public employee; and to Sec. 11121.9, which requires state agencies to provide a copy of the Bagley-Keene Act to each new member “upon his or her appointment.” Travis argued that, taken together, these provisions demonstrate that when the legislature uses the word “employment” in the personnel exception, it refers specifically to “hiring.”

The Court of Appeal disagreed. According to the court, the sections Travis cited apply only when action is taken to hire a new employee or appoint a new member to a state agency. On the other hand, Sec. 11126 permits a closed session when the state body is doing nothing more than considering the employment of an employee regardless of whether it takes any action at that time. The court cited *Lucas v. Board of Trustees* (1971) 18 Cal.App.3d 988, in which the Third District Court of Appeal held that the Brown Act’s personnel exception includes the power to both consider and act in closed session. The court reasoned that had the legislature intended to limit the personnel exception to the initial hiring decision, it could have inserted language stating that closed sessions were proper when a state body meets to consider “whether to employ.”

Additionally, Travis argued that the trial court’s interpretation of “employment” renders the other aspects of the exception mere surplusage. Travis contended that by extending “employment” beyond initial hiring, it inappropriately

encompasses the remaining reasons for holding a closed session: evaluating job performance, considering and imposing discipline, and termination. The court conceded that the argument would be true were the phrase “consider the... employment” construed to include all matters related to a public employee’s employment after he is hired. However, it rejected Travis’ argument as inaccurately framing the issue. Rather, the court defined the issue

*The court rejected  
Travis’ argument  
as inaccurately  
framing the issue.*

as “whether Munitz’s return from his leave of absence warranted a closed session in order to consider his employment with CSU.”

The court cited *Duval v. Board of Trustees* (2001) 93 Cal.App.4th 902, in support of its interpretation. In that case, the court considered whether the Brown Act’s personnel exception extended to a closed session to discuss the evaluation of an employee’s performance when the employee already had received a formal performance evaluation. The *Duval* court extended the provision’s meaning beyond the formal “performance evaluation” to include “all employer consideration of an employee’s discharge of his or her job duties.” The court ex-

plained that the personnel exception was intended to permit candid discussion in closed session and nothing in the language indicates intent to limit discussion to formal performance evaluations. The court in *Duval* went further and held that “evaluation of performance” also includes consideration of the criteria and process of the evaluation as well as preliminary matters involving performance evaluation.

The Court of Appeal found California Attorney General opinions, while not controlling, to be instructive. In 1976, the Attorney General interpreted the term “employment” in the Brown Act’s personnel exception — which at the time did not include a performance evaluation exception and permitted closed session only to consider appointment, employment, or dismissal of a public employee — to include all personnel matters relating to an individual employee and “not simply matters relating to initial employment or final discharge.” The court pointed to the Attorney General’s observation that the purpose of the personnel exception is to spare public employees the undue publicity and embarrassment that may emanate from an open meeting about their employment. In another opinion, the Attorney General explained that “employment” should be construed to include discussions of an employee’s workload.

Considering these opinions together with the court decisions, the *Travis* court reasoned that “a more flexible interpretation of ‘employment’ is permitted when it is consistent with the

purposes of both the Brown Act and the personnel exception.” The court considered this to be such a case.

The court observed that a return from a leave of absence is “at least a cousin of the initial hiring decision” because it may affect the agency in the same way that a new hire might with respect to administrative and organizational concerns. Additionally, the court noted that a discussion of an employee’s return from a leave of absence may include sensitive and personal matters involving the reasons for taking the leave and returning from it. The court noted that under the California Family Rights Act, CSU is obliged to provide leaves of absences to employees who suffer from mental or physical illness. The court criticized a rule that would publicize discussions of an employee’s physical or mental health as contrary to the legislature’s intent when the exception was created. Thus, the court held, in light of the legislature’s intent to shield employees from undue publicity and embarrassment, the personnel exception to the Bagley-Keene Act includes discussions about an employee’s return from a leave of absence.

The court rejected Travis’ arguments that the board’s closed session was improperly held in an effort to manage the public relations issues surrounding Munitz’s return and to discuss concerns about the executive compensation program that permitted Munitz to return at a salary much greater than that of regular CSU professors. The court noted that were

Travis’ assertions correct, the closed session would have been improper under the personnel exception. However, applying the substantial evidence rule, the court took Chancellor Reed’s reasons for holding the closed session at face value and declined to speculate that

anything more than a discussion regarding the sensitive nature of the accusations against Munitz and his fitness to return to CSU were discussed. (*Travis v. Board of Trustees of California State University* [2008] 161 Cal.App.4th 335.) \*

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## UCOP Hires New President, Presents Plan to Cut Workforce by 23 Percent

In the wake of a widely publicized executive compensation scandal in 2006, the U.C. Office of the President has been struggling to regain its swagger. Despite the distinction of being among the most influential administrative offices in higher education, lately UCOP has endured criticism from several fronts for what has been perceived as inefficient and ineffective administration that often lacks transparency.

The latest announcements of a new president and an ambitious proposal to streamline UCOP are the first of what may be many steps towards UCOP’s effort to regain its position of authority and effectiveness.

### U.C.’s New President

Fallout from the mishandling of executive compensation has been far reaching. As a result of his involvement, U.C. President Robert Dynes’ authority weakened, while the regents’ intervention has increased. In August 2007, Dynes announced his intent to step down, effective June 2008. University Provost and Executive Vice President

Wyatt R. (Rory) Hume took over the chief executive officer duties until recently, when the regents named Dynes’ replacement.

On March 27, the board voted unanimously to appoint University of Texas Chancellor Mark Yudof as the new U.C. president. One week later, it was announced that he would take office on June 16. Yudof was a long-time faculty member, dean, and provost at U.T. before he left the system to become president of the University of Minnesota. After serving in Minnesota for five years, he returned to U.T. as chancellor in 2002.

U.C. shared an extensive list of Yudof supporters who praised his experience and leadership. However, his appointment did not come without some of the same criticisms that have plagued U.C. for the past several years.

### Yudof’s Salary

According to U.C., the University of Texas paid Yudof a base salary of \$528,860. However, combined with other components, Yudof’s total yearly

compensation there was estimated at \$740,000. A 2007 *Chronicle of Higher Education* survey ranked Yudof as the sixth-highest-paid leader of a public university.

In the announcement of his appointment, U.C. stated the base salary would be \$591,084, and his total yearly compensation, which includes executive “perks” like a vehicle allowance, would be valued at \$828,000. However, as U.C. noted, the compensation numbers do not include standard retirement contributions, and varied reports have placed his actual salary closer to \$925,000. The base salary alone makes

*Blum defended Yudof’s salary as ‘expensive, but worth it.’*

Yudof California’s highest-paid state employee, according to the *Sacramento Bee’s* state workers’ salary database. Notably, the database lists former president Dynes’ total compensation at \$434,166 last year.

Board of regents and presidential search committee chair Richard C. Blum defended Yudof’s salary as “expensive, but worth it.” Blum also expressed a desire to avoid a bidding war with U.T. However, some questioned whether the relatively speedy search and appointment process was the best way to find a qualified, yet affordable,

leader. According to a report published by *Inside Higher Ed*, Blum took control of the selection process to the detriment of the open and inclusive environment U.C. has been hoping to foster. It was reported that Blum identified Yudof as his candidate of choice and pursued him aggressively, to the exclusion of interviewing other potential candidates. He also reportedly negotiated with Yudof for several weeks and lobbied other regents to support him.

U.C. has had a policy governing the presidential selection process since 1996. It was revised in August 2007, when Dynes announced that he would be stepping down. The policy generally requires “consultative practices” in presidential searches that includes working alongside constituent groups of the university. Even if no specific provisions of the policy were violated, Blum’s alleged unilateral tactics would be contrary to the spirit of the policy.

#### UCOP Cuts

There is hope that after spending so much to entice Yudof to join U.C., his expertise ultimately will lead to a more efficient and less costly administration. With the release of the proposed state budget and the Legislative Analyst Office’s recommendations, U.C. has been scrambling to make ends meet. Yet, it seems unavoidable that student fees will increase and “overhead,” including labor costs, will have to be reduced. Even Yudof, who leaves a legacy at U.T. after he successfully transferred control over student fees from the leg-

islature to the university, admits that an increase is a very real possibility.

But a student fee boost is only one part of the larger solution to improving budget woes and inefficiency. The same day Yudof was presented to the regents for their approval, University Provost and Executive Vice President Hume presented a plan to streamline UCOP and cut spending by 20 percent.

The proposed \$51.66 million reduction is part of the appropriations request for the 2008-09 fiscal year. The expenditure reductions are the result of the elimination of programs and their transfer out of UCOP, anticipated sav-

*Even Yudof admits that a student fee increase is a very real possibility.*

ings from the Voluntary Separation Program, and reallocation of unused funds from previous years.

The VSP was announced in November 2007, and employees were given a January 31, 2008, deadline to decide whether to participate. As part of the program, participants will receive severance pay depending on their employment classification. The university also has offered a “two-day career transition workshop to be conducted prior to August 31, 2008, on dates determined by the University.” As of the

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

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

January 31 deadline, 250 of the 1,749 FTE UCOP employees had expressed an interest in the VSP. Those employees will have until May 31 to give formal notice of their last day of employment. The budget proposal suggested that the VSP will result in at least \$1.5 million in permanent savings.

UCOP proposes to further reduce the workforce by 23 percent through program eliminations and reductions, as well as transfers of programs out of UCOP. The 23 percent reduction amounts to 404.74 FTE positions, including the elimination of six senior management group positions. In total, 179.39 FTE positions will be eliminated and 225.35 FTE positions will be transferred. The eliminations will cut UCOP spending by \$25.4 million,

while the transfers will account for a \$26.3 million reduction.

Recently, UCOP informed the Coalition of University Employees, which represents clerical workers at UCOP, that it has defined 46 separate departments as layoff units. Definition as a layoff unit does not necessarily mean the department will suffer layoffs. However, the current CUE-U.C. contract requires such definitions before determining potential layoff/reduction time plans.

During the restructuring, UCOP has implemented a vacancy control program. The office makes a point of differentiating the program from a traditional hiring freeze. Under the program, vacant positions will be carefully reviewed to determine whether they are critical to UCOP.

In his proposal, Hume emphasized that UCOP has grown too large to operate as effectively as it could, and he suggested that significantly reducing UCOP's scope and cost of operations would strengthen its ability to serve its purpose. Even as a new president, Yudof agreed with the effort to downsize UCOP and expressed that the proposal was one of the reasons he was attracted to the position. While he admitted that he had not yet gained sufficient knowledge of the situation, Yudof said, "I do have a sense...that there are too many people at the system."

Hume presented a revised organizational structure to the regents at their May meeting, and much of the restructuring process is expected to be complete in March 2009. \*

## Food Service Workers at U.C. Davis to Become University Employees

After a five-year process, food service workers at the University of California, Davis, are now eligible to become campus employees. Davis' contract with Sodexo to provide employees for campus eateries is the last of its kind in the U.C. system. But in the coming months, 175 to 200 non-management employees, as well as 400 Sodexo-employed student workers, will be eligible to transition into U.C. employment.

*The U.C. Davis chancellor faced increasing pressure from campus and community leaders.*

The announcement came as U.C. Davis Chancellor Larry Vanderhoef faced increasing pressure from campus and community leaders, as well as prominent national figures like former President Bill Clinton, to hire the workers as university employees. In a written statement, Assemblyperson Lois Wolk (D-Davis) called it a "win-win solution to a problem that has divided the campus for too long."

The campus's contract with Sodexo runs to 2010. Until then, Sodexo will continue to employ the managers and operate the food service facilities under a management contract. U.C. Davis estimates that directly hiring Sodexo workers will cost an additional \$2 million. Some of the added expense will be passed on to students. It is unclear whether some of the working relationships with Sodexo will continue after the contract expires, or if the entire food services operation will be brought in-house.

The transition to U.C. employment was strongly supported by AFSCME, Local 3299, which represents approximately 3,000 employees on the Davis campus and 20,000 employees statewide. The union is currently negotiating its service and patient care technician contracts with the university. The U.C. Davis food service workers will automatically gain AFSCME representation and will be folded into the service unit's contract upon the completion of their U.C. hiring.

### Transition Timeline

The transition from Sodexo employment to U.C. Davis is expected to take nine to twelve months. Kevin Christensen, lead researcher for the AFL-CIO Center for Strategic Research, worked closely with AFSCME organiz-

ers on the Davis campus. He told *CPER* that the workers are pleased that the administration has made the decision to hire its food service workers. However, there is concern over the length of time that it will take to complete the process. Christensen called this timetable "preposterous" in light of how long similar transitions took at other U.C. campuses.

In 2003, U.C. Santa Cruz transitioned their contracted-out food service employees into direct employment from Sodexo. The transition came after the campus's contract with Sodexo expired. It took six months to complete. The Santa Cruz campus also hired the managers as

*The transition is expected to take nine to twelve months.*

university employees, thus completely ending its relationship with Sodexo.

In 2006, U.C. Irvine transitioned its food service employees, formerly employed by Aramark, in nine months. However, as AFSCME organizer Max Alper told *CPER*, there were complexities at the Irvine campus that made it more difficult than the transition at Santa Cruz. The groundskeepers at the Irvine campus were also seeking direct employment, and the food workers demanded that U.C. include the groundskeepers in the direct hire agree-

ment. The university refused, and ultimately only the food service employees were transitioned. The groundskeepers were able to follow one-year later. Adding to the difficulty of that transition was the existing contract U.C. Irvine had with Aramark. There, the campus decided to institute a management contract, and Aramark continues to employ the managers and operate the dining facilities.

### *Issues of job security and benefits remain complicated.*

The interim associate vice chancellor of human resources at U.C. Davis, Karen Hull, is chair of the committee overseeing the transition. She told *CPER* that because this is a new experience, the committee benefits from drawing on the experiences at other U.C. campuses, as well as Sodexo's experience working with campuses across the country. Hull explained that the university has a transition strategy which extends over nine months, broken into three-month blocks, to allow for "fine tuning" of the schedule and process. Within the transition committee are eight subcommittees that will address specific complexities of the transition. The committees consist of Sodexo staff and U.C. Davis staff from human resources, student affairs, and accounting.

### **Other Concerns**

AFSCME and the food service employees are concerned that some details of the transition will be more difficult than others. While the transition itself is mostly administrative, issues of job security and benefits remain complicated.

It is not yet clear whether every worker employed by Sodexo will become a university employee. The university has more stringent requirements than Sodexo, including background checks. Christensen said that in the past, AFSCME has had no problem getting interested workers hired with the university. The university has expressed that it intends to employ all incumbent workers. However, reports that workers' positions are not guaranteed through the transition have created some unease with employees.

Hull told *CPER* that a worker's inability to produce an employment eligibility verification — an "I-9 card" — would preclude the worker from transitioning into U.C. employment. She also pointed out that certain workers will go through background checks as their job position dictates. Hull further stated that an employee who otherwise can be employed by U.C. Davis will be deemed to be qualified for the position by virtue of having performed the job for Sodexo. While the university has not yet mapped out its needs with respect to the number of positions and specific jobs, Hull said that current Sodexo employees will not be competing with new hires. If the campus de-

termines that it requires additional employees, only then will it open the positions to outside applicants.

Of further concern are details regarding seniority, retroactive pay increases, and pension credits. Because the systemwide contract is being negotiated while the transition is in its earliest stages, it is difficult to know what provisions will be included in the bargaining agreement and their role in the

### *Sodexo employees will not be competing with new hires.*

transition. At U.C. Santa Cruz, a side letter placed workers in the university's salary scale based on years worked at the campus, even if it was time worked for the outside contractor. Seniority was based on position in the salary scale. However, pension credits began to accrue on the date of the transition, and while retroactive pay was an item of negotiation, it was not part of the transition agreement.

At the U.C. Irvine campus, food service workers were considered new employees as of the date of the transition. Thus, all workers began at the bottom of the salary scale and had no seniority. Hull stressed that at Davis, seniority would play a role in the transition, but the campus has not yet decided where the transitioned employees will fit within the pay scales.

Christiensen told *CPER* that AFSCME and the workers feel strongly about receiving recognition for the time spent working at the Davis campus. The details of such recognition, he said, will be addressed as systemwide contract negotiations with U.C. continue. The union is asking the university to apply retroactive pay provisions — should there be any in the new contract — to the newly transitioned workers. However AFSCME is not confident that U.C. will acquiesce, nor that there would be sufficient funds to do so. Said Alper, “It’s probably all gone to profits.” \*

# Discrimination

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## California Supreme Court Limits Employees' CFRA Rights

In a blow to California employees seeking protection under the state's Family Rights Act, the California Supreme Court ruled in a split decision that employers are not required to have a health care provider chosen by the parties determine an employee's entitlement to medical leave prior to discharging the employee. In *Lonicki v. Sutter Health Central*, the court also held that the fact an employee during a period of medical leave continued to perform a similar job for another employer does not conclusively establish the employee's ability to do the job for the original employer.

### Background

Antonina Lonicki was hired by Sutter Health Central to work in the housekeeping department. In 1989, she became a certified technician. In June 1997, when the hospital became a level II trauma center, Lonicki's workload increased and her job became more stressful.

When Lonicki arrived at work for her 8:00 a.m. shift on July 26, 1999, her supervisor, Pat Curtis, told her that her new shift would run from noon to 8:30 p.m. Curtis denied Lonicki's request for a vacation and Lonicki left in tears. She later called to say that she was too up-

set to work. Curtis told her to get medical authorization for her absence. Lonicki brought a note to her employer from a family nurse practitioner stating that she needed a one month leave of absence "for medical reasons."

A week later, the director, Steve Jatala, told Lonicki to see Dr. Michael Cohen, an occupational physician.

### *Lonicki had a part-time job with nearly identical duties at another hospital.*

Lonicki saw Dr. Cohen and, after talking to her for two or three minutes, Dr. Cohen concluded that Lonicki was able to return to work without restrictions. Jatala told Lonicki to return to work on August 9 or be dismissed.

Lonicki began treatment with a psychologist on August 12, 1999. Jatala called her on August 17 and asked her when she was returning to work. Lonicki told him her doctor advised her to stay off work until at least August 27. Jatala then wrote Lonicki a letter

stating he would allow her paid time off, but that she had to return to work on August 23. Lonicki received the letter on August 24.

On August 26, a psychiatrist who Lonicki consulted wrote her a note stating that she "was disabled by major depression," that her symptoms were "work-related," and that her medical leave should be extended to September 26. When Lonicki brought the note to Jatala the next day, he told her to report to the human resources department. There she was informed that she had been fired for failure to appear for work on August 23 and 24.

During the time Lonicki claimed she was unable to work at the hospital because of her medical condition, she had a part-time job with nearly identical duties at another hospital. The other facility was not a trauma center and, according to Lonicki, the work there was "a lot slower" and it did not get "bad cases."

Lonicki filed a law suit in which she claimed that the hospital violated the CFRA by terminating her and by failing to follow CFRA procedures to determine the validity of her medical condition. The trial court dismissed her case and Lonicki appealed. The Court of Appeal affirmed the dismissal and the Supreme Court granted Lonicki's petition for review.

### Relevant CFRA Provisions

The CFRA, Government Code Secs. 12945.1 and 12945.2, allows up to 12 weeks of unpaid medical care



leave when an employee's "serious medical condition...makes the employee unable to perform the functions of the position." A serious medical condition includes a physical or mental condition that involves "continuing treatment or continuing supervision by a health care provider."

The employer may require the employee to submit a certification by the employee's health care provider which, according to the act, "shall be sufficient" if it includes the date the condition started, the probable duration of the condition, and states that the employee is unable to perform the functions of his or her position due to the condition.

Section 12945.2 provides that if the employer has reason to doubt the validity of the certification, the employer "may require, at the employer's

expense, that the employee obtain the opinion of a second health care provider, designated or approved by the employer." If there is a difference of opinion between the two health providers, "the employer may require, at the

*The employer may  
require the opinion  
of a second health  
care provider.*

employer's expense, that the employee obtain the opinion of a third health care provider, designated or approved jointly by the employer and the employee." The opinion of the third health

care provider is binding on the employer and employee.

### Supreme Court's Opinion

#### *Additional health care providers.*

The central issue on appeal was Lonicki's argument that, because the hospital did not seek the opinion of a third jointly agreed upon health provider, it was barred from challenging Lonicki's claim that she suffered from a serious medical condition that made her unable to do her job.

The court found the statutory language unambiguous and was not persuaded by Lonicki's argument. "Here, the pertinent statutory language does *not* require an employer faced with two conflicting health care provider opinions to obtain a binding decision from a third health care provider, and it does *not* say that an employer who fails to

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obtain such a decision will be barred, in litigation with the employee, from claiming that the employee did not suffer from a serious health condition making the employee unable to work,” said the court. “What the statutory language denotes is a legislative intent to offer the employer a choice of obtaining or not obtaining a binding decision from a third health care provider, if there is a difference of opinion between plaintiff’s health care provider and the one designated by the employer.” The

*‘The lead opinion reads ambiguity into a fairly clear statute,’ noted Justice Moreno.*

relevant section “simply states that an employer *may* resort to that remedy,” said the court, noting that “‘shall’ is mandatory and ‘may’ is permissive.”

Justice Carlos Moreno, the only justice to dissent from this part of the court’s opinion, argued that “an employer who fails to obtain a second or third opinion as to an employee’s medical condition is bound by the opinion of the employee’s health care provider, assuming that opinion contains the information required by the statute.” Justice Moreno pointed to the language that a certification by the employee’s health care provider “shall be sufficient”

if it includes certain specified information. The meaning of those words, in the context of the entire statute, implies that an employee who presents a certificate is entitled to medical leave, unless the employer has reason to doubt the validity of the certification. In that case, the employer “may” seek a second opinion, and a third opinion if the first two opinions conflict.

“The lead opinion reads ambiguity into a fairly clear statute and determines that an employer may simply ignore the procedures set forth in section 12945.2 and deny a validly certified medical leave without obtaining a second or third opinion,” noted Justice Moreno. “To arrive at this conclusion, it relies a great deal on the use of the word ‘may’ in the statute.” This reliance is misplaced, he argued. The legislature used the word “may” here, he said, because “it would make little sense for the government to *require* an employer who has reason to doubt an employee’s certification to obtain a second or third opinion.”

Further, said Justice Moreno, “what is left unsaid in the statute is at least as pertinent as what is said.” “After going into detail about what an employee must do to obtain certification of a serious health condition and what an employer can do to contest it, one would think Congress or the Legislature would have at least mentioned that the employer could essentially ignore the certification and the second/third opinion remedies and refuse the medical leave request,” he explained. “That

no mention is made of this option must be attributed not to faulty legislation but to the fact that Congress and the Legislature never intended it.”

The majority did not find Justice Moreno’s reasoning persuasive. It noted that the words “shall be sufficient” are found in subdivision (k)(1) of Sec. 12945.2 which has “nothing to do with the third health care provider.” It reasoned that the purpose of those words is to limit the type of information that an employer can require an employee to submit in a certification. The majority also argued that Justice Moreno’s interpretation would bar employers “*in all cases*, from litigating an employee’s entitlement to medical leave,” whether it used a third health care provider or not. Surely, reasoned the court, if the legislature meant “to take such a dramatic step” it would have said so more explicitly.

The majority found support for its position in several federal cases interpreting identical language in the federal Family and Medical Leave Act.

The majority summarized its ruling as follows:

Under both the CFRA and its federal counterpart, the FMLA, an employee is entitled to medical leave when, because of a serious health condition, the employee cannot perform the assigned job’s duties. If an employer doubts the validity of such a claim, nothing in either law precludes the employer from denying the employee’s request for medical leave and discharging the employee if the employee does not come to work.

Of course, an employer embarking on that course risks a lawsuit by the employee and perhaps a finding by the trier of fact that the employer's conduct violated the employee's rights under either the CFRA or the FMLA, or both, by denying the requested medical leave. To avoid such risks, the employer can resort to the dispute-resolution mechanism provided for by both laws.

## *The relevant inquiry is whether she can do her job at the defendant's hospital.*

### ***Effect of Alternate Employment.***

The majority overruled the Court of Appeal's holding that an employer must grant CFRA medical leave only if the employee is unable to perform the essential job functions "generally, rather than for a specific employer." It found no support for that reading of the statute. Rather, it agreed with Lonicki "that the relevant inquiry is whether a serious health condition made her unable to do her job at defendant's hospital, not her ability to do her essential job functions 'generally'...."

The majority relied on *Stekloff v. St. John's Mercy Health Sys.* (8<sup>th</sup> Cir. 2000) 218 F.3d 858, a case interpreting the FMLA. In that case, a psychiatric

nurse who claimed she could not perform the duties of her position because of a serious medical condition was working part-time for a different employer. The Court of Appeals in *Stekloff* explained that "the inquiry into whether an employee is able to perform the essential functions of her job should focus on her ability to perform those functions in her current environment."

While the ability to perform the functions of a similar or identical position for another employer may be evidence of her ability to do her job, it is not conclusive, said the court.

When a serious health condition prevents an employee from doing the tasks of an assigned position, this does not necessarily indicate that the employee is incapable of doing a similar job for another employer. By way of illustration: A job in the emergency room of a hospital that commonly treats a high volume of life-threatening injuries may be far more stressful than similar work in the emergency room of a hospital that sees relatively few such injuries. Also, the circumstance that one job is full time whereas the other is part time may be significant: Some physical or mental illnesses may prevent an employee from having a full-time job, yet not render the employee incapable of working only part time.

Justice Ming Chin, joined by Justices Marvin Baxter and Carol Corrigan, dissented from this portion of the opinion. "The words of the CFRA and the legislative history sup-

port the view that the Legislature did not intend an employee to be able to take advantage of the medical leave policy in order to further her own employment goals," he wrote.

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

Plaintiffs' attorneys are disappointed in the decision because it will make it more difficult for employees to benefit from the CFRA. "While the court correctly ruled that performance of similar duties for one employer does not conclusively establish that an employee could also do similar work for a different employer, the court's ruling with respect to the medical certification process is flawed," said Patricia Shiu of the Legal Aid Society – Employment Law Center, one of the entities filing a friend of the court brief in the case on behalf of Lonicki. "By allowing employers to ignore the medical certification process which was designed precisely to allow health care providers to determine the need for and extent of leave, the court's holding will lead to unnecessary litigation about the adequacy of medical certifications that have not been ultimately decided by a third opinion and deprive employees of their right to ascertain in a timely manner whether their leave is medically necessary." (*Antonina Lonicki v. Sutter Health Central* [4-7-08] No. S130839 \_\_\_ Cal. 4th\_\_\_, 2008 DJDAR 4917. \*

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## U.S. Supreme Court to Rule on Scope of Retaliation Under Title VII

The United States Supreme Court has agreed to review a federal appeals court decision that raises the following question: Whether, or to what extent, the anti-retaliation provision of Title VII of the 1964 Civil Rights Act protects an employee from dismissal because she cooperated with her employer's internal investigation of sexual harassment?

Vicky Crawford, while employed by the Metropolitan Government of

### *Metro fired Crawford and three other employees who cooperated with the investigator.*

Nashville and Davidson Counties, Tennessee, met with one of the employer's human resource representatives investigating suspected sexual harassment by the Metro school district's employee relations director. During the meeting, Crawford told the investigator that she and other female employees had been sexually harassed by the director. Metro fired Crawford and three other employees who cooperated with the investigator.

The Sixth Circuit Court of Appeals ruled that Crawford was not protected by Title VII's anti-retaliation provision because she did not engage in "active, consistent opposition" to the harassment and no charge was pending with the Equal Employment Opportunity Commission at the time Crawford told the investigator about the harassment.

At the invitation of the Supreme Court, the Justice Department urged the court to review the decision of the appeals court. In its brief, also signed by the general counsel of the EEOC, the solicitor general argued that the Sixth Circuit misconstrued the retaliation clause in such a way so as to leave

employees who cooperate with internal investigations at risk of retaliation with no remedy. If the decision were allowed to stand, said the DOJ, employees would be less likely to cooperate with investigations, and the preventive and deterrent purposes of internal corrective policies would be undercut.

The Supreme Court granted review on January 18, 2008, and briefing is in progress. "Friend of the court" briefs have been filed by the Department of Justice, the National Employment Lawyers Association, the Leadership Conference on Civil Rights, and the National Women's Law Center, among others. The date for oral argument has not been set. (*Crawford v. Metropolitan Government of Nashville and Davidson County* [1-18-08, cert. granted] No. 06-1595.)\*

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## Pending Federal Legislation Would Prohibit Sexual Orientation Discrimination

The Employment Non-Discrimination Act, H.R. 3685, sponsored by Representative Barney Frank (D-Massachusetts), would prohibit discrimination in employment based on sexual orientation. The bill passed the House last November by a vote of 235 to 184, 14 not voting, with 88 percent of Democrats voting for the legislation and 82 percent of Republicans opposing. It now is pending in the Senate. The act

would prohibit employers of 15 or more employees, including state and federal government employers, employment agencies, and labor unions, from discriminating on the basis of actual or perceived sexual orientation. It prohibits affirmative action, quotas, or preferential treatment based on sexual orientation and does not require employers to provide benefits to the employee or his or her domestic partner. Reli-

gious organizations and the armed forces are exempt from the law.

The enforcement powers and procedures are the same as those under Title VII of the Civil Rights Act. A plaintiff must file a charge with the Equal Employment Opportunity Commission prior to filing a lawsuit in federal court. Remedies for violations include injunctive relief such as reinstatement, back pay, compensatory damages, and attorneys' fees. Punitive damages are available except against a government employer. Unlike Title VII, ENDA would not allow an individual to bring a disparate impact claim. This means a plaintiff could not

claim an employer's facially neutral practice has a disproportionate adverse effect on individuals with a different sexual orientation.

H.R. 3685 differs from the bill originally introduced in April 2007, H.R. 2015, also sponsored by Representative Frank. The prior bill also prohibited gender identity discrimination. Gender identity was defined as "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth." H.R. 2015 faced stiff opposition and did not get out of committee. \*

cans, and 2 were independents. Of those voting against, one was a Democrat, Senator Harry Reid (D-Nevada). The rest were Republicans. Two senators did not vote: Senator John McCain (R-Arizona) and Senator Charles Hagel (R-Nebraska). Failure of the motion to proceed to a vote indicates that the bill will most certainly die.

The act would have amended Title VII, the Age Discrimination Act of 1967, the Americans with Disabilities Act of 1990, and the Rehabilitation Act of 1973 "to clarify that a discriminatory compensation decision or other practice that is unlawful under such Acts occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice, or for other purposes." \*

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## U. S. Senate Republicans Dash Hopes of Overturning *Ledbetter*

Senate Republicans blocked legislation that would have reversed the United States' Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.* (2007) 127 U.S. 2162, 185 CPER 61. In that case, the court held that the time limits for filing administrative complaints alleging pay discrimination are triggered by the last pay decision that demonstrated discriminatory intent, not the issuance of the last paycheck that reflects the discriminatory activity. The court reached this conclusion in the face of evidence that the plaintiff was not aware of the discriminatory decision until after the time limit had expired. Justice Ruth Bader Ginsberg dissented from the

majority decision and called on Congress to enact legislation reversing the court's ruling.

Representative George Miller (D-California) sponsored H.R. 2831, known as the Lilly Ledbetter Fair Pay Act of 2007. It passed the House by a vote of 225 to 199, with nine lawmakers not voting, and was shepherded through the Senate by Senator Edward M. Kennedy (D-Massachusetts.) On April 23, 2008, at a vote on a motion to end debate and proceed to a vote on the legislation, 56 voted for the motion to go forward and 42 voted against. A three-fifths majority was required. Of those senators voting for the motion, 48 were Democrats, 6 were Republi-

# Public Sector Arbitration

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## Discipline Justified Because Video Captures Grievant's Failure to Perform Work

The grievant, filmed sitting in his truck rather than completing his assigned maintenance work orders, exhibited cause for discipline, concluded Arbitrator Jerilou Cossack. There was no acceptable explanation for his conduct, but she found no logical connection between the pay-rate reduction and the grievant's misbehavior.

The grievant worked for the county as a mechanical maintenance technician. He was responsible for maintaining and operating pump stations throughout the county, and for training his assistant.

Because of allegations made by his prior supervisor, the county placed the grievant under surveillance from December 14, 2004, to January 12, 2005. Based on the conduct captured on the surveillance tapes, the grievant was demoted to the assistant technician position in September 2005, and his pay was reduced for one year.

The grievant was accused of several types of misconduct. He was charged with stopping for fast food or coffee beyond his one-hour break, and going to the post office and bank while on duty. He also was charged with sitting in his truck instead of performing his assigned duties.

The county argued that it is against its policy for employees, even on a paid lunch break, to stop at a fast food restaurant and eat in the truck or at a job site. The union countered that it has been the practice for 20 years for workers to drive through fast food restaurants when traveling between sites.

*It is a fundamental tenet of fair play that the employer clearly articulate the rules.*

Arbitrator Cossack explained that it is a fundamental tenet of fair play that the employer clearly articulate the rules employees are expected to follow and the penalties that may result from infractions. Here, she found no clear county rule specifying if and under what circumstances field crew members can stop at fast food restaurants or get coffee.

In the face of contradicting testimony, the arbitrator held the county could not base discipline on evidence that the grievant stopped for food or coffee or for bathroom breaks.

Arbitrator Cossack gave short shrift to the county's charge that the dispatch log did not match either the grievant's surveillance observation or his job sheet. She found that employees were not warned of, or disciplined for, lack of congruency between the log and the job sheets. And field employees testified it was not uncommon for the dispatch log to be inaccurate.

The grievant also was charged with failure to complete all tasks assigned to him on his work order. The county based this allegation on the surveillance tape, where the grievant was observed spending much less time to complete a job than the "contracting hours" allocated to a task and identified on the work order.

In one instance, the grievant spent only 45 minutes at the job site for work scheduled for one-and-a-half contracted hours. The surveillance tape showed the grievant reading a newspaper in his truck while his assistant performed the work. On another occasion, the tape showed the grievant sitting in his truck for two of four contracted hours, while his assistant worked for one hour. In total, eight similar charges were brought.

The arbitrator dismissed the grievant's explanations for his conduct, finding they ignored the charges that he had not spent sufficient time at the job sites to complete the tasks enumerated on the work orders. In each instance, he was captured on tape not performing any of the delineated tasks, and the time spent at the job site was substantially less than the contracted hours. Even if an experienced employee can

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finish a task in fewer than the contracted hours, reasoned Arbitrator Cossack, the grievant still failed to perform his assigned duties.

The arbitrator rejected the union's explanation that the grievant was doing paperwork or studying the safety manual while sitting in his truck. The tape revealed he was reading the newspaper or doing nothing, and the arbitrator found it unlikely that the grievant was handling paperwork or studying for as long as he was sitting in the truck. On this basis, Cossack concluded that the county established the grievant had not engaged in productive activity on several occasions, and that discipline is warranted when an employee does not do the work he is hired to do.

Considering the union's procedural due process claims, the arbitrator explained that while the parties' contract does not contain any time limit within which the county must initiate discipline, the concept of "cause" requires an employer to be reasonably prompt in making disciplinary deci-

sions. Unreasonable delay is unfair because it deprives employees of an opportunity to put forward a defense.

The surveillance on which the grievant's discipline was predicated occurred in December 2004 and January 2005. Yet, the grievant was not confronted with any allegations of wrongdoing until June 15, 2005, six months later. In addition, the county failed to provide a copy of the surveillance tape before the grievant's *Skelly* meeting. The arbitrator found that the six months that elapsed between the surveillance and the allegations of wrongdoing was an unreasonably long period of time. However, she found it highly unlikely that a more proximate confrontation would have allowed the grievant to provide a satisfactory explanation for his documented failure to perform assigned tasks.

Arbitrator Cossack concluded that there was no acceptable explanation for the grievant's failure to complete his work or for the excessive amount of time he was caught sitting in his truck. She explained that a maintenance tech-

nician works largely unsupervised and is responsible for training assistants. Therefore, she held, the county's demotion of the grievant was a reasonable response to his failure to perform assigned tasks.

But the arbitrator found no logical relationship between the grievant's salary step demotion and his misconduct. The county division chief testified that the pay step reduction was designed to reimburse sanitation district rate payers for money paid to an employee who did not deliver the service. However, no one had computed the amount of time the grievant was paid for work he did not perform. Thus, the arbitrator held that the pay step reduction was improper, and ordered the grievant to be made whole for the difference between the top pay step of the assistant classification and the step from which he was reduced. (*County of Sacramento and Stationary Engineers, Loc. 39* [4-26-07; 32 pp.]. *Representatives*: Timothy D. Weinland [deputy county counsel] for the county; Brook D. Pierman [Weinberg, Roger & Rosenfeld] for the union. *Arbitrator*: Jerilou H. Cossack.) \*

# Arbitration Log

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- **Contract Interpretation**
- **Workers' Compensation**
- **Leave of Absence**

**Santa Clara Valley Transportation Authority and Amalgamated Transit Union, Loc. 265** (5-17-06; 10 pp.). *Representatives:* Russell D. Atkinson (office of general counsel) for the authority; William Flynn (Neyhart Anderson Freitas Flynn & Grosboll) for the union. *Arbitrator:* Bonnie G. Bogue.

*Issue:* Did the transit authority violate the collective bargaining agreement when it notified the grievant that his unpaid leave of absence had expired and released him from employment?

*Union's position:* (1) Section 14(b) of the parties' agreement provides that if the Workers' Compensation Appeals Board determines that an employee's injury is not an industrial injury, the employee is entitled to a maximum two-year unpaid leave of absence while he is unable to return to work. However, under Sec. 14(f), if the workers' compensation board determines that the injury is covered, then the employee is entitled to up to four years of leave.

(2) The grievant fell from a load-bearing platform at work in 2002. In May 2003, shortly after he returned to work, he again went on leave due to back problems.

(3) The grievant was released from employment in May 2005, before there had been a final determination by the workers' compensation board on

whether the grievant's injury was a covered industrial injury.

(4) The transit authority cannot unilaterally decide whether the grievant's injury is or is not a covered industrial injury under Sec. 14 of the agreement. Nor does the WCAB have jurisdiction to grant a contractual leave of absence as a remedy when it makes its final determination.

(5) A workers' compensation medical examiner determined that the 2003 injury was the result of the 2002 injury, which was determined to be industrial. Therefore, the current injury is industrial within the meaning of Sec. 14.

(6) The grievant must be reinstated and granted four years of leave to which he is entitled under contract Sec. 14.1(f).

*Employer's position:* (1) The four-year leave allowed by Sec. 14.1(f) applies only if the employee's leave is an industrial injury. Because the grievant's leave has never been so designated, the transit authority can release the grievant from employment after his two-year leave period expired, under Sec. 14.1(b).

(2) The arbitration board is without jurisdiction to determine whether the grievant is entitled to an industrial injury leave under Sec. 14.1(f), because only the WCAB has jurisdiction to decide if the grievant's injury is entitled to workers' compensation. Thus, medical evidence concerning the cause and nature of the grievant's injury is not relevant to the contract interpretation dispute.

(3) The arbitration board should allow the completion of the workers' compensation process. If the board determines the grievant is covered, the remedy would be for the transit authority to recalculate his leave of absence and make him whole.

*Arbitrator's holding:* Grievance sustained.

*Arbitrator's reasoning:* (1) Section 14 of the contract is clear and unambiguous on its face. But ambiguity arises when the workers' compensation board has not made a determination as to eligibility at the end of the two years allowed in Sec. 14.1(b). This ambiguity must be resolved in a way that furthers the purpose of Sec. 14.

(2) To release the grievant from employment before the eligibility determination has been made denies him

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the contract right of up to four years of leave.

(3) The contract does not allow the employer or its claims adjuster, or arbitration board, to decide whether the medical evidence does or does not support the grievant's claim that his 2003 injury was related to or caused by his prior industrial injury. Only the WCAB is allowed to determine if an employee's injury is covered.

(4) The contract requires that the grievant not be released from employment until the workers' compensation board has made a final determination that his injury is not covered, or until the four-year maximum leave has expired, whichever occurs first. The transit authority violated Sec. 14 by releasing the grievant from employment before either occurred. The grievant must be reinstated to an unpaid leave of absence with restored seniority and benefits.

*(Binding Grievance Arbitration)*

- **Past Practice**
- **Contract Interpretation**
- **Bargaining Unit Work**
- **Managerial Status**

**American Federation of State, County and Municipal Employees, Loc. 1724, and City of Eugene** (6-4-07; 30 pp.). *Representatives:* Christine Nesbit (Harring Long Gary Rudnick) for the city; Lou Sinniger (union representative) for the union. *Arbitrator:* Luella E. Nelson.

*Issue:* Did the city violate the agreement when it classified the wetlands ecologist and restoration ecologist po-

sitions as non-represented managerial positions outside the bargaining unit?

*Union's position:* (1) The union is the exclusive representative of a "wall-to-wall" unit that encompasses all city employees except those specifically excluded in the contract's recognition clause. Professional employees were considered excluded until 1987, when that clause was added. All subsequent contracts excluded "managerial exempt" employees and made no mention of professional employees, who are now not excluded.

(2) There is no past practice of excluding professionals. The union challenged the city's proposal to reclassify the wetlands ecology coordinator to the wetlands ecologist position and exclude it from the bargaining unit when it improperly advertised the newly created restoration ecologist position as exempt. The city violated the contract by excluding these two positions from the bargaining unit.

(3) A 1990 advisory arbitration award, which concluded that the parties had yet to agree on the inclusion of professional employees in the unit, was intended to aid the parties in settling future classification disputes, not to impact any existing employees or positions or exclude professional positions from the unit.

(4) Although the definition of "managerial exempt" incorporates the concept of professional employees, a position must be managerial to be excluded from the bargaining unit. Professional qualifications are only factors to be considered.

(5) Educational requirements are criteria for exclusion from the bargaining unit, but are not determinative and cannot be the sole basis for exclusion. The union has never agreed to exclude employees based solely on the requirement of a four-year degree.

(6) Ecologists do not initiate, develop, or implement policy and thus are not in managerial exempt positions. The general policies of the wetlands program are established, and any adjustments must be approved by superiors.

(7) The wetlands ecology coordinator was reclassified outside the bargaining unit but continued to perform the same duties. This is a transfer of bargaining unit work, resulting in loss of a bargaining unit position. A finding that the position is out of the unit would mean that the contract was violated and the city should be required to retain an equivalent position in the unit.

*City's position:* (1) The plain language of the contract excludes from the unit those positions for which a four-year degree is required. None of the positions represented by the union require a bachelor's degree. Engineers, architects, and CPAs, listed as excluded in the contract, are not commonly distinguished by "policy development" or "program management" duties. Despite the absence of managerial skills, they are excluded because they are professionals.

(2) Exemption from the unit is not dependent on having managerial or supervisory duties. The city has 170 positions whose defining characteristic is the application of knowledge in an advanced field of study, and all have

been exempt from the unit based on contract language. Most employees in these positions do not have supervisory or managerial duties.

(3) The ecologist positions at issue here are properly excluded from the bargaining unit under contract language that exempts any position which requires a relevant four-year degree. The incumbents and their managers agree that the positions require extensive knowledge at the level of a four-year degree or higher.

(4) The city's code provides that professionals will not normally be included in a unit with other employees unless they so choose by majority vote. Historically, the union has agreed that it does not represent professionals. According to an arbitrator's ruling, the parties have understood since 1971 that professionals, defined by the city code, were exempt.

(5) During the 1987 contract negotiations, when the current recognition clause was added, the union acknowledged that professionals were exempt based solely on their professionalism. Given both parties' original intent and continued acceptance of that exclusion, these newly created professional positions are unrepresented. It

is unprincipled to argue that the ecologist positions should be included in the unit because they did not exist in 1987.

(6) In 1991, when the union agreed on a list of classifications that would remain outside the unit unless employees voted to join, positions on that list continue to be excluded from the unit based on the degree requirement. There is no meaningful basis to treat ecologists as within the unit, while excluding accountants, engineers, librarians, planners, lawyers, and other bona fide professionals. The city has never agreed to exclude only listed professional classes.

(7) Interpreting the contract to include ecologists in the unit would create doubt about the scope of the unit and disturb the status quo. Inclusion of the ecologists could create workplace anxiety, causing them to seek work where their advanced degrees and expertise will be utilized and acknowledged.

(8) The fact that the wetlands ecologist was initially placed in the bargaining unit and then reclassified is not an improper transfer of bargaining unit work. Staff initially classified the position as exempt and, as the position grew over time, reclassified it because the

wetlands ecologist was performing exempt work.

*Arbitrator's holding:* Grievance denied.

*Arbitrator's reasoning:* (1) Under the contract, the union must file a grievance over alleged performance of unit work by exempt personnel 21 days after learning of the occurrence. No such grievance has ever been filed, and thus, that claim is dismissed.

(2) The contractual language excluding "managerial exempt" employees from the bargaining unit draws on federal and state law but adds language traditionally used to define a "professional" employee. The umbrella term, "managerial exempt," is ambiguous because the question of whether an employee is a "professional" is legally and logically distinct from whether he or she is a "managerial" employee.

(3) Prior to 1987, the contract recognition clause did not explicitly exclude professional employees from the unit. Instead, it listed excluded positions, none of which were professional within the meaning of the underlying law or contractual language. The exclusion of professional employees occurred by operation of the city code under which the list of included positions was developed, and under which professional employees were entitled to a self-determination election. No such election occurred, and professional employees were excluded simply by operation of the local ordinance.

(4) The arbitrator's advisory award, relied on by the union, disregarded the history of the bargaining

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unit. When it was formed, there was no need for agreement on the exclusion of professionals because that result was pre-ordained by the city code and the lack of a self-determination election.

(5) Contrary to the arbitrator's conclusion, whether an employee has a degree can help determine if he or she is a professional, but it does not directly relate to managerial status.

(6) The parties never agreed to allow existing professional employees to be "grandfathered out" of the unit while newly created positions automatically were to be included. The parties' agreement in this regard applied only to non-professional position employees who wanted to remain outside the unit.

(7) When the parties negotiated the 1987 recognition language that continues in the current contract, they were aware that professional positions were excluded from the bargaining unit. They never agreed to roll newly created professional positions into the unit. Thus, the recognition clause, like the underlying city code, excluded professionals from the unit unless and until a majority of such professional employees voted to be in the unit. Therefore, if the two ecologist positions were properly classified as professional positions, they were properly excluded from the unit.

(8) It is appropriate for the union to ensure that paraprofessional positions do not migrate into non-represented professional titles. However, when the main thrust of the duties being performed is professional in nature, as it is here, it is appropriate to reclass-

sify them as exempt and exclude them from the bargaining unit.

*(Binding Grievance Arbitration)*

• **Contract Interpretation**

• **Past Practice**

**Solano County Education Assn., CTA/NEA, and Solano County Office of Education/Solano County Superintendent of Schools (07-23-07; 22 pp.).** *Representatives:* Namita S. Brown (Lazano Smith) for the county; Clyde H. Williams (CTA emeritus staff, Solano Education Association) for the association. *Arbitrator:* William E. Riker.

*Issue:* Did the Solano County Office of Education violate Article 13 of the collective bargaining agreement when it assigned teaching positions to newly hired external candidates?

*Association's position:* (1) The county violated the terms of the collective bargaining agreement by failing to internally advertise three vacant teaching positions in its special education program. Under the contract, the county has an obligation to advertise vacant positions and to give unit members notice of such vacancies. If any unit member applies for a position, he or she is entitled to consideration before the position is made available to external candidates.

(2) Contrary to the county's contention, the assignment of a unit member to a requested position creates a vacancy, within the meaning of the contract. This vacancy triggers the contractual obligation to advertise the position and give priority to internal applicants.

(3) The county's contention that it has the management right not to advertise vacancies is incorrect. There is no management rights clause in the contract.

(4) A change in the transfer language allows unit members to know their assignment for the next year. It did not authorize the county not to advertise positions stemming from assignments.

(5) In a unit of 110 members, where only three positions are in dispute, advertising the vacancies in accordance with the contract terms would not have a negative impact on staffing needs.

(6) The grievance regarding the position at Cleo Gordon School was timely filed. The original grievance was verbally amended without any objection from the county. The association only became aware of the position after filing its grievance, and the employer has not cited any harm from including this allegation in the grievance.

*County's position:* (1) When the county makes assignments in June for the following year, openings that result from the positions left behind by unit members assigned to other requested vacant positions need not be advertised. This has been the past practice since the 1970s.

(2) Due to the shortage of teachers with special education certifications and the demands imposed by school districts the county serves, it is critical to plan ahead for the assignments.

(3) The concerns in the grievance should be addressed at the bargaining table not at arbitration.

(4) The Cleo Gordon position was untimely added to the grievance. The association waited six weeks before attempting to add it to their grievance.

*Arbitrator's holding:* Grievance denied.

*Arbitrator's reasoning:* (1) The addition of the Cleo Gordon issue was untimely. The original grievance was filed in June; the handwritten note relating to that position was not sent until October.

(2) Article 13, the contract language at the center of the dispute, was negotiated to provide a systematic process to ensure that unit members annually have the opportunity to advise the employer if they will be returning to their assignment in the upcoming school year.

(3) Under the contract, the unit members have priority in selecting the assignments that need to be staffed for the upcoming year. To accomplish this task, the county sets various time periods for unit members to make their assignment interests known. This allows the county to determine its staffing needs early in the year.

(3) In the traditional school district, all vacancies must be posted and unit members given priority to apply and interview before external candidates are considered. However, the county office of education provides unique services. Because of statewide shortages in credentialed personnel for the program, recruitment is given high priority. Once the school year begins and a vacancy arises, the county will advertise internally until a candidate is selected. This process results in a

“domino effect,” where one vacancy creates another. Once the assignment of unit members is completed, the county completes the staffing with outside candidates.

(4) There is a long-standing past practice that vacancies are not created by assignments. This past practice was corroborated by numerous witnesses including the former association president. Assignments do not create vacancies that trigger the advertising and internal priority process. The county would face a difficulty if there was a domino effect for assignments.

(5) Article 13 identifies an assignment as being distinct from a vacancy. This is consistent with the parties' intent when they implemented the notification process

(6) This practice does not infringe on the rights of the unit members to have vacant positions advertised if they become vacant during the school year or at other times, when vacancies are the result of retirement, growth, resignations, or transfer. However, the assignment process does not activate the vacancy section of the contract, and therefore, the county did not violate the contract.

*(Binding Grievance Arbitration)*

#### • Duty to Bargain

**California Correctional Peace Officers Assn. and Department of Corrections and Rehabilitation (Salinas Valley State Prison)** (12-3-07; 6 pp.). *Representatives:* Christopher E. Thomas (labor relations counsel) for the state; Gregg M. Adam

(Carroll, Burdick & McDonough) for the association. *Arbitrator:* C. Allen Pool.

*Issue:* Did the department violate the MOU by allegedly converting a prison gymnasium to inmate housing without meeting and conferring?

*Association's position:* (1) Although the state has the right to make the decisions to activate, de-activate, and convert prison facilities to house an overflow of inmates, the state was obligated to meet and confer with the union prior to implementing the changes. By the time the parties got to the bargaining table, conditions had changed; yet, none of the state's decisions involved emergencies justifying action without meeting and conferring.

*State's position:* (1) The state is not required to meet and confer again on issues that already have been bargained. Local agreements at Salinas Valley State Prison relating to these issues have been in effect for years.

(2) The state's actions were within the managerial prerogatives. And, the state did not refuse to meet and confer; its actions were emergency revisions to existing negotiated “Institutional Activation Schedules” that specify how many guards are assigned to designated numbers and types of inmates.

*Arbitrator's holding:* Grievance denied.

*Arbitrator's reasoning:* (1) After the state made a decision to activate one or more of the gyms to house an overflow of inmates, Sec. 27.01 of the MOU requires it to issue an official notice to the union of its decision. The union can

then request to meet and confer. Another arbitrator recently concluded that within the unique working environment of a prison, when the union raises a legitimate safety or security concern stemming from a proposed operating change, Sec. 27.01 requires the state to meet and confer on impact issues upon receipt of a bargaining request from the union.

(2) Contrary to the union's contention, the notices provided to the union by the state explicitly stipulated that these activations were emergencies. Each of the five formal notices stated that it involved an "emergency revision" to an existing institutional activation schedule.

(3) The requirement for immediate action has a significant meaning in the unique environment of a prison. The parties do not have the luxury of meeting and conferring prior to implementing an emergency change. This does not mean the state is not obligated to meet and confer when the union raises a legitimate safety or security concern. It means the meet and confer process takes place after implementation of the change. Therefore, the state did not violate Sec. 27.01 when it implemented the activation and de-activations of prison facilities prior to meeting and conferring on the impact of the changes.

*(Binding Grievance Arbitration)*

- **Drug Testing**
- **Due Process**

**City of Sacramento and Stationary Engineers Loc. 39** (2-11-08; 14 pp.). *Representatives:* Kathleen T. Rogan

(senior deputy city attorney) for the city; Jannah V. Manansala (Weinberg, Roger & Rosenfeld) for the union. *Arbitrator:* Paul D. Staudohar (CSMCS Case No. ARB-06-0230).

*Issue:* Did the city violate the parties' settlement agreement or the grievant's due process rights when it placed him on unpaid administrative leave after he failed a drug test?

*City's position:* (1) Federal regulations require the city to immediately remove from a safety-sensitive position an employee who fails a drug test. Because the grievant was required to hold a Class B driver's license, he was removed from his position as a truck driver when he tested positive for marijuana. No employee has been returned to a safety-sensitive position until he has met with a substance abuse professional and has provided a negative urine sample.

(2) Contrary to the union's argument, *Barber v. State Personnel Board* (1976) 556 P.2d 306, 28 CPER 52, does not apply. In that case, the plaintiff was fired before the *Skelly* hearing. The court found a "constitutional infirmity" in the imposition of discipline before the employee is given notice of the reasons for the punitive action and an opportunity to respond. Here, the grievant was placed on unpaid administrative leave pending the *Skelly* hearing. After testing for a second time, the grievant was placed on unpaid leave from May 5 to May 30. This action was not punitive within the meaning of *Barber* and did not violate due process.

(3) Although *Skelly* hearings normally occur within three to five days, there are no limitations imposed on the city for setting a *Skelly* hearing. Holding the *Skelly* hearing 16 business days after the grievant was placed on unpaid administrative leave was reasonable and did not deny the grievant due process rights.

*Union's position:* (1) In *Bostean v. Los Angeles Unified School Dist.* (1998) 63 Cal.App.4th 95, 130 CPER 69, the Court of Appeal found that an employee placed on an involuntary unpaid leave deprived him of continued employment and was tantamount to a suspension without pay. The fact that the employee in *Bostean* was given the opportunity to use compensatory time off during his unpaid leave did not affect the court's decision. Under *Bostean*, the city's decision to place the grievant on involuntary unpaid leave prior to his *Skelly* hearing was punitive and violated his due process rights. The grievant's due process rights were also violated under *Barber* because the grievant was placed on unpaid leave before the city gave him an opportunity to present his argument.

(2) Although the parties' "last chance settlement" provided for a 20-day suspension, the suspension was substantially longer because of the period of unpaid leave.

(3) The city could have paid the grievant for performing work in non-sensitive positions that did not require a Class B license.

(4) The city took longer than normal to process the grievant's case. This

conduct constituted disparate treatment.

(5) The grievant should be credited with any compensated time off he was forced to use, and paid for any days for which he was not compensated.

*Arbitrator's holding:* Grievance denied.

*Arbitrator's reasoning:* (1) There was an abnormal delay in processing the grievant's termination letter and conducting the *Skelly* hearing; this was caused by management's neglect. Although greater than normal, the delay was not so long as to violate the grievant's due process rights. There is no required time limit for holding the *Skelly* hearing, and the city has some scheduling latitude. There is no evidence that the grievant was treated differently from other employees.

(2) The grievant was not deprived of due process by being placed on unpaid leave prior to the *Skelly* hearing. *Barber* is distinguishable. Barber was discharged before a *Skelly* hearing took place. Here, the grievant was placed on unpaid leave prior to a *Skelly* hearing, and was not given the 20-day suspension until after the hearing. Placement on unpaid leave is not punitive or tantamount to a suspension because it was not disciplinary.

(3) The union's reliance on *Bostean* is unpersuasive. There, the employee was placed on indefinite involuntary illness leave without pay for seven months. There, the court found that the employee was deprived of a property interest in his continued employment and entitled to a pre-deprivation no-

tice and hearing. The grievant was on unpaid leave for three weeks, not seven months. In *Bostean*, keeping the employee on the job did not pose any threat to his or others health or safety. Here, allowing the grievant to continue to drive a waste removal truck while under the influence of a narcotic would have posed a health and safety threat.

(4) The city did not violate the settlement agreement by failing to compensate the grievant for lost wages while on unpaid leave, and did not violate the grievant's due process rights by placing him on unpaid leave before the *Skelly* hearing.

*(Binding Grievance Arbitration)*

# Resources

## Serving the Public

Most public service jobs require interpersonal contact that is either face-to-face or voice-to-voice – relational work that goes beyond testable job skills but is essential for job completion. This book focuses on this *emotional* labor and what it takes to perform it. The authors weave a narrative of stories from the trenches gleaned through interviews, focus groups, and survey data. They go beyond the veneer of service delivery to the real, live, person-to-person interactions that give meaning to public service.

For anyone who has ever felt apathetic toward government work, the words of caseworkers, investigators, administrators, attorneys, correctional staff, and dispatchers all show the human dimension of bureaucratic work and underscore what it means to work “with feeling.”

**Emotional Labor: Putting the Service in Public Service**, by Mary E. Guy, Meredith A. Newman, Sharon H. Mastracci (2008) 256 pp. M.E. Sharpe, <http://www.mesharpe.com/index.htm/>. Hardcover, \$79.95; softcover 29.95.

## Californians Speak Their Minds

The Public Policy Institute of California has released its annual *PPIC Statewide Survey: Californians and Their Government*. The most recent survey includes the responses of 2,002 Californians. Both the full report and a summary can be found on the PPIC website.

Among the findings: “Pink slips for public school teachers and other reductions in services for vulnerable Californians are making state residents reconsider the wisdom of using spending cuts to balance the budget. Californians are becoming increasingly gloomy about California’s precarious fiscal condition and bleak economic outlook. And that gloom is taking its toll in their assessment of elected leaders.”

The report goes on to say, “Nearly all Californians (94 percent) see the state budget situation as at least somewhat of a problem today. With the reality of state spending cuts hitting home, concern about the effects has grown dramatically. Today, 56 percent of Californians say

they are very concerned about the effects of spending reductions in the governor’s budget plan, up 20 points since January (36 percent).”

According to the PPIC analysis, “The upshot is that Californians are now apparently more willing to consider tax increases as part of a solution to the budget crisis.” Says pollster Mark Baldassare, PPIC president and CEO, “Californians are rethinking their priorities, given what they’ve learned about spending cuts over the past couple of months. Beyond that, they are feeling financially squeezed as a result of the economic downturn. Any reduction in state services may only add to their sense of vulnerability.”

**Public Policy Institute of California Statewide Survey: Californians and Their Government**, by Mark Baldassare, Dean Bonner, Jennifer Paluch, and Sonja Petek (2008) 38 pp. Public Policy Institute of California, <http://www.ppic.org/main/home.asp/>. Available online.

## Networking for Results

The real work of many governments is done not in stately domed capitols but by a network of federal and state officials working with local governments and nongovernmental organizations to address issues that cross governmental boundaries. *Managing Within Networks* analyzes the structure, operations, and achievements of these public management networks that are trying to solve intractable problems at the field level. Author Robert Agranoff notes how knowledge is managed and value added within these intergovernmental networks.

From data compiled on 14 public management networks in the U.S., the author identifies four different types of networks based on their purposes, and observes the differences between network management and traditional management structures and leadership. His data covers such areas as transportation, economic and rural development, communications systems and data management, water conservation, wastewater management, watershed conservation, and services for persons with developmental disabilities.

**Managing within Networks: Adding Value to Public Organizations**, by Robert Agranoff (2007) 192 pp. Georgetown University Press, <http://press.georgetown.edu/index.php/>. Softcover, \$26.95.

### Work and Family

The Alfred P. Sloan Work and Family Research Network is one of the premier online destinations for information on this subject. It is a “one-stop shop” for state policy resources including afterschool care, dependent care, family leave, flexible work schedules, low wage workers, and paid sick days. Originally aimed toward academics, the network now also targets the information needs of researchers, workplace practitioners, and state public policymakers.

The Sloan network aims to increase awareness of the issues, involve all parties in the discussions, and support collaboration. Toward that end, the site offers multidisciplinary teaching resources and access to academics and researchers; evidence-based information on cutting-edge workforce issues, talent management, and the impact of work and family issues on business outcomes; and unbiased policy data about work and family trends, legislation, and statistics.

**Sloan Work and Family Research Network**, <http://wfnetwork.bc.edu/>.

### Online Workers’ Compensation Resource

The Institute for Research on Labor and Employment and the Labor Occupational Health Program at U.C. Berkeley publish *Workers’ Compensation in California: A Guidebook for Injured Workers*. The guidebook, prepared for the California Commission on Health and Safety and Workers’ Compensation, gives an overview of the California workers’ compensation system. It is meant to help workers with job injuries understand their basic legal rights, how to request workers’ compensation benefits, and where to seek further information and help.

Topics include the basics of workers’ compensation, steps to take after getting hurt on the job, medical care,

resolving problems with medical care and medical reports, temporary disability benefits, working for your employer after injury, permanent disability, and benefits when you need to change jobs. There is also a resource list, references to important laws and regulations, and a glossary.

The 2006 edition is online in both English and Spanish, and is kept current with updates on the LOHP website. Printed copies may be obtained from the Commission.

**Workers’ Compensation in California: A Guidebook for Injured Workers**, 3rd Edition (2006, with online updates) 106 pp. Labor Occupational Health Program, U.C. Berkeley, [www.lohp.org](http://www.lohp.org). Commission on Health and Safety and Workers’ Compensation, [www.dir.ca.gov/chswc](http://www.dir.ca.gov/chswc). Available online and in print.

### Creating a Workers’ Comp Carve-Out

California workers’ compensation law allows labor unions and employers to “carve out” alternative systems for delivering benefits to injured workers and resolving problems and disputes. Creating a carve-out can help avoid the delays, excessive costs, and adversarial interactions that often characterize the state system.

Another online IRLE and LOHP resource is *How To Create a Workers’ Compensation Carve-Out in California: Practical Advice for Unions and Employers*, also prepared for the California Commission on Health and Safety and Workers’ Compensation. This booklet discusses important issues to consider in designing a carve-out and ensuring its success. Topics include reasons to create a carve-out, eligibility requirements, identifying problems and goals, designing the carve-out to meet your goals, hiring the best people, and staying involved in the operation of the carve-out.

**How To Create a Workers’ Compensation Carve-Out in California: Practical Advice for Unions and Employers** (2006) 38 pp. Labor Occupational Health Program, U.C. Berkeley, [www.lohp.org](http://www.lohp.org). Commission on Health and Safety and Workers’ Compensation,



[www.dir.ca.gov/chswc](http://www.dir.ca.gov/chswc). Available online and in print. Contact the Commission for printed copies.

### **Spinning the Charter School Numbers**

An important aim of social science research is to provide unbiased information that can help guide public policies. However, social science is often construed as politics by other means. The polarized nature of social science research is visible in the heated debate over charter schools, which author Jeffrey Henig uses to illustrate the use and misuse of research in policy debates.

Henig draws on interviews with researchers, journalists, and funding agencies on both sides of the debate, as well as data on federal and foundation grants and an analysis of media coverage, to explore how social science research is “spun” in the public sphere. He looks at the consequences of a highly controversial *New York Times* article that cited evidence of poor test performance among charter school students. The front-page story, based on research findings released by the American Federation of Teachers, sparked an explosive debate over the effectiveness of charter schools. Henig shows that despite the political posturing in public forums, many researchers have since revised their stances according to accumulated new evidence and have begun to find common ground.

The core problem, Henig concludes, has less to do with research itself than with the way it is often sensationalized or misrepresented in public discourse. He argues that we can do a better job of bringing research to bear on the task of social betterment.

**Spin Cycle: How Research Is Used in Policy Debates: The Case of Charter Schools**, by Jeffrey R. Henig (2008) 316 pp. Russell Sage Foundation, <http://www.russellsage.org/>. Hardcover, \$32.50.

### **Labor Project for Working Families Anniversary Report**

The Labor Project for Working Families recently marked its 15th anniversary. Since 1992, this national

nonprofit advocacy and policy organization has been working with union members, negotiating teams, organizers, policy makers, as well as community based organizations and activists to advocate for family friendly workplaces. To acknowledge this milestone, LPWF has released an Anniversary Report featuring the organization’s programs and achievements over a decade and a half.

LPWF has worked with unions to negotiate for work family issues such as child and elder care benefits, paid family leave, and flexible work hours; collaborated with local and national coalitions of unions and advocates to pass laws so workers will not have to choose between their jobs and their families; trained union staff, stewards, and members on work family issues, the Family and Medical Leave Act, and Paid Family Leave law; and forged coalitions of unions organizing child care workers to link organizing with improved child care access and quality.

**Labor Project for Working Families Anniversary Report.** To receive a copy, contact Vibhuti Mehra at (510) 643-6813 or email [vibhuti@working-families.org](mailto:vibhuti@working-families.org).

### **New to the Union Officer Job?**

In straightforward language author Bill Barry, a veteran union activist and labor studies program director, explains how to create a union that can be strong, grow, and thrive in any environment. Barry explains the organizing model (versus the servicing model) of unionism. He advises how to do the kind of strategic planning needed to build your union; analyze the various functions of the union and its finances; and develop a communications network that involves and rallies the members. The book explains the laws you have to look out for, how to deal with other officers and union staff, and how to organize yourself to do what needs to be done to pull it together and make it all work.

**I Just Got Elected — Now What? A New Union Officer’s Handbook**, by Bill Barry (2007) 53 pp., Union Communication Services, <http://www.unionist.com/>. Softcover, \$10.

# Public Employment Relations Board

## Orders & Decisions

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

### Dills Act Cases

#### Representation Rulings

#### Withdrawal of appeal of dismissed severance petition granted: State of California.

(*State of California, Peace Officers of California, and California Statewide Law Enforcement Assn.*, No. Ad-371-S, 3-13-08; 2 pp. dec. By Member Rystrom, with Members McKeag and Wesley.)

**Holding:** The petitioner's request to withdraw its appeal of the dismissal of its severance petition was granted.

**Case summary:** In November 2007, the petitioner filed a severance petition that sought to create a bargaining unit consisting of all job classifications within California's Bargaining Unit 7. The unit, made up of approximately 2,200 peace officers, is exclusively represented by the California Statewide Law Enforcement Association.

The severance petition was dismissed for failure to provide sufficient proof of support. The petitioner filed exceptions to PERB's determination and amended its petition for severance.

Soon after, the petitioner informed the board that it withdrew its appeal. The board accepted the notification as a request to withdraw both the exceptions and the amended petition for severance.

The board reviewed the record and determined that the withdrawal was in the best interests of the parties and

consistent with the Dills Act. Accordingly, PERB granted the petitioner's request to withdraw its appeal.

### EERA Cases

#### Unfair Practice Rulings

#### Speech must relate to employees' interests as employees to be protected: Journey Charter School.

(*California Teachers Assn./NEA v. Journey Charter School*, No. 1945, 2-28-08; 22 pp. Dec. by Member Wesley, with Member McKeag; Chair Neuwald, concurring and dissenting.)

**Holding:** The charging party's unfair practice charge was dismissed because the evidence failed to establish that the discharge was based on a protected activity. (See the Public Schools section in this issue of *CPER*, pp. 25-27, for complete coverage of the story.)

#### EERA preempts city charter provisions: San Francisco USD.

(*International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. San Francisco Unified School District*, No. 1948, 3-13-08; 33 pp. dec. By Chair Neuwald, with Members McKeag and Wesley.)

#### Reprint Service

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

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



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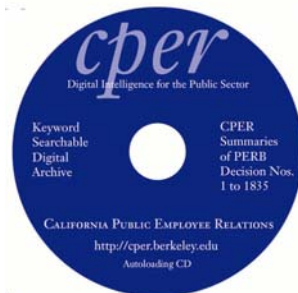
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**Holding:** The charging party's unfair practice charge was dismissed because EERA's impasse resolution provisions preempt the binding interest arbitration provisions contained in the city charter. (See the Public Schools section of this issue of *CPER*, pp. 30-37, for complete coverage of the story.)

**Insufficient facts to show retaliation: San Mateo County Office of Education.**

(*Moberg v. San Mateo County Office of Education*, No. 1946, 2-29-08; 7 pp. dec. By Member Wesley, with Members McKeag and Rystrom.)

**Holding:** The charging party's unfair practice charge was dismissed because there were insufficient facts to demonstrate a nexus between his protected activity and the reprimand he received for rude and disrespectful behavior.

**Case summary:** Eric Moberg was a teacher with San Mateo County Office of Education and a member of the San Mateo County Educators Association. On June 7, 2007, Moberg acted as a representative on behalf of another employee. The same day, apparently unrelated to the representation, Moberg requested his personnel file from the SMCOE's human resources department. The following day Moberg filed a grievance on his own behalf citing what he termed "rude and disrespectful behavior" by SMCOE Associate Superintendent Jeannie Bosley.

One week later, Superintendent Bosley emailed Moberg to schedule a meeting to discuss Moberg's behavior on June 7, when he requested his personnel file. Moberg's email response to Bosley questioned her authority to "insist to meet" during his vacation and requested that he receive pay for his time. Several weeks later, Bosley issued Moberg a letter of reprimand for his rude and disrespectful behavior when he requested his personnel file. The letter explained that it was an oral reprimand put into writing "in lieu of delivering it verbally at a meeting" that she attempted to schedule.

Moberg filed an unfair practice charge alleging Bosley retaliated against him by harassing him with demands that he meet with her and reprimanding him with false accusations.

The board agent dismissed the charge based on Moberg's failure to allege sufficient facts to establish a nexus

between the protected activity of representing another union member and his reprimand for rudeness. The B.A. noted the temporal proximity between his protected activity and the letter of reprimand. However, because proximity alone is insufficient to show retaliation, the agent examined the contextual evidence. The B.A. found that Moberg failed to provide facts to establish disparate impact or departure from established procedures.

On appeal, Moberg stressed that the B.A.'s finding of temporal proximity between his protected conduct and the reprimand established a prima facie case. Moberg argued that additional facts, including disparate treatment and departure from established procedures, are sufficient to demonstrate a nexus between his conduct and the reprimand.

Citing *Novato Unified School Dist.* (1982) No. 210 54 CPER 43, the board noted that to establish a prima facie case of retaliation, a charging party must show that he exercised a protected right, the employer knew of the protected activity, there was an adverse employment action taken against the employee, and the adverse action was motivated by the protected activity.

The board found that Moberg did engage in protected activity, that SMCOE was aware of the activity, and that the letter of reprimand was an adverse action under EERA. Thus, the issue was whether Moberg alleged sufficient facts to show that the reprimand was motivated by the protected conduct and thereby retaliation.

First, the board dismissed the notion that temporal proximity alone is sufficient to establish a prima facie case of retaliation. However, noting the proximity in time between Moberg's protected conduct and the reprimand, the board conceded that contextual facts could establish a nexus between the conduct and the adverse action.

In support of his claim of disparate impact, Moberg charged that while he was reprimanded for rude and disrespectful behavior, his identical claim against Superintendent Bosley did not result in a reprimand. The board rejected the argument, finding that Bosley and Moberg were not similarly situated because there was no showing that Bosley had been rude and disrespectful to Moberg. In contrast, the

SMCOE human resources department determined that Moberg had engaged in rude and disrespectful behavior. Thus, according to the board, there were insufficient facts provided to find disparate impact.

The board also turned aside Moberg's claim that management's departure from standard procedures showed retaliation. Because Moberg failed to refute the assertion that it was at his request that the oral reprimand be put into writing, he failed to provide sufficient facts to establish a nexus based on this theory. The board rejected Moberg's additional allegations regarding other departures from standard procedure because they were merely conclusions without supporting facts. Although the charging party's factual allegations must be considered true, a charge still must contain a clear and concise statement of the facts and conduct alleged to constitute an unfair practice.

Ultimately, PERB agreed with the B.A. and dismissed the charge for failure to state a prima facie case of retaliation.

**Arbitrator's award on retaliation not repugnant to EERA: Santa Ana USD.**

(*O'Neil v. Santa Ana Unified School Dist.*, No. 1951, 3-28-08; 12 pp. dec. By Chair Neuwald, with Members McKeag and Wesley.)

**Holding:** The board dismissed the unfair practice charge and deferred to the arbitrator's award which found that the charging party was not retaliated against for her participation in association activities.

**Case summary:** The charging party was a third-grade teacher and an active member of the association. She was also vocal in her opposition to her principal's restructuring plan.

Several months after she wrote a letter to the principal expressing concern over the proposed restructuring, the district informed her that she would be transferred to another school. The district said the transfer was needed to implement a program improvement plan in compliance with federal law.

The charging party filed a grievance alleging that the transfer violated provisions of the collective bargaining agree-

ment. She also filed an unfair practice charge with PERB to ensure compliance with the six-month statute of limitations period.

The parties took the grievance to binding arbitration. The arbitrator determined that the teacher's transfer was not based on a contractual or statutory standard, but on administrative preference, and, therefore, that the district had initiated the transfer "arbitrarily or capriciously." However, the arbitrator did not find that these violations were a result of the charging party's participation in association activities. The arbitrator ordered the district to offer the charging party her former position and to pay any lost compensation or benefits caused by the transfer.

The board agent deferred to the arbitrator's award and dismissed the retaliation charge because the charging party could not establish that the arbitrator failed to address the issues raised in the charge or that the decision was repugnant to the purposes of EERA. The B.A. also dismissed the party's unilateral change allegation because only the exclusive representative, not an individual employee, has standing to raise allegations of bad faith bargaining. The charging party appealed the dismissal of her retaliation charge to the board.

In her appeal, the charging party asserted that the B.A. erred in finding the issue of retaliation "was already addressed in arbitration." While the arbitrator reached a decision on the contractual violation issues, she argued, "PERB provides a broader range of protection such that what might not be a violation under the contract would be a violation under EERA."

EERA Sec. 3541.5(a)(2) gives the board jurisdiction to review an arbitration award to determine if it is "repugnant to the purposes" of EERA. If the board finds repugnancy, it must issue a complaint and decide the case on the merits. Otherwise, it must dismiss the charge.

In *Dry Creek Joint Elementary School Dist.* (1980) No. Ad-81a, 47 CPER 82, the board adopted the post-arbitration deferral standard as laid out by the National Labor Relations Board in *Spielberg Manufacturing Co.* (1995) 112 NLRB 1080. The standard dictates that the board will defer to an arbitrator's award — and necessarily dismiss the charge

— if the unfair practice issues were presented to and considered by the arbitrator in a fair and regular proceeding in which the parties agree to be bound and the arbitrator’s decision is not “clearly repugnant to the purposes and policies of the Act.”

In *Dry Creek*, the charging party alleged refusal to negotiate in good faith. The board explained that it will not ignore an unfair practice charge “if the issues in that charge are not encompassed by the arbitration proceeding and included in the arbitrator’s disposition of the case.” Further, PERB pointed out, while it may not find an arbitrator’s award repugnant simply because it would have issued a different remedy, it may consider an award repugnant if it fails to protect the essential and fundamental principles of good faith negotiations.

The board examined several cases where similar or parallel issues were presented to an arbitrator and then to the board. After doing so, it returned to the *Dry Creek* standard and considered whether the charging party met her burden.

PERB determined that the unfair practice allegations were presented to and considered by the arbitrator. First, the charging party asserted to the arbitrator that the district involuntarily transferred her because of her association activities. During the arbitration proceeding, the charging party presented evidence of her association membership and participation, including activities that put her at odds with the district. After hearing this evidence, the arbitrator determined that the charging party was not transferred in response to her organizational conduct.

There was no dispute, the board continued, that the proceedings were fair and regular and that the parties agreed to be bound by the decision. Lastly, the board looked to whether the arbitrator’s award was contrary to the purposes and policies of EERA.

The board rejected the charging party’s argument that the decision was repugnant because it was “based on interpreting the contract to prohibit only discrimination based on activity officially sanctioned by the union,” rather than the broader concept of protected conduct in EERA. First, the board observed, the arbitrator’s award was limited to

finding that the district did not violate the contract provision prohibiting retaliation for association activities. Second, the board concluded that the purpose and policies of EERA were upheld because the arbitrator’s analysis parallels that of PERB’s analysis of a retaliation charge under the act.

Accordingly, the B.A.’s deferral to the arbitrator’s decision and dismissal of the charge were affirmed because the charging party failed to show that the arbitrator’s award was palpably wrong.

## HEERA Cases

### *Unfair Practice Rulings*

#### **Judicial estoppel bars unfair practice charge based on inconsistent position: CSU.**

(*Academic Professionals of California v. Trustees of the California State University*, No. 1949-H, 3-24-08; 13 pp. dec. By Member McKeag, with Members Wesley and Rystrom.)

**Holding:** The charging party’s unfair practice charge was dismissed because the union was precluded from asserting a position to the board that was inconsistent with the assertion made in superior court.

**Case summary:** In 1999, the Academic Professionals of California filed a grievance charging that CSU failed to provide members of Bargaining Unit 4 with negotiated performance increases. The contract required CSU to distribute 40 percent of a 4 percent compensation pool as performance increases and the remaining 60 percent of the 4 percent compensation pool as general salary increases.

An arbitrator sustained the grievance and found that CSU had failed to distribute the performance increases, though it had met the requirement to allocate funds to general salary increases. To remedy the contract violation, the arbitrator awarded the difference between the amount of the original 40 percent of the 4 percent compensation pool and the subsequent figure that resulted from the decrease in CSU’s PERS contribution rate.

The union and the university were unable to agree on how the PERS contribution rate — 7.05 percent — should

be calculated. The parties returned to the arbitrator twice to resolve their dispute. APC contended that the award should be distributed in the form of a general salary increase. CSU argued that the funds should be distributed as a one-time payment. After fruitless attempts by the arbitrator to persuade the parties to reach an agreement, he ordered that \$100,771 immediately be distributed to the unit employees. Still, APC maintained its position that the award was meant to be distributed as part of a general salary increase; CSU maintained that a lump-sum distribution was appropriate.

Seven months after the arbitrator rendered his final order, APC petitioned the superior court to confirm the arbitration award. The court order, drafted by APC, confirmed the arbitrator's award in its entirety, including the immediate distribution of \$100,771 plus prejudgment interest, to Unit 4 members. CSU informed APC that it intended to abide by the order and that each entitled employee would receive \$53.17. APC advised the university that "the appropriately pro-rated portion of each employee's initial payment will need to be added to the employee's base monthly salary." CSU refused to distribute anything over the \$100,771 amount and distributed \$53.43 — increased from \$53.17 due to interest — to each employee.

One month later, CSU filed with the superior court a Notice of Satisfaction of Judgment. APC originally opposed the notice because it had no evidence that the payments were made. Eventually, the union filed an Acknowledgement of Satisfaction of Judgment with the court. The acknowledgement stated, "The judgment is satisfied in full."

Subsequently, the union filed an unfair practice charge against CSU based on its distribution of the withheld funds as a one-time payment as opposed to a salary increase. The ALJ held that, under the principle of *res judicata*, APC was precluded from asserting that position to PERB. The ALJ also dismissed the case for failure to establish all the elements of an unlawful unilateral charge.

Citing *Aguilar v. Lerner* (2004) 32 Cal.4th 171, the board explained that judicial estoppel applies when a party successfully asserts a position in a judicial or quasi-judicial

proceeding and then attempts to assert a totally inconsistent position in a subsequent proceeding.

To identify APC's initial position, PERB looked to the petition to the superior court for confirmation of the arbitration award and its Acknowledgement of Satisfaction of Judgment filed with the court. The petition for confirmation favored the arbitrator's award order to distribute the funds immediately. Additionally, according to PERB, the acknowledgement represented the union's position that the obligation to fulfill the judgment — i.e., to distribute the \$100,771 immediately — was satisfactorily performed.

APC argued that its acknowledgement was simply an expression of satisfaction of the initial payment of \$53.43 to each employee; it was not an acknowledgement that there were no additional funds to be distributed. The board rejected this argument in light of the express language in the acknowledgement. The board also noted that APC could have stated in its acknowledgement that the judgment was *partially* satisfied but that CSU still owed the salary component of the award. Its failure to do so solidified its position on the issue.

Therefore, said the board, the union asserted a position in superior court that CSU had fully and properly complied with the arbitrator's award. The court's acceptance of the acknowledgement demonstrates that APC successfully asserted its position to the court. When APC filed the instant unfair practice charge against CSU, it took an entirely opposite position, claiming that CSU did not comply with the arbitrator's award. The board concluded that APC should not be permitted to represent to the court that CSU complied with the arbitrator's award and later represent to PERB that CSU violated the law when it complied with it. Consequently, the board found that the elements of judicial estoppel were met, and APC was precluded from asserting in its unfair practice charge a position contrary to that which it advanced to the court.

**No showing of good cause for late filing: U.C.**

(*University Professional and Technical Employees, CWA Local 8 v. Regents of the University of California*, No. Ad-370-H, 2-29-08; 9 pp. dec. By Chair Neuwald, with Members McKeag and Rystrom.)

**Holding:** The case was not reopened because the charging party failed to file a timely appeal and did not show good cause for a late filing. The board agent's dismissal was affirmed.

**Case summary:** Gabriel Ginez was a U.C. employee and member of UPTE, CWA Local 8. The union filed an unfair practice charge on May 11, 2007, that alleged U.C. violated HEERA when it denied Ginez his right to have a union representative present during two meetings with his supervisors.

On August 2, the board agent issued a warning to Local 8 that the unfair practice charge would be denied if an amended charge were not filed that corrected deficiencies in the original. The union did not file an amended charge. The agent sent a dismissal letter on August 20, which included notice of the right to appeal the dismissal to the board within 20 days. With a five-day extension applied pursuant to the PERB regulation related to service by mail, the deadline to appeal was September 14. Local 8 did not file an appeal.

On November 1, the local filed a letter with PERB that requested the case be reopened. The letter was dated October 19, and the proof of service showed the letter was mailed on October 23.

The board explained that pursuant to its decision in *Los Angeles Unified School Dist.* (2007) No. Ad-368, 188 CPER 90, a request to reopen a case in order to amend a charge is considered an appeal of the dismissal of the charge. As such, the appeal was untimely because it was not filed within 20 days of the board agent's dismissal letter.

While PERB has discretion pursuant to PERB Reg. 32136 to accept an untimely appeal, it refused to do so in this case because the union did not present reasonable and credible evidence to support a finding of good cause to excuse the late filing.

The union professed that it was prevented from sending Ginez's letter to PERB because he was out of the country and subsequently bedridden. However, the board frowned on the absence of dates for either circumstance. Further, Ginez's letter was dated September 5, prior to the deadline for filing an appeal. The board found the failure to send the letter until October 23 was indicative of a lack of reasonableness and credibility.

Local 8 also claimed that its steward had terminated his U.C. employment and a volunteer steward had taken his place. This led to delays and miscommunication. However, the board cited evidence that the prior steward did not leave U.C. until after the original deadline had passed. Thus, any confusion that may have occurred as a result of the staff changes would not have affected the union's ability to file a timely appeal.

The board was also reluctant to accept the explanation offered by the union that the new steward was "left completely in the dark" about impending deadlines due to an inability to find Ginez's file in the union offices. PERB suggested that anyone at the union could have requested information directly from PERB. According to the board, when such a request finally occurred, PERB responded immediately. However, even after Ginez's case file was sent to Local 8 — and, the need to send the letter and amend the charge was discovered — the union did not file an appeal until 22 days later. This alone, said the board, precluded a finding of good cause to accept the late filing.

Therefore, the board found that the appeal to reopen the case was untimely, and the board agent's dismissal was upheld.

***Duty of Fair Representation Rulings*****Charge dismissed as untimely: CFA.**

(*Onkvisit v. California Faculty Assn.*, No. 1947, 2-29-08; 4 pp. dec. By Chair Neuwald, with Members Wesley and Rystrom.)

**Holding:** The charging party's unfair practice charge was dismissed as untimely because it was filed with PERB



nearly a year after the union informed him that it would no longer pursue his grievance, and therefore six months after the statute of limitations period ended.

**Case summary:** Sak Onkvisit, a professor at San Jose State University, filed an unfair practice charge against his union, CFA, alleging that it breached its duty of fair representation. Onkvisit refused to grant a make-up exam to a student who had been in a motorcycle accident. Onkvisit denied this contention. The associate dean granted the student a make-up exam and requested the charging party provide the student's previous grades so an ad-hoc committee could determine the student's final grade. Onkvisit refused to provide the grades and was demoted from full-time associate professor for the 2005-06 academic year.

Onkvisit submitted a grievance to CFA in response to what he perceived to be an unlawful adverse employment action. The association declined to submit Onkvisit's grievance to arbitration in a letter dated April 17, 2006, and, upon Onkvisit's appeal, affirmed its position on May 16, 2006.

Onkvisit filed an unfair practice charge against CFA on May 15, 2007. The board agent found it was untimely and dismissed the charge. Onkvisit appealed to the board and argued that the dismissal should be reversed because his demotion was pending before the State Personnel Board.

PERB agreed with the B.A. that the charge was untimely. A charging party has six months from the date that he knows, or should have known, of the conduct underlying the charge to file a claim with the board. Here, according to the board, the six-month statute of limitations period ran from May 16, 2006 — the date on which CFA notified Onkvisit that it affirmed its decision not to pursue his grievance — to November 16, 2006. Citing *Los Rios College Federation of Teachers, CFT/AFT (Violett et al.)* (1991) No. 889, 90 CPER 66, the board explained that the six-month statute of limitations period begins to run on the date the charging party knows, or should have known, that further assistance from the union was unlikely. The board also relied on *California State Employees' Assn. (Calloway)* (1985) No. 497-H, 65 CPER 69, to explain that the statute of limitations period does not begin anew each time the union refuses to process a grievance.

Notably, the board commented in a footnote that the charging party's pending case before the State Personnel Board was irrelevant to its determination that his unfair practice charge was untimely.

## MMBA Cases

### *Unfair Practice Rulings*

#### **Notice of intent to change policy triggers limitations period: South Placer Fire Protection Dist.**

(*South Placer Fire Administrative Officers Assn. v. South Placer Fire Protection Dist.*), No. 1944-M, 2-22-08; 5 pp. + 7 pp. R.A. dec. By Member McKeag, with Chair Neuwald and Member Wesley.)

**Holding:** The association's charge was dismissed as untimely because the six-month statute of limitations began to run when the association received notice of the employer's intent to implement an action that constituted a basis for the unfair practice charge and not when the action was actually implemented.

**Case summary:** The South Placer Fire Administrative Officers Association filed an unfair practice charge alleging the South Placer Fire Protection District unilaterally removed work from the battalion chief bargaining unit. The dispute centered on a revised job description for the Emergency Medical Services Administrator. The district renamed that as an EMS Officer, Division Chief, position; division chiefs are not included in the bargaining unit.

On September 21, 2005, at a district board meeting attended by the association, the battalion chief job description was revised and the position renamed. Soon after, the district presented the association with its operations manual that included the new title and revised job description. On June 16, 2006, the district announced that effective June 24, 2006, the EMS Officer, Division Chief, position would be filled. The association filed an unfair practice charge with PERB on December 7, 2006, alleging an unlawful unilateral change in violation of the MMBA.

The regional attorney dismissed the association's charge as untimely. The R.A. explained that PERB is prohibited from issuing a complaint with respect to any charge based on an alleged unfair practice that occurred more than six months prior to the filing of the charge. Citing *Gavilan Joint Community College Dist.* (1996) No. 1177, 122 CPER 88, the R.A. observed that the six-month limitation period begins to run once the charging party knows, or should have known, of the conduct underlying the charge.

The association acknowledged the six-month statute of limitations governs unfair practice charges. However, it contended that the underlying charge stemmed from the June 16, 2006, notice of intent to fill the EMS Officer, Division Chief, position. The association reasoned that because its contract with the district included a zipper clause, the district could not make a change to the MOU and the parties were not required to bargain over any proposed changes. Thus, according to the association, the district's actions did not violate the MOU until June 16, 2006 — when the district gave notice of intent to fill the renamed and repurposed position. Using that date, the association argued, the six-month statute of limitations period would not have run until late-December 2006.

The R.A. rejected the notion that the existence of a zipper clause changed the calculation of the statute of limitations period. Nor did she find factual allegations establishing that the statute had been tolled. Further, the R.A. explained that a charging party must file its claim when it has actual or constructive notice of a clear intent to implement an action that constitutes the basis of the unfair practice. The R.A. cited *Peralta Community College Dist.* (1998) No. 1281, 139 CPER 79, which held that the charging party may not wait until actual implementation occurs to file its charge with PERB.

The board agreed with the R.A. and cited additional authority that rejected the assertion that a unilateral change does not occur until it is implemented. It pointed out that the association was present at the board meeting when this decision was made and received actual notice of the intent to implement the change. Thus, the charge was not timely filed

and was properly dismissed. The statute of limitations began to run in September 2005, and the six months ran until March 2006 — before the new position was ever filled.

**Appeal of dismissal must state grounds for board review: IBEW Loc. 1245.**

(*Neronha v. IBEW Local 1245*, No. 1950-M, 3-28-08; 2 pp. dec. By Chair Neuwald, with Members Wesley and Rystrom.)

**Holding:** The charging party's appeal of the dismissal of her unfair practice failed to state the grounds for her appeal and was dismissed.

**Case summary:** The charging party filed an unfair practice charge against the union, alleging it failed to properly represent her. The board agent dismissed the charge as untimely and for failure to state a prima facie case.

The charging party filed an appeal and asserted, "How can you ask a union to represent you after they have been retained by the employer?" The board commented that the assertion did not demonstrate a deficiency in the board agent's dismissal.

The charging party's additional argument referred to facts that the board agent failed to include in his warning letter. Again, the board noted that the appeal did not indicate how these facts would cure the statute of limitations problem cited in the board agent's warning letter.

Regulation 32635 directs that an appeal of a dismissal must state the specific issues of procedure, fact, law, or rationale to which the appeal is taken; identify the page or part of the dismissal to which each appeal is taken; and state the grounds for each issue cited.

Because the charging party failed to state the grounds for the issue raised on her appeal, she failed to comply with the requirements in the PERB regulation. Therefore, the board dismissed the appeal.

**No reconsideration without board error or newly discovered evidence: Stationary Engineers Loc. 39.**

(*Fisher v. Stationary Engineers Loc. 39*, No. 1940a-M, 3-28-08; 2 pp. dec. By Member Wesley with Members McKeag and Rystrom.)

**Holding:** The request for reconsideration failed to demonstrate that the board's decision contained prejudicial errors of fact or, alternatively, to present newly discovered evidence.

**Case Summary:** The charging party sought reconsideration of the board's decision regarding his unfair practice charge alleging that the union had breached its duty of fair representation. In *Stationary Engineers Loc. 39 (Fisher)* (2008) No. 1940, 189 CPER 122, the board dismissed the charge as untimely.

Under PERB Reg. 32410, reconsideration of PERB decisions is permitted where the decision contains prejudicial errors of fact or, alternatively, where the party has newly discovered evidence that was not previously available and could not have been discovered with the exercise of reasonable diligence. According to the board, simply arguing the same facts that were presented in the original appeal does not satisfy the requirements of the regulation.

Here, because the requesting party did not present newly discovered evidence, the request for reconsideration was denied.