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LETTER FROM THE EDITOR

Dear *CPER* Readers:

At this time of year, our attention shifts to Sacramento and California's annual budget negotiations. Paying no heed to the constitutional deadline, lawmakers seem to have gotten accustomed to going down to the wire. Those of you who look to the state coffers for financial support certainly have your ears to the ground. But, if I can speak for all of us, the economic concerns are more widespread this year. The mortgage meltdown. The tumbling stock market. Ever-increasing gas prices. It's not hard to feel uneasy.

Yet, when we read the newspaper or listen to the news, we get divergent assessments of the problem from the experts and, of course, the politicians. In the end, we're left not knowing what to think about the future of our economy. Some are forecasting an unprecedented worldwide fiscal crisis. Others are more optimistic and are confident that things will turn around soon.

Whether we like it or not, public sector labor relations practitioners around the state are not exempt from this uncertainty. Many of the stories in this issue attest to that fact. In state government, salaries are being squeezed and some benefits may fall by the wayside. Clearly, at the bargaining table, neither labor nor management can afford to ignore the broader economic climate in which negotiations take place.

But this issue of the journal offers a diversion from the gloomy news. Our main article by Emily Prescott, Allyson Hauck, and Dana Barton could not be more up to date. They take a look at the impact the high court's "gay marriage" decision may have on local government employees whose job it is to issue marriage licenses. And, Bonnie Bogue offers practitioners a clear discussion of the rules of evidence as they are typically applied by arbitrators.

The PERB jurisdictional battle continues to work its way through the courts, with a second opinion in *Contra Costa* reaching the opposite conclusion of the court in *San Jose*. Stay tuned. The State Supreme Court can be expected to weigh in.

Recent decisions by the U.S. high court make considerable adjustments in the field of age discrimination and retaliation causes of action.

So, despite the financial uncertainties, *CPER* is one resource you *can't afford* to be without.

Sincerely,



Carol Vendrillo,
Editor

When Firmly Held Religious Beliefs Conflict With the Right to Wedded Bliss

Emily Prescott, Allyson Hauck, and Dana Barton

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CONSIDER the following hypothetical situation:

Mark is an employee at the local county clerk's office. After last month's landmark California Supreme Court decision on same-sex marriage was issued, Mark told his supervisor that he had a religious objection to same-sex marriage and asked his supervisor for an exemption from certain job duties, including issuing marriage licenses and performing marriage ceremonies for same-sex couples. In addition, Mark has been vocal at work about his objection to same-sex marriage. He has asked coworkers about their beliefs and quoted scripture to them. Mark's gay coworker, Cynthia, has complained that Mark's behavior creates a discriminatory environment. Additionally, the county received a complaint from the public after Mark was heard discussing his beliefs in an area of the office open to the public.

Must the county offer Mark an accommodation based on his religious belief? May the county limit Mark's religious speech with regard to his coworkers and in areas open to the public?

Same-Sex Couples' Right to Marry Under In re Marriage Cases

This hypothetical highlights challenges faced by county clerks' offices across California since the historic ruling by the state Supreme Court in *In re Marriage Cases* on May 15, 2008, when a 4-3 majority decided that state statutes precluding same-sex marriage violate the California Constitution.¹

The question before the court was whether the California Constitution prohibits a statutory scheme that expressly differentiates between the unions of same-sex and opposite-sex couples. The law afforded all of the significant legal rights and obligations to both types of unions but assigned a different name to

each: “marriage” for heterosexual couples and “domestic partnership” for same-sex couples.² In other words, gay and straight couples were “separate but equal.”

Recognizing marriage as a deeply rooted tradition in the state’s history, the court concluded that limiting same-sex couples to domestic partnerships impinged on their right to marry.³ Specifically, this statutory scheme violated same-sex couples’ privacy and due process rights to marriage, and the guarantee of equal protection under the Constitution. The court determined that the state could neither demonstrate a compelling interest in maintaining this dichotomy, nor show that limiting marriage to heterosexual couples was necessary to preserve the institution of marriage.⁴

The court acknowledged that its decision challenged a predominate understanding of marriage as a union of a man and a woman,⁵ but recognized that societal views can evolve. The court noted that for more than a century, California had prohibited marriages between individuals of different racial backgrounds.⁶ And, in the “not-so-distant past,” the state maintained rules and practices that segregated minorities from public facilities and excluded women from holding certain occupations or sitting on juries.⁷ These examples demonstrate that practices tolerated or even accepted by society “often mask an unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions.”⁸ Over time, what are accepted practices become intolerable.

And so, California became the second state to acknowledge a constitutional right for same-sex couples to marry.⁹

How the Decision Affects County Employers

When *In re Marriage Cases* was decided, controversy quickly ensued at counties across the state. The refusal by some employees to perform marriage ceremonies or issue marriage licenses to same-sex couples on religious grounds became fodder for the news media.¹⁰ This article explores

the conflict between the right of employees to seek religious accommodation and the duty of employers to provide a non-discriminatory workplace to its employees and religious-neutral services to the public.

In our hypothetical example, the textbook analysis requires the county to engage in an interactive process to explore whether it can accommodate Mark’s specific request to be relieved of certain duties or provide some other accommodation. To determine whether a county should or

must fulfill an employee’s accommodation request, it is necessary to carefully balance the employee’s right to free exercise and enjoyment of religion with the government’s duties to uphold the constitutional right to marriage and not to entangle itself in religion. Because the county and its employees owe a specific duty to uphold the laws and California Constitution, we believe this traditional balancing tips strongly against accommodating the employee’s specific request to refuse to perform his or her job duties.

The county need not modify the employee’s job duties to allow him to accommodate his religious beliefs. Here, the county may make good-faith efforts to reasonably accommodate Mark in a religious-neutral manner, such as a transfer. While the county should permit the employee to exercise any generally available right to transfer to another available job, there is a strong question whether a county has a right to violate its own rules by permitting an employee to change jobs to avoid the county’s constitutional duty to license same-sex marriages. However, in the interest of avoiding becoming a “test case,” where the ability to accommodate through transfer exists, that may be a wise choice.

Religious Accommodation in the Workplace — A Brief Overview

Both the California and federal Constitutions protect freedom of religious expression.¹¹ In the context of employment, this freedom is also protected by Title VII of

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the Civil Rights Act of 1964, and by the California Fair Employment and Housing Act.¹² Both statutes make it unlawful for an employer to discriminate against an employee on the basis of religion. If an employee requests an accommodation based on religious beliefs, an employer must make good-faith efforts to reasonably accommodate that employee's religious beliefs and practices unless doing so would create an undue hardship.¹³ Under Title VII, the Supreme Court has held that an undue hardship is one that presents more than a de minimis cost to the employer.¹⁴ The FEHA, however, requires an employer to demonstrate that an accommodation would require "significant difficulty or expense" to prevent an undue hardship.¹⁵ In California, under the FEHA, county employees may be held to a higher standard.

If the county declines to accommodate Mark, or offers an alternative he finds unacceptable, he may make a religious discrimination claim under the FEHA by alleging: (1) he holds a sincere religious belief; (2) the employer was aware of that belief; and (3) the belief conflicts with an employment requirement.¹⁶

For our hypothetical, we will assume that Mark met his initial burden¹⁷ and the burden has shifted to the employer to establish either that (1) it made good faith efforts to accommodate Mark, or (2) it could not do so without suffering an undue hardship.¹⁸ Some counties have declined to entertain requests like Mark's because they view such requests as discriminatory or possibly even unlawful, thereby constituting an undue hardship.¹⁹ Other counties are willing to accommodate employees and have begun to determine what type of accommodation is appropriate.²⁰

County Likely Would Not Be Required to Exempt Employee From Certain Job Duties

Mark asked to be excused from issuing marriage licenses and performing marriage ceremonies for same-sex couples

— essentially carving out those established responsibilities from his job. A court likely would conclude that Mark's requested accommodation is not required by law. Instead, an offer to transfer Mark out of the department that handles marriage may be sufficient. Moreover, agreeing to Mark's request would likely prevent the county from providing services in a religious-neutral manner, creating an undue burden on the employer.

In *Bruff v. North Mississippi Health Services*,²¹ an

employment counselor refused to discuss a client's homosexual relationship because it conflicted with the counselor's religious beliefs. Management met several times to consider whether an accommodation was feasible, but ultimately concluded that the counselor could not determine which patient issues to counsel in advance of an appointment and that accommodating the request would create an uneven distribution of work for other counselors.²² Instead, the employer gave Bruff 30 days notice to find another position at the hospital.²³

In *Shelton v. University of Medicine and Dentistry of New Jersey*,²⁴ the Third Circuit Court of Appeals confronted a

deliveryroom nurse who refused to take part in emergency abortions, risking patients' health and safety. The employer determined that staffing shortages prevented it from accommodating assignment trades.²⁵ Instead, the hospital offered the nurse a lateral transfer to the newborn intensive care unit and invited her to contact the human resources department to identify other open nursing positions. Shelton did not accept the transfer and instead sued when she was terminated.²⁶

Both courts held that the employers offered a sufficient reasonable accommodation and were not required to carve out job duties to suit the employees since doing so would create an undue hardship on the employer.²⁷

The Seventh Circuit also has held that a city offered a reasonable accommodation to a police officer by giving him the opportunity to transfer to another unit rather than carving

Agreeing to excuse the employee from issuing licenses could prevent the county from providing services in a religious-neutral manner.

out certain duties. In *Rodriguez v. City of Chicago*,²⁸ a police officer requested to be relieved from guarding an abortion clinic. When the city offered a transfer instead of carving out those duties, the officer turned it down and brought suit. The majority opinion held that the city's attempt at accommodation was sufficient.²⁹

Judge Richard Posner's concurring opinion in the *Rodriguez* case is notable. Although Posner agreed with the result, he asserted that the court should have decided the city was not required to offer the officer an accommodation because to offer an accommodation was itself an undue hardship. He wrote that safety officers should not be allowed "to recuse themselves from having to protect persons of whose activities they disapprove for religious (or any other) reasons."³⁰ Judge Posner emphasized the "importance of public confidence in the neutrality of its protectors," and reasoned that the need for public confidence should allow a public safety agency to claim undue hardship and "escape any duty of accommodation."³¹

Although a county clerk does not perform a public safety function, the importance of religious neutrality by government agencies that provide services to the public cannot be overlooked. Indeed, the county has an obligation to perform services in a religious-neutral manner and a right to "protect its own legitimate interests in performing its mission."³² At a minimum, as in *Bruff* and *Shelton*, it would likely be unduly burdensome for our county to carve out Mark's duties, since there would be no way to determine in advance which members of the public he would be unable to serve. And under *Rodriguez*, our county may claim that to even entertain Mark's request for accommodation is unduly burdensome because, as discussed below, it would undermine public confidence that the county is meeting its Establishment Clause obligation to perform marriage services in a religious-neutral manner.

The County Likely Must Explore Whether Other Reasonable Accommodations Can Be Offered

Counties would be on solid ground if they refuse to carve out specific duties as an accommodation, and may have a reasonably strong argument that *any* accommodation would be unduly burdensome. However, our hypothetical county has decided it does not want to be the test case and opts to

consider whether there are other reasonable accommodations it can offer.³³

Under Title VII, an employer is not obligated to offer one reasonable accommodation over another, even if the employee has a preference. The Supreme Court held that Title VII directs that "*any* reasonable accommodation by the employer is sufficient to meet its accommodation obligation...."³⁴ The employer may consider the burden on other employees and the impact on the terms of a collective bargaining agreement if the accommodation were granted.³⁵ Under the FEHA, an employer must "explore" any reasonable available alternative.³⁶

Whether a hardship exists will vary depending on "overall financial resources of the covered entity" and "type of operations, including the composition, structure, and functions of the workforce of the entity."³⁷ The two most common types of undue hardship are additional costs to accommodate the employee and the need for coworkers to shoulder part of the accommodated employee's workload.³⁸ Assuming that the county could carve out certain duties for Mark, it has determined that, as in *Bruff*, doing so would unduly burden other coworkers and the public. In addition, because our county is very small, there are no transfer opportunities for Mark at this time. The county plans to offer Mark 90 days to seek a transfer opportunity, consistent with its civil service rules.

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Employer May Prohibit Workplace Expressions of Religious Opposition to Same-Sex Marriage

During the time our county explored possible accommodations, it received two complaints about Mark's workplace conduct: one from a gay coworker and one from a member of the public. Both are offended by Mark's vocal religious objections to same-sex marriage. Mark has requested a further accommodation that he be allowed to express his religious objections to same-sex marriage, both to his coworkers and to members of the public.

The county has an obligation to provide a workplace free from discrimination in a religious-neutral manner.³⁹ The county also has a First Amendment Establishment Clause obligation to provide services in a religious-neutral manner and a right to "protect its own legitimate interests in performing its mission."⁴⁰ Now, in addition to Mark's right to freedom of religious expression, the county must address its competing constitutional rights to protect public employee speech and governmental neutrality.⁴¹

When the public employee's rights conflict with the public employer's rights and duties, a court will balance them pursuant to the *Pickering* test established by the United States Supreme Court.⁴² When balancing Mark's right to freedom of speech as a public employee, the United States Supreme Court ruled in *Garcetti v. Ceballos* that the First Amendment only protects public employees' speech when they speak "as citizens" on "matters of public concern" and not when they speak "as employees" as part of their official job duties.⁴³ If a court concluded that Mark is speaking as an employee, his speech is not protected, and he has no competing right to balance against the rights of the county. But if a court concluded that Mark is speaking as a citizen, he would be afforded First Amendment protection. But the county can still refuse to accommodate Mark's speech, if it can demonstrate: (1) Mark's speech was expressed

pursuant to his official job duties; (2) on balance, under the *Pickering* test, the speech was unduly disruptive; or (3) the alleged adverse employer action was taken for a legitimate non-retaliatory reason not in response to the employee speech.⁴⁴

Thirty days before the Supreme Court decided *Garcetti*, the Ninth Circuit Court of Appeals decided *Berry v. Department of Social Services*.⁴⁵ In *Berry*, the court applied the

Pickering balancing test and found in favor of the employer because of the risk of violating the Establishment Clause. In *Berry*, a Tehama County employee was prohibited from discussing religion with clients, prohibited from holding prayer meetings in a county conference room, and asked to remove visible religious items in his workspace.⁴⁶ Berry alleged that this violated his First Amendment right to free speech and expression. The court found in favor of the employer because the risk of an Establishment Clause violation based on the county's entanglement with religion outweighed Berry's free exercise claim. It also found, "it would be an undue hardship to require the Department to accept, or have to rebut, the inherent suggestion

of Department sponsorship that would arise..." by allowing this type of speech and expression.⁴⁷

If Mark could demonstrate that his speech is not "as an employee" related to his official job duties, then the *Berry* analysis under the *Pickering* test is more appropriate.

In *Peterson v. Hewlett-Packard Co.*,⁴⁸ the Ninth Circuit Court of Appeals similarly held that a private employer did not need to accommodate Peterson's religious beliefs, which included posting biblical messages meant to discourage homosexuality. These messages were exhibited next to posters promoting tolerance of sexual orientation as part of the company's workplace diversity program. Analyzing this case under a failure-to-accommodate claim (without Establishment Clause implications), the court held that Title VII does not require the employer "to accommodate an

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employee's desire to impose his religious beliefs upon his co-workers."⁴⁹ While the court determined that the accommodation requested placed an undue hardship on the employer, it explained that the employer "must tolerate some degree of employee discomfort in the process of taking steps required by Title VII to correct the wrongs of discrimination."⁵⁰ But the employer need not tolerate behavior that will "demean or degrade" members of its workforce.⁵¹

Under these cases, the county likely has an obligation not to consider an accommodation that would unlawfully entangle the county in the promotion of a religious message, cause undue disruption, or create a high level of workplace discomfort amongst employees.

Conclusion

The cases strongly suggest there is no need to accommodate by carving out marriage duties from Mark's current position. Employers who offer alternative accommodation to employees like Mark have flexibility to determine an appropriate religious accommodation and may consider a compromise that "eliminates the conflict between employment requirements and religious practices."⁵² Accommodation likely will lead to different action in different counties. The California Fair Employment and Housing Commission has acknowledged the need for flexibility, and will consider the size of the employer facility, the number of employees, and the size of the budget. In the meantime, counties are within their rights to ensure a workplace free of discrimination and to ensure that services are provided to the public in a religious-neutral manner.

As California embarks on a new path that recognizes a same-sex couple's right to marry, the outcome for individuals seeking religious accommodations in the public workplace is just now being explored. Counties are on the frontline of this ruling, and will face challenges in balancing its duties under the Establishment Clause and Constitution with employees' religious freedom. County employers may place themselves at risk for accommodating an employee if that accommodation endorses unlawful discrimination against individuals or couples based on sexual orientation. Or

counties may face the risk of a religious discrimination suit by an employee alleging the county failed to consider his or her request for accommodation. Accordingly, counties should carefully consider how an accommodation request might affect both its internal and external operations. If a county makes a claim of undue hardship, it should be prepared to articulate what the hardship is and how it will specifically affect the county's ability to provide public services in a religious-neutral and lawful manner. *

1 (2008) 43 Cal.4th 757.

2 *Id.* at 779-780.

3 *Id.* at 737, 783.

4 *Id.* at 784-785.

5 *Id.* at 853.

6 The Supreme Court of California outlawed the prohibition on interracial marriage in *Perez v. Sharp* (1948) 32 Cal.2d 711.

7 *In Re Marriage Cases*, *supra*, 43 Cal.4th at 854.

8 *Id.*

9 Massachusetts was the first state to find that its constitution prohibited limiting marriage to a union between a man and a woman in *Goodridge v. Dept. of Public Health* (2003) 440 Mass. 309.

10 Renaud, John-Paul, "California's county clerks' policies vary on same-sex marriages," *Los Angeles Times*, June 16, 2008; Tony Perry, Craig Gustafson, "14 County workers objected to services," *San Diego Union-Tribune*, June 19, 2008; "Clerk reassigns workers who object to gay marriage," *Los Angeles Times*, June 20, 2008.

11 The California Constitution provides, "Free exercise and enjoyment of religion without discrimination or preference are guaranteed." Cal. Const., Art. 1, Sec. 4. The U.S. Constitution precludes the passage of any law that prohibits the free exercise of religion. U.S. Const., Amendment 1.

12 Gov. Code Sec. 12940(a); 42 USC Sec. 2000e-e(a)(1).

13 Gov. Code Sec. 12940(a); 42 USC Sec. 2000e.

14 *Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 84.

15 Gov. Code Sec. 12926(s).

16 *California Fair Employment and Housing Comm. v. Gemini Aluminum Corp.* (2004) 122 Cal.App.4th 1004, 1011, 169 CPER 54; see also, *Opoku-Boateng v. State of California* (9th Cir. 1996) 95 F.3d 1461, 120 CPER 79 (third prong satisfied where employer threatened adverse action or subjected employee to discriminatory treatment). Under Title VII, a plaintiff is required to show: (1) he

had a bona fide religious belief; (2) the practice associated with the religious belief actually conflicted with the job requirements; (3) he informed the employer of the conflict; and (4) that, as a result of the conflict, the employer either failed to hire or terminated the employee or the employee felt forced to resign. *Balint v. Carson City, Nevada* (9th Cir. 1999) 180 F.3d 1047, 1050 (en banc), 137 CPER 62. The FEHA, unlike Title VII, does not require an adverse employment action; it merely requires that the employee's religious belief conflict with an employment requirement.

17 Courts in California have taken an expansive view of what constitutes a religion or a religious practice. The FEHA defines "religion" to include "all aspects of religious belief, observance and practice." Gov. Code Sec. 12926(o).

18 "Once the employee establishes a prima facie case with sufficient evidence of the three elements, the burden shifts to the employer to establish that 'it initiated good faith efforts to accommodate or no accommodation was possible without producing undue hardship. [Citations.]'" (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 370, 58 Cal.Rptr.2d 747.) *FEHC v. Gemini Aluminum Corp., supra*, 122 Cal.App.4th 1004, 1011, 169 CPER 54.

19 Renaud, John-Paul, "California's county clerks' policies vary on same-sex marriages," *Los Angeles Times*, June 16, 2008.

20 *Id.*

21 *Bruff v. North Mississippi Health Services* (5th Cir. 2001) 244 F.3d 495, 498.

22 *Id.* at 497.

23 *Id.* at 502.

24 *Shelton v. University of Medicine and Dentistry of New Jersey* (D.N.J. 2000) 223 F.3d 220.

25 *Id.* at 223.

26 *Id.* at 224.

27 *Bruff, supra*, 244 F.3d at 502; *Shelton, supra*, 223 F.3d at 227-228.

28 *Rodriguez v. City of Chicago* (7th Cir. 1998) 156 F.3d 771.

29 *Id.*

30 *Id.* at 779.

31 *Id.*

32 *Berry v. Department of Social Services* (9th Cir. 2006) 447 F.3d 642, 648, 178 CPER 65, quoting *City of San Diego v. Roe* (2004)

543 U.S. 77, 170 CPER 48.

33 Under Title VII or the FEHA, a decision to flatly refuse any consideration of an accommodation could be problematic given that employers can refuse to accommodate "[o]nly if the employer can show that no accommodation would be possible without undue hardship."

34 *Ansonia Board of Education v. Philbrook* (1986) 479 U.S. 60, 107 S. Ct. 367 (emphasis added).

35 *Trans World Airlines, Inc. v. Hardison, supra*, 432 U.S. 63, 79-81; *Chalmers v. Tulon Co. of Richmond* (4th Cir.1996) 101 F.3d 1012, 1017-18; *Opuku-Boateng, supra*, 95 F.3d 1461, 1468, 130 CPER 29.

36 Gov. Code Sec. 12940 (j). To date, no California court has ruled on whether the duty to explore reasonable accommodations is greater under the FEHA than the de minimis standard under Title VII.

37 Gov. Code Sec. 12926(s.1-5).

38 Sakai, Charles, Erich Shiners and Genevieve Ng, "Religion in the Workplace: A Public Employer's Guide to Reasonably Accommodating Employee's Religious Practices," *2008 Bender's Calif. Lab. & Empl. Bull.* 224 (June 2008).

39 See Gov. Code Sec. 12940(a); 42 USC Sec. 2000e-e(a)(1).

40 *Berry v. Department of Social Services, supra*, 447 F.3d 642, 648, 178 CPER 65 (quoting *City of San Diego v. Roe, supra*, 543 U.S. 77, 170 CPER 48).

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

42 *Id.*

43 *Garcetti v. Ceballos* (2006) 547 U.S. 410, 180 CPER 13.

44 *Id.* at 424.

45 *Berry v. Department of Social Services, supra*, 447 F.3d at 648, 178 CPER 65.

46 *Id.* at 648-651.

47 *Id.* at 655.

48 *Peterson v. Hewlett-Packard Co.* (9th Cir. 2004) 358 F.3d 599, 164 CPER 77.

49 *Id.* at 607 (citing *Chalmers v. Tulon Co. of Richmond, supra*, 101 F.3d 1012, 1021).

50 *Id.*

51 *Id.* at 608.

52 *Ansonia Board of Education, supra*, 479 U.S. at 70.

Pocket Guide to Disability Discrimination in the California Workplace

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

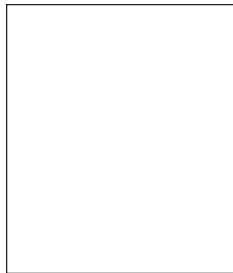
Disabled California employees who face discrimination in the public sector workplace are protected by the federal Americans with Disabilities Act of 1990 and the California Fair Employment and Housing Act. This Guide describes who the laws cover, how disabilities are defined, and the remedies available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

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

Order at <http://cper.berkeley.edu>

For What It's Worth: Myth and Reality of Evidence in Arbitration

Bonnie G. Bogue



THE CALIFORNIA Arbitration Act provides:

- The neutral arbitrator shall preside at the hearing, shall rule on the admission and exclusion of evidence and on questions of hearing procedure and shall exercise all powers relating to the conduct of the hearing.
- The parties to the arbitration are entitled to be heard, to present evidence and to cross-examine witnesses appearing at the hearing, but rules of evidence and rules of judicial procedure need not be observed....

***Bonnie Bogue** has been an arbitrator and mediator since 1977, and is a member of the National Academy of Arbitrators. She is a former director of the CPER Program and has authored several CPER Pocket Guides, including Pocket Guide to Public Sector Arbitration: California, which she coauthored with Arbitrator Frank Silver. The author would like to thank C. Allen Pool and Geraldine Randall for their input to this article.*

Arbitrators are granted broad discretion by this statutory language — they have the authority to enforce the rules of evidence, but are not required to do so. Evidentiary issues arise at the arbitration hearing and are dealt with on the spot, rarely addressed in any written arbitration award. So, how do advocates in arbitration know what an arbitrator will do?

Do not be fooled by the often-voiced myth that rules of evidence are not enforced. Most arbitrators will tell you: The rules of evidence may not be as strictly enforced as they are in a court of law; however, the rules exist for a reason — to keep out evidence with limited probative value, to keep the hearing focused on the stated issue, and to keep out evidence that contravenes the rights of the parties or third parties or is unduly prejudicial. Arbitrators welcome objections designed to further these goals, and sometimes will object on their own volition to avoid burdening the record with evidence they know will have no probative value.

But as any experienced advocate can attest, arbitrators vary in their approach to procedure in many ways, one being the degree of flexibility in applying rules of evidence. Their varying approaches may be shaped by their prior professional lives. Some do not have law degrees; others are lawyers with litigation experience. Some were former arbitration advocates. Some were administrative law judges at

the Public Employment Relations Board or the National Labor Relations Board. Others were mediators, with limited experience in formal hearings. Some are academics, steeped in the principles of labor relations or labor law, but without litigation experience. Also, arbitrators do not observe each other in the hearing room, which limits the opportunity for developing a common approach.

Do your homework. Be aware that arbitrators do seek a common approach to evidentiary issues, including discussions in local and national meetings of the National Academy of Arbitrators. Read the same books that arbitrators read. There is a list in the bibliography, below. These books reflect a consensus among arbitrators that has developed over many years. That consensus is clear: The rules of evidence are applied in arbitration.

Come to the hearing with a solid understanding of the basic rules of evidence. Follow this rule of thumb: Give arbitrators something hard to hang their hat on. Put another way: Submit only the best (strongest) evidence. If you rely on weaker evidence because it is easier to acquire, or because you assume the arbitrator will admit that evidence “for what it’s worth,” you may lose your case. Just because the arbitrator receives the evidence does not mean it will be found credible or persuasive enough to support your burden of proof. On the other hand, you may win the case if you make the extra effort to produce the best evidence available — in terms of both witnesses and documents.

The primary rules of evidence that are commonly enforced in arbitration are set out and briefly explained below. First are rules that pertain to reliability of the evidence — that is, to assure the best evidence is in the record. Second are rules designed to protect the interests and privileges of the parties or third persons.

Rules That Assure the Best Evidence

Relevancy and materiality. In order to keep the hearing on track, arbitrators customarily uphold objections to

evidence that is not relevant or material. Do not get hung up on the difference between relevance and materiality. Just remember to ask questions or present documents that will either prove a fact necessary to your case or disprove assertions of the other side. Relevancy does not simply mean relevant to your theory of the case. It may be relevant to the theory of the other side’s case.

Relevancy objections are welcomed by arbitrators if made in good faith. Such objections, particularly early in the hearing, bring the nature of the dispute into focus. The arbitrator’s only knowledge of the case comes from discussions

surrounding the framing of the issue and the parties’ opening statements. Relevancy objections also can help the parties, who often have widely divergent theories and positions and do not know where the other side is coming from.

Arbitrators are known to allow testimony that may not be relevant or material, although related to the dispute, because they understand that grievance arbitration often serves as a forum for the principals to have their “day in court.” This practice allows the parties to clear the air and further the ongoing relationships between the union and management, and between employees. It lets the parties know the arbitrator has heard the “whole story”

and thereby serves their ongoing interests. However, putting into evidence everything that touches on the dispute obscures the issue, prompts objections, and prolongs the time (i.e., expense) of the proceeding. And in the end, it will not help win the case.

Foundation. Evidence requires a “foundation.” Where did this information come from? How does the witness know what he is testifying about? The arbitrator needs to know the source of the information in order to determine whether it is reliable.

Because arbitrators usually will sustain an objection to an unauthenticated document, be prepared to call the author of the document as a witness. Sometimes the recipient of the document can swear to the authenticity of the signature and

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that the document was received in the normal course of business. Call the custodian of a business record to authenticate that he recognizes it as a document produced in the regular course of business. An arbitrator may allow a witness to testify about a document before the foundation is laid, on the promise that a later witness will authenticate it. The more effective practice is to obtain a stipulation as to the documents' authenticity to reduce the number of witnesses or length of testimony.

If the evidence is testimony, lay the foundation by asking the witness how he or she knows what you are asking about. For example, if you intend to ask the witness if the grievant was following standard operating procedures, begin by establishing that there are standard procedures, including producing any written procedures. Then, ask how the witness knows what those procedures are and how he or she knows what the grievant did that varied from them.

The 'best evidence' rule. This rule requires the original document, itself, be placed in evidence, rather than a witness's description of a document or an unauthenticated photocopy of it. If the original document can be produced without undue burden on the custodian of that document, the arbitrator likely will require production of the original.

Given photocopying technology, copies are customarily accepted, along with testimony to show who made the copy and where the original is kept. Of course, this does not preclude evidence offered to show that the copy is not authentic.

Form of the question. A common objection is to the "form of the question" because the question is leading, vague and ambiguous, asks for a narrative response, calls for speculation, or is badgering or argumentative. Arbitrators usually uphold such an objection and ask the advocate to rephrase it because such questions elicit testimony that has limited probative value and can create an unclear record. But the arbitrator may overrule the objection if she finds the objection is overly technical or intended merely to break the

flow of questioning or to confuse the witness by interrupting between the question and answer. An advocate may ask the arbitrator to "strike" answers to improper questions from the record. If the *motion to strike* is granted, the arbitrator will not consider that testimony even though it still appears in the transcript.

Leading questions are those that imply the answer or, at the worst, describe an event and ask the witness if he agrees with that description. An advocate's leading questions of his own witness are improper because they taint the record by providing an answer that the witness would not have come

up with on his own, or that reflects the advocate's "spin" on the evidence.

Arbitrators will uphold objections to improper leading questions, and are even known to object on their own to cut off the question before it is completed. Once a leading question is stated, the witness is improperly alerted to the answer the advocate wants. Even if an objection is sustained, the damage has been done.

Not all leading questions are improper. They are entirely proper on cross-examination, where the point is often to lead the witness into making a statement she was avoiding on direct examination. Also, leading questions in direct examination regarding undisputed or nonmaterial matters, such as the

witness's position or the structure of the employer's business, are admissible and desirable, as they save hearing time.

An example of a leading question is, "Weren't you angry when the grievant yelled at you to go to hell?" The proper form of the question would be, "What, if anything, did the grievant say to you? What was his tone or demeanor when he said that? What was your reaction?" Of course, that is an obvious example that most advocates know they should avoid. However, leading questions crop up with alarming frequency in complex factual scenarios, even from experienced advocates.

It is an acquired skill to refrain from asking leading questions while at the same time avoiding vague and ambiguous or overly broad questions.

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Vague and ambiguous questions are improper because they confuse the witness and may produce misleading or irrelevant testimony. Questions that are compound or complex, rather than shorter and simpler, are often ambiguous. An advocate who writes out questions may err in this regard.

Open-ended questions, such as, “What happened when you came to work that morning?” call for a *narrative response* and feed witnesses’ natural tendencies to tell everything they know or justify their own conduct. Specific questions keep testimony focused and avoid irrelevant testimony, hearsay, and improper opinions.

Questions that call for *speculation*, or answers that offer speculation even if the advocate did not ask the witness to guess or speculate, are improper. Phrase questions that ask for the witness’s own observations or actions, rather than asking why something happened. When preparing witnesses, tell them not to guess and reassure them it is all right to say they do not know the answer, either to your question or to questions on cross-examination.

A question that *misstates the evidence* by incorrectly paraphrasing prior testimony or document is improper in either direct or cross-examination.

Arbitrators uphold objections when the witness’s answer is *not responsive to the question*. Even when the question is properly phrased, witnesses may offer nonresponsive testimony, particularly when the question only asked for a “yes” or “no” answer. If the yes or no answer creates any ambiguity, the other advocate can give the witness the chance to clarify through further questions on redirect examination.

Badgering questions are those designed merely to upset or harass the witness. Similarly, *argumentative questions* are designed to get the witness to admit his explanation makes no sense, or to agree with a contrary interpretation of events, or to admit that the case lacks merit.

There is a line between legitimate cross-examination — designed to press witnesses to change their story or say

something they avoided saying during direct examination — and improper badgering or argumentative questions. It is the arbitrator’s call when an advocate has crossed that line. But it is unlikely the other side’s witness is going to agree with your theory of the case, so save your argument to persuade the arbitrator how to interpret the evidence.

Witness opinions and conclusions. Witnesses are not asked for their opinions or conclusions. The arbitrator wants to hear what they know, saw, heard, or did — that is, facts rather than opinions.

An example of an improper question is, “What does Section 3 of the collective bargaining agreement require?”

That is the ultimate contract interpretation to be made by the arbitrator. But a proper question is, “How have you applied Section 3?” Then the answer is not an opinion, but evidence of parties’ application of the contract. Another example is, “Was the grievant drunk?” Although lay opinions about intoxication are admissible, the better questions are, “Describe the grievant’s demeanor and appearance.” “Based on that demeanor, what did you conclude and why?” The arbitrator needs to know what the witness saw, not the witness’s conclusions, in order to determine if there is proof of intoxication or if the employer’s response to the observed conduct was reasonable.

Certain opinions are admissible. A witness’s opinion or conclusion is admissible if offered to establish that person’s state of mind, if state of mind shows the basis for a subsequent action, such as putting an apparently intoxicated employee on investigatory leave.

Opinions and conclusions can be elicited from “experts” such as doctors or drug lab technicians. But the arbitrator is likely to require testimony from the expert to explain the medical or scientific facts and findings on which his opinion was based. This allows the arbitrator to determine the weight to give that opinion, or compare it to the opinion of the other side’s expert. Remember, the parties have bargained for the arbitrator’s opinion, not the experts’.

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Hearsay. The first challenge of hearsay is to understand what it is, what it is not, and what is an exception to the hearsay rule. A complete explanation of the hearsay rule is too long for this forum. But, a simple definition is: Testimony is hearsay if a witness testifies to what he heard another person say, when the purpose of his testimony is to prove the truth of what that other person said.

Testimony is hearsay only if offered to prove the truth of what was said, but not if intended merely to show the witness's "state of mind." Example: Joe testifies that Fred said, "I checked the door and it is locked." That statement is hearsay if it is offered to prove that Fred checked the door. It is hearsay to prove the door was locked. It is not hearsay, however, if offered to show that Joe heard Fred make the statement. Evidence that Joe heard Fred say this would be relevant to explain why Joe did not lock the door before he went home.

Documents are also hearsay, if offered to prove the truth of what is stated in the document. Nonetheless, a document may be admitted if it was written in the regular course of business, was created close in time to the event the document records, and if there is evidence that the writing is trustworthy, such as testimony from the author or custodian of the record explaining its preparation and chain of custody. A written statement may be admitted to corroborate or attack a witness's testimony. A document may be used to "refresh" a witness's recollection, even if it is not admitted into evidence.

Arbitrators may accept hearsay evidence under relaxed evidentiary rules, but with a couple of caveats. The primary caveat: If the only evidence you have to support a material fact is hearsay, hearsay evidence will not be sufficient to sustain your burden of proof as to that fact. Secondly, do not use hearsay if the person who made the statement can be called to testify. Do not burden the record with someone's recall of what the person said if you can offer the testimony of the person who actually said it.

Even if hearsay is admitted under the relaxed standard, it is suspect evidence because the person who made the statement, orally or in writing, cannot be cross-examined to test credibility. Sworn declarations of absent witnesses usually will not be admitted unless the other party waives any objection. If a witness is not able to attend the hearing, testimony by telephone is preferable to a written declaration, if the parties agree or the arbitrator so rules. Newer technology allowing live video testimony may solve some of the inherent problems of hearing but not seeing the witness.

Some statements that sound like hearsay may nonetheless be admissible because they are not considered hearsay or fall under an exception. For example, an "excited

utterance" is admissible because it is assumed such statements tend to be true. Or, an admission of misconduct is admissible because it is assumed people do not admit to wrongdoing that they did not commit. Likewise, a party's admission against his own interest — like a hearsay statement by a manager that he believed the grievant's story — are admissible, as are "prior inconsistent statements" that are offered to contradict what the same person testified to at the hearing. Or, hearsay may be admitted to corroborate another witness's testimony.

Offers of settlement and statements made in mediation.

Arbitrators are quite likely to exclude evidence concerning settlement of the grievance that was discussed during the lower steps of the grievance procedure or prior to the arbitration hearing. Arbitrators recognize that allowing such evidence tends to chill the use of the grievance procedure, which is designed to resolve cases short of arbitration. They also recognize that parties may offer to accept less than what they think they are entitled in hopes of settling the case short of arbitration; therefore, such offers are not admitted because they are prejudicial as implying a weakness in the party's position.

Likewise, anything said by the parties in mediation will not be admitted. Mediators themselves will not be called as

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witnesses to testify to what was said during mediation, to protect the efficacy of the mediation process.

Burden of proof and order of the hearing. The employee organization that has filed the grievance is the “moving party.” It has the burden of going forward first with its opening statement and evidence, and also bears the ultimate burden of proof in contract interpretation cases. Although discipline grievances also are filed by the employee organization (or sometimes the individual grievant), it is well-settled that the employer bears the burden of going forward as well as the burden of proof in all discipline cases.

If a party raises an argument that the grievance is not arbitrable, either procedurally or substantively, then that party bears the burden of going forward with evidence and proving the arbitrability claim. The arbitrator may bifurcate the proceeding and decide the arbitrability issue before receiving evidence on the merits of the dispute.

Parol evidence in contract interpretation cases. A basic rule of contract interpretation is that the “language speaks for itself.” Parol evidence is evidence outside of the four corners of the agreement, offered to prove the parties’ intended meaning of the terms used in the agreement. Parol evidence is not admissible to change the meaning of clear and unambiguous contract language.

An arbitrator will admit parol evidence only upon a showing of an arguable ambiguity in the contract’s language, even if, in the final analysis, the arbitrator may conclude the language is not ambiguous and must be given its plain meaning. Parol evidence commonly consists of bargaining history, including testimony and notes about statements made at the bargaining table. It may be contemporaneous statements by party spokespersons, made when the contract negotiations were completed. It may be past practice of the parties before the new contract language was negotiated or how the language was applied after the agreement was reached. This evidence may inform the arbitrator of the context in which the language was negotiated, or serve as evidence of the parties’ mutual understanding.

A basic rule of contract interpretation is that the ‘language speaks for itself.’

Rules That Protect Rights and Interests

Pre-hearing discovery. It is often said, “There is no discovery in arbitration,” reflecting that the California Arbitration Act does not provide for pre-hearing depositions of witnesses. The act gives subpoena power to command production of documents “at the hearing,” which has been interpreted not to include pre-hearing production.¹ In contrast, some cases, emanating from the Federal Arbitration Act or interpreting the law of jurisdictions other than California, have held that a labor arbitrator has authority to compel pre-hearing discovery production of documents and witness depositions. Independent of the arbitration procedure statutes, unions may demand documents to fulfill the employer’s statutory obligation to make available materials necessary for the union to comply with its representational duties. But no reciprocal duty applies to the labor organization to reveal evidence to the employer prior to the hearing.

Customarily, the arbitrator will authorize the party advocate to issue a subpoena in the arbitrator’s name, rather than the arbitrator preparing the subpoena. Requesting a subpoena for documents well in advance of the hearing is advisable, as it can lead to discussions that may narrow the scope of the subpoena to avoid undue burden to produce the documents, and avoid using hearing time to resolve such issues. Any dispute over relevancy of the subpoenaed documents or the burden of production can be brought to the arbitrator in a conference call prior to the hearing itself.

Many collective bargaining agreements require the parties, prior to the arbitration hearing, to exchange copies of the documents they will introduce and lists of witnesses they intend to call. Some agreements expressly prohibit evidence to be admitted in arbitration that was not exchanged in lower steps in the grievance procedure.

Pre-hearing exchange of documents and witness lists is encouraged by arbitrators, regardless of the legal authority for the arbitrator to issue subpoenas compelling pre-hearing discovery. Without encouraging the seemingly headlong rush

to turn arbitration into a judicial forum, including the cost and time of pre-hearing discovery, arbitrators nonetheless recognize that exchange of documents and witness lists allows effective use of hearing time. It also can lead the parties to stipulate to undisputed facts that may preclude the need for testimony or documentary evidence. If either party introduces “surprise” evidence or witnesses, the arbitrator is likely to grant a continuance to another hearing day, to allow the other party time to prepare a response.

Due process. Discipline cases present a different evidentiary process. In California’s public sector, the *Skelly*² line of cases requires, as a matter of constitutional due process, that the employee be given notice of disciplinary action with copies of materials supporting that action and the opportunity to respond before discipline is imposed. This “Skelly packet” should contain all the information on which the discipline is based, so it in effect serves as pre-hearing discovery of the employer’s case if the discipline is appealed to arbitration.

In the private sector, “industrial due process” is based on the principle that the employee and union representative should have notice of the grounds for discipline so that the grievant can be defended. Arbitrators may invoke this industrial due process principle, under the fairness element of the traditional test for just cause, to require pre-hearing disclosure.

New or ‘after-acquired’ evidence. Evidence of conduct that occurred after the grievance was filed is usually not admitted if it would change the basis for the grievance. Such evidence defeats the purpose of the grievance procedure steps, which allow the parties to review the evidence and seek resolution of the dispute without resort to arbitration. The arbitrator is likely to exclude the evidence if there is no good reason it was not previously provided, unless the requesting party had actual knowledge of it and would not be prejudiced by its admission. Or, the arbitrator may allow the union to amend the grievance at that point, if doing so

would not prejudice the employer’s ability to respond or the amendment was no surprise to the employer. Or, the arbitrator may grant a continuance to allow the union to amend the grievance and time for the employer to consider the amended grievance, so as to avoid the cost of processing a second or third grievance on the same underlying issue.

Another dispute over after-acquired evidence occurs when the employer seeks to introduce evidence of additional misconduct by the grievant after discipline was imposed. Arbitrators may exclude it altogether, or may allow the

employer to amend the disciplinary notice to include the subsequent allegations of misconduct and delay the hearing until the employee and the union have time to review and respond to the newly discovered evidence. In public sector cases, after-acquired evidence runs afoul of due process rights of pre-discipline notice and opportunity to respond. An arbitrator may admit after-acquired evidence but only if it is relevant to the question of the whether reinstatement is an appropriate remedy, and as long as the union and the employee have the opportunity in the arbitration to respond fully to the allegations of post-

discipline misconduct.

A party may seek to submit additional evidence after the hearing is closed but before an award has been issued. Arbitrators have the discretion to reopen the record, but are customarily reluctant to do so absent a showing of good reason the evidence was not produced at the hearing. Arbitrators will evaluate whether failure to admit the additional evidence would jeopardize a party’s right to a full and fair hearing, which arguably could constitute an abuse of the arbitrator’s discretion and grounds for setting aside the award.

After the award is issued, it is final and binding. The arbitrator cannot augment the record or reconsider the award, absent both parties’ consent or a court order setting aside the award and remanding it for further proceedings.

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Privileged communications. Judicial rules of evidence recognize a number of privileged statements that cannot be used as evidence. The courts have developed these privileges, codified in the Evidence Code, to ensure that certain relationships are not compromised by compelling one party to disclose what was said in confidence by the other party. The privilege is waived if a third party was present because then the communication was not made in confidence.

Arbitrators will enforce these privileges by excluding testimony that would disclose privileged communications. These include conversations or correspondence between lawyer and client, doctor or psychologist and patient, priest and penitent, and spouses. The attorney-client privilege is recognized as extending to communications between a party's attorney and officials and/or members of that party's upper management. It does not apply to individual employees and union members unless the attorney's communication concerned that individual's arbitration testimony on behalf of that party. In addition, in labor arbitration, mediators have a privilege not to disclose what they were told during mediation; this is codified in statutes and in the rules of the Federal Mediation and Conciliation Service.

A union may assert a privilege between a union representative and the grievant when preparing the grievant for the arbitration. There is no statutory union-member privilege, but many arbitrators recognize a "quasi privilege" since the union representative is serving the same role as an attorney had the matter gone to court rather than arbitration. Also, the right to representation is recognized by the employee-relations statutes, and may be compromised if the union representative is compelled to testify for the purpose of attacking the credibility of the grievant's own statements.

Constitutional and statutory rights. Although constitutional rights are not often raised as procedural defenses to the admission of evidence, arbitrators are reluctant to compel production of evidence that would violate these rights. The most frequently invoked constitutional right is

the due process right in the federal Constitution and parallel provisions in the state Constitution, as it applies to the employee's right to be heard before the constitutionally protected property interest in continued employment can be denied. The employee or union may invoke this right to prevent the admission of evidence in arbitration that was not provided in the pre-discipline due process proceeding.

An employee may invoke the Fifth Amendment by declining to testify on the grounds his statements could incriminate him and could be used in a criminal action. The constitutional protection against self-incrimination does not preclude the grievant being called as a witness in the arbitration. While arbitrators cannot compel such testimony, they can draw an adverse inference from the failure of the grievant to testify. A request for a continuance of the arbitration proceeding may be granted to allow the criminal proceeding to be completed to avoid the constitutional issue.

Arbitrators are likely to respect the Fourth Amendment right against illegal search and seizure. The protection has been judicially extended to a public employee's desk or locker where the employee has a reasonable expectation that these areas are not accessible by a supervisor or manager. This issue may arise if a public employer conducts such a search, or if a search by a law enforcement officer produced evidence that would be inadmissible in a criminal proceeding.

Other statutes and ordinances, particularly those covering public employees, such as California's Education Code, Public Safety Officers Procedural Bill of Rights Act, and Firefighters Bill of Rights Act, provide a number of rights and protections that arbitrators will recognize.

Privacy and personnel records. Privacy rights often are raised with regard to medical records because statutory protections create a significant evidentiary issue. If the grievant has put his medical condition at issue by claiming it is the cause of discrimination or is a defense for discipline based on performance, an arbitrator likely will find the

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grievant has waived his privacy interest in medical records or to the testimony of his physician to corroborate those records. An arbitrator may examine the medical records “in camera” and only admit those portions that are relevant to the issues raised by the grievance. Portions of the records that are not necessary or relevant to the issue in dispute may be excluded or redacted.

Personnel records are subject to protections appearing in statutes, ordinances, charters, and collective bargaining agreements. If the arbitrator finds information in the grievant’s personnel file is relevant and material, she may provide an “in camera” review to assure that only relevant information is made part of the record. A third-party’s personnel records may also be relevant — such as discipline records relevant to a claim of disparate treatment. Again, in camera inspection and redaction of names, Social Security numbers, and other personal or confidential information may serve to protect those privacy interests.

If the arbitrator is persuaded that redaction is not sufficient to protect against unjustified disclosure of confidential information, the arbitrator can issue an order to seal the record and transcript, and to allow the evidence to be used only by the arbitrator, the advocates, and party representatives as is necessary to present, brief, and decide the case.

Conclusion

The strong advocate is one who uses evidence effectively. In sum:

- Develop your theory of the case and identify evidence to support it.
- Anticipate the other party’s theory of the case and find the best evidence to respond.
- Do not burden the record with irrelevant or unreliable evidence; use the rules of evidence as a guide.
- Assume the arbitrator will apply the rules of evidence. That will help you to produce the best and strongest evidence to support your case or to rebut the other side’s.
- Use objections effectively. Object only to testimony or documents that produce irrelevant or unreliable evidence, create an unclear or incomplete record, or violate the rights of your party and witnesses. *

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1 CCP Sec. 1282.6 (a)

2 *Skelly v. State Personnel Board* (1975) 15 Cal. 3d 194 ;
Barber v. State Personnel Board (1976) 188 Cal 3d. 395.

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Recent Developments

Local Government

In *Contra Costa* PERB Jurisdiction Case, Court Reaches Opposite Conclusion to *San Jose*

IN THE SECOND appellate ruling to address the issue, the First District Court of Appeal ruled in *County of Contra Costa v. Public Employees Union Local One*, and *County of Contra Costa v. California Nurses Assn.*, that the Public Employment Relations Board does not have exclusive jurisdiction to determine whether certain “essential employees” may be prevented from participating in a strike. The court’s ruling is rooted in the fact that the threatened work stoppage was not the subject of an unfair practice charge filed with PERB. This is contrary to the recent ruling of the Sixth District Court of Appeal in *City of San Jose v. Operating Engineers Local Union No. 3* (2008) 160 Cal.App.4th 951, 189 CPER 38, thereby assuring that this important issue is headed to the California Supreme Court.

In the *Contra Costa* case, the county filed a complaint in superior court against Public Employees Union Local One; Social Services Union, SEIU Local 535; United Clerical, Technical and Specialized Employees, AFSCME Local 2700; and Professional and Technical Employees, AFSCME Local 512. The county sought to enjoin certain public employees from participating in a one-day strike. Collectively, these unions represented approximately

5,800 employees. The county sought to enjoin 270 of these employees, claiming that their participation in the strike would create a substantial and imminent threat to public health and safety. The county also petitioned to prevent all nurses from participating in the job action.

The trial court issued a temporary restraining order enjoining approximately 160 employees from striking and all nurses from engaging in a sympathy strike. PERB intervened in the lawsuit, asserting exclusive jurisdiction over the issue before the court because the unions’ proposed strike was arguably protected or prohibited by the Meyers-Milias-Brown Act, which the agency is charged with enforcing.

Following an evidentiary hearing, the trial court concluded that the MMBA did not apply to the county’s complaint and PERB did not have exclusive jurisdiction. Local One and PERB both appealed.

Like the court in *San Jose*, this court determined that the issue presented was not moot despite the fact that the parties had since settled their contract negotiations, because the matter is one “capable of repetition, yet evading review.”

The court began its jurisdictional analysis by reviewing the board’s historic background and the statutory framework in which it operates, as laid out by the Supreme Court in *Coachella Valley Mosquito and Vector Control Dist. v. PERB* (2005) 35 Cal.4th 1072, 173 CPER 18. It also recognized that, effective July 1, 2001, the legislature conveyed to PERB exclusive jurisdiction over alleged violations of the MMBA.

The County Sanitation decision did not turn on the MMBA; it was based on the common law.

The court then turned to *County Sanitation Dist. No. 2 v. Los Angeles County Employees Assn.* (1985) 38 Cal.3d 564, 65 CPER 2, where the California Supreme Court announced for the first time that public employees have the right to strike. At the same time, the Supreme Court also gave public agencies the right to go to court to request an injunction based on a showing that the strike would have a detrimental impact on public health and safety. But, the appellate court underscored, while the parties in *County Sanitation* were covered by the MMBA, the court’s decision did not turn on that act; it was based on the common law.

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

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The Court of Appeal looked closely at two other Supreme Court decisions that interpreted the Educational Employment Relations Act — *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 41 CPER 2, and *El Rancho USD v. National Education Assn.* (1983) 33 Cal.3d 946, 58 CPER 15. In *San Diego*, the Court of Appeal noted, the Supreme Court found it significant that the teachers association may have committed two unfair practices by

The court brushed aside the argument that strike-related conduct is always either arguably prohibited or protected by the MMBA.

striking and limited its holding that PERB had exclusive jurisdiction over strikes to injunctions against strikes by employee organizations certified as the exclusive representative under EERA.

In *El Rancho*, where the Supreme Court held that EERA divested the superior court of jurisdiction over a school district's suit for tort damages arising out of a strike, the court's ruling was premised on the fact that the district had filed unfair practice charges with PERB prior to filing its lawsuit.

"Thus," said the Court of Appeal, "we believe *El Rancho* should not be read so broadly as to apply to any strike-related issue that does not clearly implicate an unfair labor practice."

The appellate court was unreceptive to PERB's argument that strikes are part of the bargaining relationship constructed under the MMBA and, therefore, a strike by essential employees is conduct that is arguably protected by the MMBA as an exercise of employee rights or arguably prohibited as an unlawful coercive pressure tactic. The court underscored that the conduct at issue in *San Diego* and *El Rancho* "clearly implicated unlawful labor practices," and brushed aside what it viewed as the argument that strike-related conduct is always either arguably prohibited or protected by the MMBA.

The First District took note of the contrary conclusion reached by the Sixth District Court of Appeal in *San Jose*, but found its reasoning "overly broad." It also was unreceptive to the argument that the legislature intended to divest the courts of jurisdiction it previously had exercised when it conveyed PERB jurisdiction over the MMBA.

The Court of Appeal also took note that *San Diego* and its progeny concerned teachers, where as the employees in the *Contra Costa* case involved nurses, probation officers, and airport operations specialists. "As important as teachers are," reasoned the court, "a one-day strike by nurses

could have life-threatening implications."

In *PERB v. Modesto City Schools* (1982) 136 Cal.App.3d 881, CPER SRS 21, the court found that public policy would not be served by having superior courts throughout the state interpreting statewide labor policy with conflicting results. "One of the basic purposes for the doctrine of preemption," said the court in *Modesto*, "is to bring expertise and uniformity to the task of stabilizing labor relations."

The court found no need to defer to PERB's expertise.

In the present case, the Court of Appeal found no need to defer to PERB's expertise and concluded that the trial courts are quite capable of resolving these issues. Nor did the court agree with Local One's argument that the case exemplifies an area of law in need of consistent rulings by an expert agency, not a superior court judge "acting at the last minute, having just heard of the case and considered the law and the issues for the first time that same day." "Assuming this is a problem," responded the Court of Appeal, "we fail to see how the PERB review would solve it." The determination of which employees should be covered by *County Sanitation's* public health and safety exception "is very fact specific,"

said the court, and therefore “the need for uniform statewide policy is not very compelling because the trial court’s decision will depend on the circumstances of each individual case.

Summing up, the court said:

We acknowledge that strikes by essential public employees can potentially involve unfair labor practices, as, for example, where such strikes constitute a failure to negotiate in good faith. However, we see no evidence of allegations or conduct on the record before us suggesting that any party to this case had committed, or had threatened to commit, an unlawful labor practice.

The Court of Appeal found PERB’s reading of the Supreme Court’s ruling in *Coachella Valley* “overbroad.” In *Coachella*, the high court found a six-month statute of limitations period applicable under the MMBA because, in part, the six-month period is found in EERA and other state collective bargaining laws and, the court reasoned, the legislature must have intended a coherent and harmonious system of laws where all unfair practices are handled similarly. Under *Coachella*, said the Court of Appeal, “it is reasonable to conclude that PERB now has jurisdiction over strikes under the MMBA insofar as the strikes constitute unfair labor practices. The Supreme Court has never held, however, that all strikes implicate unfair practice charges.” “In the absence of any indication that the employees the County was seeking to prevent from striking were committing an unfair practice, or that the County

was committing an unfair practice by seeking the injunction, the MMBA was not implicated and the PERB had no jurisdiction over the complaint.” The court underscored that “strikes by essential employees are not inherently unlawful under the MMBA.

Nor was the court receptive to Local One’s asserting that, in granting PERB jurisdiction over the MMBA, the legislature intended to take away the authority of the courts to hear matters falling under *County Sanitation*.

The union’s argument that the trial court erred by issuing a labor injunction without complying with the conditions set out in Labor Code Sec. 1138.1 was also set aside by the court. That section restricts the issuance of injunctions in cases “growing out of a labor dispute,” except under

certain prescribed conditions. While the court expressed no opinion as to whether Sec. 1183.1 even applies to public agencies or public employees, it found that satisfaction of some of the conditions in the statute could not be accomplished by the county.

Concluding that it had “narrowly interpreted” the scope of PERB’s jurisdiction, and acknowledging the importance of the issue to every local state agency and labor organization representing these employees, the Court of Appeal “urged” the Supreme Court to resolve the current dispute between the Sixth and First Circuits. (*County of Contra Costa v. Public Employees Union Local One*; *County of Contra Costa v. California Nurses Assn.* [2008] 163 Cal.App.4th 139.)

Firefighters Seek MMBA Amendment to Protect Local Interest Arbitration

A BILL MAKING its way through the legislature proposes to give the superior courts exclusive jurisdiction over any actions concerning interest arbitration that involves an employee organization representing firefighters. According to its sponsor, the California Professional Firefighters, S.B. 1296 would restore the status quo to July 1, 2001, when S.B. 739 gave the Public Employment Relations Board authority over the Meyers-Milias-Brown Act. The bill declares that, in giving PERB jurisdiction over local government employer-

employee disputes, the legislature did not intend to supersede existing voter-approved local charters and ordinances that allow either party to compel binding interest arbitration when negotiations have reached impasse.

The sponsor and the author of the legislation, Senator Ellen Corbett (D-San Leandro), point to the appellate court’s ruling in *City and County of San Francisco v. International Union of Operating Engineers* (2007) 151 Cal.App.4th 938, 185 CPER 24, as evidence of the court’s misunderstanding of the legis-

lature's transfer of jurisdiction from the superior court to PERB. In that case, negotiations between the city and the operating engineers reached impasse and the city filed an action in superior court seeking to compel binding interest arbitration as provided for in the San Francisco City Charter. The trial court rejected the city's petition, concluding that PERB has exclusive jurisdiction over the matter and neither party could turn to the court until the administrative process before PERB had been exhausted. The Court of Appeal affirmed the trial court ruling.

Proponents of the bill assert that the MMBA jurisdiction acquired by PERB extends only to unfair practice determinations. They argue that if a city and a firefighter's union reach an impasse during negotiations and there

is a local ordinance that permits either party to seek a court order compelling binding arbitration, there is no unfair practice charge over which PERB has exclusive jurisdiction.

Proponents also contend that, even if existing law gives PERB such broad authority as the courts have concluded, the legislature is free to amend and clarify the statute in favor of policies that encourage arbitration of bargaining disputes. The proponents underscore that, by enacting this bill, the legislature would not be requiring the use of binding interest arbitration. Rather, it would merely establish that, where arbitration has gained voter approval, PERB lacks jurisdiction to interfere with the operation of valid local laws.

The professional firefighters association also points out that local law enforcement agencies and employee organizations representing law enforcement personnel are exempted from PERB jurisdiction. This bill, it contends, would restore the status quo prior to 2001, when neither firefighters nor law enforcement employees were under PERB's jurisdiction and both could rely on voter-approved local provisions that provide other methods of dispute resolution. Allowing local law enforcement employees and employers to use arbitration ordinances while submitting firefighters to PERB jurisdiction creates a procedural disparity. Existing law permits PERB to rule on unfair practices, CPF concedes, but it should not supersede the voter-approved charters and ordinances.

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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 of 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>

Opponents to the bill charge that it would establish a separate process for firefighters that diverges from the administrative exhaustion rule governing other public employees and employers.

And, they assert, the court rulings finding that PERB has exclusive jurisdiction over MMBA violations are correctly decided.

Chat with HR Director Is Not Due Process Hearing, But No Liability Found

A THREE-JUDGE panel of the Ninth Circuit Court of Appeals concluded that a civil service employee of the City of Alameda was not afforded appropriate due process rights when he was not allowed to partake of a pre-termination hearing before being laid off. To remedy that violation, the court ordered an evidentiary hearing before an impartial decisionmaker. However, the court found no liability — and thus no right to damages — on the part of the city or the city manager.

The employee, Edward Levine, was a property manager for the city. In 2004, he was informed by the city manager, James Flint, that he was going to be laid off. Because Levine believed Flint disliked him and that the layoff was pretextual, he requested in writing a pre-termination hearing. Flint gave the letter to the city's human resources director, Karen Willis, and instructed her to make sure Levine's due process rights were respected. Willis then advised Levine that he was not entitled to a pre-termination hearing under his union contract because he was being laid off and not discharged for cause.

In her letter, Willis offered to meet with Levine to discuss layoff procedures and retirement benefits. Later, Levine and Willis ran into each other in the HR department where they had a five-minute conversation.

Levine filed a federal civil rights action against the city and against Flint, both individually and as the city manager, alleging he had been deprived of his due process rights under the Fourteenth Amendment of the U.S. Constitution. The district court found that Levine had established that his due process rights had been violated and that he was entitled to a full evidentiary hearing before a third-party neutral. But, it found that Flint was not personally liable based on qualified immunity, and the city was not liable as a municipality.

On appeal, the Ninth Circuit agreed with the district court on all counts. It concluded that Levine had a protected property interest in continued employment and, citing *Cleveland Board of Education v. Loudermill* (1985) 470 U.S. 532, 64X CPER 2, that he was entitled to have a hearing before his layoff to allow him to “present his

side of the story.” Willis’ offer to meet with Levine to discuss layoff procedures, and the random five-minute encounter between the two, failed to give Levine a meaningful opportunity to respond to the layoff decision.

Concluding that Levine’s due process rights were violated by the city’s failure to provide a pre-termination hearing, the court held it was not improper for the district court to order a full evidentiary hearing to remedy that violation. The Ninth Circuit explained that, under *Loudermill*, an employee with a property interest is entitled to a limited pre-termination hearing

An employee with a property interest is entitled to a limited pre-termination hearing.

that is to be followed by a more comprehensive post-termination hearing. The lower court’s order directing that Levine be afforded a full post-termination hearing was appropriate because there was no way to give Levine the process he had been due — an opportunity to respond *before* the termination occurred. The Ninth Circuit noted that, as *Loudermill* directs, the adequacy of pre-termination and post-termination hearings are interrelated and the scope of one affects the scope of the other.

The court also affirmed the district court order that the hearing be conducted before a third-party neutral. Case law directs that an impartial decisionmaker is required for a post-termination hearing, and the district court made a sound factual finding that persons working for the city would not be sufficiently neutral, given the extensive litigation between Levine and the city.

Having found a due process violation, the court then turned to the matter of liability. In agreement with

Willis and expressly told her to ensure that Levine's due process rights were respected. Therefore, said the court, Flint took action to protect Levine's constitutional rights, and there is no evidence that Flint knew or should have known that Willis would have denied Levine's request for a hearing. And, the court added, even if Flint had approved Willis' action, he still would have been entitled to qualified immunity because the union contract did not provide a pre-termination hearing prior to layoff and Flint reasonably could have believed that Willis' conduct was lawful.

The city also was not liable for the due process deprivation. As a municipality, the law permits monetary damages if the constitutional violation was the product of a policy, practice, or custom adopted by city officials that amounted to deliberate indifference to constitutional rights. The court found no evidence that the city had such a policy or that a policy or practice was the moving force behind the violation of Levine's due process rights. (*Levine v. City of Alameda*; *Levine v. Flint* [9th Cir. 2008] 525 F.3d 903.)

If an official reasonably believes his or her conduct was lawful, qualified immunity applies.

the lower court, the Ninth Circuit concluded that Flint was not personally liable based on qualified immunity. This defense shields a government official from civil damages unless his or her conduct "violates a clearly established right of which a reasonable person would have known." In other words, if an official reasonably believes his or her conduct was lawful, qualified immunity applies.

In this case, said the court, Flint believed his conduct was lawful. He forwarded Levine's letter to Wil-

Wage, Meal, and Rest Provisions of Labor Code Are Not Applicable to Charter County

PROVISIONS OF THE state Labor Code that govern overtime pay, minimum wages, and mandatory meal periods and rest breaks do not apply to Alameda County because it is a charter county. These entitlements involve employee compensation, and under the California Constitution, a charter county is given the exclusive right to provide for the number, compensation, tenure, and appointment of employees. The First District Court of Appeal stressed that, under the home rule doctrine, matters of compensation are of a local rather than a statewide concern and fall within the county's exclusive constitutional purview.

The case was brought by three chaplains who worked at the Santa Rita jail in Alameda County. They claimed that they did not receive overtime pay, meal periods, or rest breaks to which they were entitled. They worked in excess of eight hours a day and/or 40 hours a week and were not compensated for break periods during which they were required to work.

The trial court determined that the Labor Code sections cited in the complaint could not be applied to employees of Alameda County because it is a charter county and, as such, is constitutionally charged with setting employee compensation.

On appeal, the chaplains argued that, while charter counties admittedly are authorized by the California Constitution to determine the “compensation” of their employees, there is a difference between employee compensation and the regulation of employees’ working conditions. They asserted that requiring overtime for hours worked in excess of eight hours a day and premium pay for denial of meal breaks or rest periods is not compensation, but working conditions set by the Labor Code.

Under the ‘home rule’ doctrine, certain county charter provisions trump conflicting state laws.

The appellate court first relied on the language found in Article XI of the Constitution that decrees a county’s charter provisions to be “the law of the State” with “the full force and effect of legislative enactments.” “Under the ‘home rule’ doctrine,” said the court, “county charter provisions concerning the operation of the county, and specifically including the county’s right to provide ‘for the number, compensation, tenure, and appointment of employees’...trump conflicting state laws.”

In addition to the constitutional language regulating employee compensation, the court also found support for this opinion in *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 160 CPER 19. There, the Supreme Court struck down legislation that required local agencies to resort to interest arbitration to resolve bargaining impasses concerning economic issues arising during negotiations with unions representing firefighters and law enforcement officers. The court found the statute was an affront to the constitutional grant of authority to all counties, not just charter counties.

The district court cited two other Supreme Court decisions. In *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, CPER SRS 8, the high court invalidated a statute that attempted to prohibit the distribution of state funds to local public agencies which granted employees cost-of-living increases. And, in *San Francisco Labor Council v. Regents of University of California* (1980) 26 Cal.3d 785, 45 CPER 57, the Supreme Court struck down legislation requiring the university to pay its employees at least prevailing wages. In both cases, the Supreme Court relied on constitutional grants of power and autonomy to block “legislative interference.”

Addressing the chaplains’ contention that the cited Labor Code provisions concern working conditions, not compensation, the Court of Appeal turned to *Kim v. Regents of University*

of California (2000) 80 Cal.App.4th 160, 142 CPER 34, which rejected an employee’s claim for overtime compensation under Labor Code Sec. 1194 because the regents are “exempt from its mandate by virtue of their constitutional status.” Relying on prior cases, the court in *Kim* also recognized that the regents could not be compelled to comply with the prevailing wage requirements of the Labor Code.

The Court of Appeal brushed aside the chaplains’ assertion that the

The Labor Code provisions intrude on the county’s power to set its employees’ compensation.

constitutional autonomy exercised by the Regents of the University of California was more extensive than that conveyed to the counties. While agreeing that the power granted to counties and to the university is “not coextensive,” the Court of Appeal nonetheless concluded that the Labor Code provisions addressing overtime pay and the payment of prevailing wages intrude on the county’s power to set its employees’ compensation. And, the court added, such compensation matters “are of local rather than statewide concern.”

The appellate court reacted similarly to the chaplains' claims for meal and rest breaks governed by Labor Code Secs. 512 and 226.7. Considered in a vacuum, the court said, the argument "seems plausible" that these statutory benefits relate to working conditions, not compensation. However, the court noted, the chaplains are seeking monetary compensation for the meal period and rest breaks they were not provided. As such, it is compensation governed by home rule provisions applicable to charter counties and is a matter of local rather than statewide concern.

The appellate court also found little support for the chaplains' argument that the Labor Code provisions are not in conflict with the charter because the charter is silent with respect to overtime pay, and meal and rest period regulation. Reiterating its reliance on the county's constitutional grant of power, the court found no requirement that these matters be detailed in the charter itself.

Moreover, the court observed, the county has provided for compensation in its charter and through adoption of its administrative code, salary ordinances, and in various memoranda of understanding it has entered into with organizations representing county employees. "Consequently," the court concluded, "although we do not accept the dubious proposition that the Labor Code sections would apply to fill a void in a charter county's com-

pensation scheme, such void does not appear to exist here." (*Curcini v. County of Alameda* [6-5-08; certified for publication 7-1-08] A115652 [2008] 1st Dist., ___Cal.App.4th___, DJDAR 10173.)

Public Schools

District Wrong to Vacate Arbitration Award Reinstating Employee

THE SECOND District Court of Appeal ruled in *California School Employees Assn. v. Bonita Unified School Dist.* that a school district's governing board erred when it vacated an arbitration award reinstating a classified employee. The court determined that the board violated the terms of the collective bargaining agreement and Education Code Sec. 45113(e), and affirmed the trial court's judgment confirming the award in favor of the employee.

Background

Donald Roberts worked as a lead maintenance mechanic for the Bonita Unified School District for nine years. He was represented by the California School Employees Association. The district superintendent sent him a "Notice of Termination and Suspension Without Pay" listing nine "causes" and 24 "reasons" for suspending and discharging him, including creating a sexually hostile work environment, refusing to complete assigned duties or comply with directions, and intimidating employees. The notice specified that he would be suspended without pay during the pendency of dismissal proceedings because he presented "an unreasonable risk of harm to District staff and District property."

The district did not apply the progressive disciplinary steps provided for in the collective bargaining agreement prior to issuing the notice. Under the agreement, the district was required to use progressive discipline, "which shall not be bypassed unless the serious nature of the offense warrants it." The agreement also stated that the question of whether the "nature of the offense

The district did not apply the progressive disciplinary steps.

was so serious as to require bypassing progressive discipline" may be submitted to arbitration and that the arbitrator's award is "final and binding."

Roberts challenged the suspension and termination in two ways. First, he requested a traditional hearing before the governing board under Ed. Code Sec. 45113(c) that provides for a hearing on disciplinary charges at the option of the employee. The hearing is conducted by a hearing officer appointed by the board, but it is the board that makes the final decision.

Second, Roberts and the union filed a grievance under the terms of the collective bargaining agreement and Ed. Code Sec. 45113(e). The statute, enacted in 2001 but never before construed by the courts, allows classified employees to arbitrate certain disciplinary matters.

The parties agreed to consolidate the two procedures before one labor arbitrator, Richard Calister. They stipulated that, if Calister determined Roberts' alleged conduct was not so serious as to authorize bypassing progressive discipline, the termination decision would not stand. On the other hand, if he were to decide the conduct was sufficiently serious so as not to require progressive discipline, the matter would proceed to hearing under Sec. 45113(c). In that case, Calister would become the board's hearing officer, neither the arbitration rules nor the grievance procedure would apply, and the board would be authorized to accept, reject, or modify Calister's decision.

After a 25-day evidentiary hearing, Calister concluded that the nature of Roberts' offenses was not so serious as to require bypassing progressive discipline and that the district had therefore violated the agreement. He found "the only appropriate remedy" was for Roberts to be reinstated with backpay and benefits.

The governing board, after reviewing the arbitration award and the testimony and evidence presented, issued its own decision. It found that

the arbitrator had “exceeded his powers” by improperly defining “serious nature of the offense.” The board vacated the award and determined that Roberts had been properly suspended and terminated.

CSEA and Roberts filed a petition with the trial court to confirm the arbitration award. The trial court granted the petition, and the board appealed.

Court of Appeal Decision

The court upheld the trial court’s confirmation of the arbitration award, finding that the board failed “to accord proper deference” to it.

The court noted that Ed. Code Sec. 45113 provides, in relevant part, that the governing board of a school district shall proscribe written rules and regulations governing classified service; that an employee shall be subject to disciplinary action “only for cause as prescribed by” the board, but that the board’s determination of the sufficiency of the cause for disciplinary action is conclusive; and, at subsection (e), that “[n]othing in this section shall be construed to prohibit the governing board pursuant to an agreement with an employee organization...from *delegating its authority to determine whether sufficient cause exists for disciplinary action* against classified employees...*to an impartial third party hearing officer*. However, *the governing board shall retain authority to review the determination under the standards set forth in Section 1286.2 of the Code of Civil Procedure.*”

The agreement between the district and the union provided for arbitration of the dispute. It also provided that the decision of the arbitrator shall be final and binding, “with the exception of the board’s statutory authority to review the award under the Arbitration Act, specifically section 1286.2 of the Code of Civil Procedure.” The court explained that the Arbitration

*The governing board
found the arbitrator
had ‘exceeded
his powers.’*

Act requires an arbitration award be vacated if any of the following applies: the award was procured by corruption fraud, or any other undue means; there was corruption of any of the arbitrators; the rights of the party were prejudiced by the arbitrator’s misconduct; the arbitrators exceeded their powers; or the party’s rights were substantially prejudiced by the refusal of the arbitrator to postpone the hearing or to hear evidence material to the controversy or some other conduct.

The district argued that the contract’s arbitration provisions are partially or totally invalid, pointing to Sec. 45113(b), which states that “the governing board’s determination of the sufficiency of the cause for disciplinary action shall be conclusive.” “Not so,” replied the court. “Nothing in the

clear, unambiguous language of Education Code Sec. 45113(b) — which governs *board hearings* — invalidates the CBA’s ‘final and binding’ provision, which applies to *arbitration*,” said the court. The cases relied on by the district were decided before the enactment of Sec. 45113(e) and so have been abrogated by statute to the extent they interpreted Sec. 45113(b) “as a flat prohibition on the arbitration of disciplinary matters involving classified employees.”

The court likewise rejected the district’s reliance on legislative history to support its position that an arbitration award under Sec. 45113(e) is nonbinding, thus rendering the collective bargaining agreement’s “final and binding” provision invalid.

The court addressed the board’s concern about preserving its right to review disciplinary decisions under the hearing process authorized by Sec. 45113(b) and its own regulations. The court clarified that its holding is limited to the board’s authority to review an arbitration award where the dispute is confined to the “serious” offense exception to progressive discipline, as set forth in the parties’ contract. It explained:

As we read subdivisions (b) and (e), respectively,...they authorize two distinct methods of challenging disciplinary action, the former under the auspices and regulations of the board, the latter by an arbitrator under the rules of the AAA and the provisions of the CBA. Here, the Education Code and the CBA — to which the District was a signatory

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

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By Dale Brodsky • 1st edition (2004) • \$15

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— permitted Roberts to pursue both methods, and he did. To simplify the process, the parties agreed to participate in a single proceeding in which Mr. Calister would act as an arbitrator on a preliminary issue and as the board's hearing officer on any subsequent issues. Mr. Calister resolved the preliminary issue in Roberts' favor, effectively ending the proceeding at the arbitration stage. Consequently, the scope of the board's *administrative* authority under Education Code section 45113(b) is not part of this case.

The court dismissed the district's argument that the arbitrator had exceeded his powers under the arbitration act because he interpreted "serious offense" to mean "criminal act," stating, "That is not even a plausible reading of the arbitration award." The board overlooked the arbitrator's finding that many of the charges against Roberts were not supported by the evidence. This reduced the gravity of whatever he may have done, said the court. Calister also took into account how the

district had responded to behavior by other employees in Roberts' department in determining the seriousness of his behavior. He found "the use of rude, obscene, vulgar, profane, and sexually explicit language was 'rampant'" in the department, and management did nothing to stop it.

"The arbitrator's task was not to define 'serious' in the abstract, as someone might do with a dictionary, or to decide whether particular conduct could be labeled 'serious,'" the court explained. Instead, he had to determine "whether Roberts' conduct was so serious *that progressive discipline was not warranted.*" The court found that Calister applied generally accepted rules of contract construction in accomplishing his task.

The court underscored that this case involved a collective bargaining agreement, which the court said, "is an effort to erect a system of self-government." It is the arbitrator's construction that was bargained for,

the court said, and so far as the arbitrator's decision concerns a construction of the contract, the courts have no business overruling the award if its interpretation is different from the arbitrator's.

The court also noted that "in reviewing an arbitration award, the board is required to apply the same standards as the courts." The California Supreme Court in *Moncharsh v. Heily and Blase* (1992) 3 Cal.4th 1, held that, in arbitration proceedings, neither the merits of the controversy nor the validity of the arbitrator's reasoning is subject to judicial review. "Further," it said, "a court may not review the sufficiency of the evidence supporting an arbitrator's award," and "an arbitrator's decision cannot be reviewed for errors of fact or law." The court in *Moncharsh* explained that the parties enter into an arbitration agreement knowing there is a risk the arbitrator may make a mistake, but they are willing to take that risk in exchange for a quick, inex-

pensive, and conclusive resolution to their dispute.

In this case, the court concluded the arbitrator did not exceed his powers and the governing board was not authorized to vacate the award. "Because the board did not properly apply the standards set forth in Section 1286.2 of the Code of Civil Procedure Roberts' statutory rights were violated

The board did not properly apply the standards set forth in the Code of Civil Procedure.

and the trial court had the authority to review and confirm the arbitration award," it said, affirming the judgment of the trial court.

"We are extremely pleased with the court's decision," Christina Bleuler, one of the attorneys representing CSEA in the case, told *CPER*. "By permitting employers and unions to agree to binding discipline arbitration, Section 45113(e) provides classified employees with the very important right of a neutral review of disciplinary actions. Since this was a case of first impression, it is gratifying to have such a definitive and correct judicial interpretation of the statute," she said. (*California School Employees Assn. v. Bonita Unified School Dist.* [2008] 163 Cal.App.4th 387.)

Agreement for Compressed Salary Schedule Violates Education Code

A COLLECTIVE bargaining agreement between a school district and the teachers union implementing a new salary schedule that would have allowed teachers to obtain merit increases more quickly has been found to violate Education Code Sec. 45028. In *Adair v. Stockton Unified School Dist.*, the Third District Court of Appeal determined that the new salary schedule did not comport with the statute's uniformity requirement.

Background

Previously, Stockton Unified School District teachers were paid according to a 27-step schedule according to their level of training and the number of years of teaching experience. In 2000, the district and the Stockton Teachers Association entered into negotiations for a new salary schedule. Both sides wanted to make Stockton more competitive with neighboring school districts for teachers in the mid to high salary levels. The union was also concerned about salary stagnation because teachers in other districts reached the high end of the salary schedule much sooner than in Stockton. STA proposed a compressed schedule in order to address this problem.

In addition to salary increases for all teachers, the parties agreed to

eliminate steps 17, 18, and 19, and to renumber step 20 to step 17, step 21 to step 18, and all subsequent steps accordingly, resulting in a 24-step schedule. The district moved all teachers who had 18, 19, and 20 years of experience into step 17, which enabled teachers with 17 years of experience or less to move up the salary ladder faster. However, the new schedule meant that teachers in steps 1 through 16 would progress through the schedule in 24 years, while those who had been at steps 18 through 26 would be required to work between 25 and 27 years or more to attain the same 24 years of credit.

Certain senior teachers and STA filed a petition for writ of mandate against the district, claiming that its actions violated Sec. 45028, which specifies that teacher salaries "shall be classified on the salary schedule on the basis of uniform allowance for years of training and years of experience." The trial court ruled in favor of the teachers, finding that the new schedule violated the statute, that there was no exception to the uniformity requirement, and that STA's ratification of the contract did not waive the teachers' right to relief. It ordered the district to restore the teachers' experience credit, lost compensation, and retirement contributions. The district appealed.

Court of Appeal Decision

At the time the collective bargaining agreement at issue in this case was negotiated, Sec. 45028 provided, in relevant part, that “each person employed by a school district in a position requiring certification qualifications... shall be classified on the salary schedule on the basis of uniform allowance

The Ed. Code forbids disparate treatment of teachers with the same level of training and experience.

for years of training and years of experience, except if a public school employer and the exclusive representative negotiate and mutually agree to a salary schedule based on criteria other than a uniform allowance for years of training and years of experience” under the Educational Employment Relations Act.

EERA Sec. 3543.2(e) states, “Pursuant to Section 45028 of the Education Code, the public school employer and the exclusive representative shall, upon the request of either party, meet and negotiate a salary schedule based on criteria other than a uniform allowance for years of training and years of experience.” However, the statute also provides that, if the public school employer and the union do not reach

mutual agreement, the provisions of Sec. 45028 requiring a salary schedule based on a uniform allowance for training and experience apply.

Under Sec. 45028, “when teacher salary schedules operate on the basis of education and experience, they must be *wholly* uniform,” the court instructed. “A ‘uniform’ salary schedule means that teachers will be compensated invariably according to their seniority and education,” it said. “Such a rule forbids disparate treatment of groups of teachers with the same level of training and years of experience.”

The court cited several cases in support of its conclusion that the new salary schedule violated Sec. 45028’s uniformity requirement. In *Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified School Dist.* (1978) 21 Cal.3d 650, a teacher with one year of public school experience and five years of private school experience was credited with only one year. When the rule changed, allowing credit for all years of private school experience, the teacher asked for reclassification according to the new rule, but was denied. The California Supreme Court held that the district’s disparate treatment of teachers with private school experience violated Sec. 45028’s uniformity requirement. In *San Francisco Teachers Assn. v. San Francisco Unified School Dist.* (1987) 196 Cal.App.3d 627, 76 CPER 52, the court found a violation of the rule where teachers with the same training and experience were given unequal credit on the basis of the

order in which their years of experience and education accrued.

The district contended that its system did not violate the uniformity requirement because all teachers in a given step having the same level of experience and same level of training receive the same salary. The court responded that “it is illogical and myopic to focus on a single cell of the sched-

Teachers who were sent back to lower step levels received ‘the short end of the stick.’

ule and declare the entire schedule uniform....” “A system in which one class of teachers must work one, two or three years longer than another group with the same course training to obtain the same merit salary increases fails to grant credit for experience and training uniformly, and thus violates section 45028’s requirement that teacher salaries be *wholly* commensurate with years of experience and training,” it explained.

The court said that the teachers who were sent back to lower step levels under the new system were treated as “second-class employees” and received “the short end of the stick.” It compared their situation to that of the teachers in *United Teachers of Ukiah v. Board of Education* (1988) 201 Cal. App.3d 632, who were limited to five

years credit for experience outside the district, and not given full credit when the rule was changed to allow credit for all years outside the district. In that case, the court found a violation of Sec. 45028. And, in *California Teachers Assn. v. Board of Education* (1982) 129 Cal. App.3d 826, 53 CPER 24, the court found a violation where the Whittier school board adopted a rule limiting a teacher to only one vertical step advancement in any one-year period. The result was that a teacher who had been at the maximum step of a class for more than one year and then moved to a higher class was, under the new rule, placed at a step below her or his number of years of experience. Comparing the rule in that case to the situation before it, the court said:

Here, the District's action pushed some teachers but not others into step levels below their years of experience. Thus, while less experienced teachers move up the salary ladder at a rate of one step per year, more experienced teachers were *regressed* to step levels below their number of years of experience. Like the board's rule in *Whittier*, this policy had the effect of hindering the salary advancement of one group of teachers based solely on their seniority within the system.

Nor was the court persuaded by the district's claim that even if its system resulted in a uniformity violation, the practice fell under the EERA Sec. 3543.2 exception, permitting an agreement "based on criteria other than a uniform allowance for years of training and years of experience." The court found that, under the new system, "the only touchstones for determining into

which step a teacher will be placed are years of experience and training," and that the district's goal of encouraging teacher recruitment and retention is not a "criterion" within the meaning of the statute.

The court next addressed the district's argument that, even if there was a uniformity violation and no exception applied, the trial court's remedy exceeded its powers. The trial court ordered the district to "restore all salary schedule experience credit" to the senior teachers, meaning, according to the Court of Appeal, "that the District must transfer all teachers with 18 to 20 years of experience out of step 17 and into the step corresponding to their years of experience." In other words, "teachers with 18 years of experience must be assigned to step 18, 19-year veterans must be assigned to step 19,

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Pocket Guide to the Educational Employment Relations Act

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

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

By Bonnie Bogue, Carol Vendrillo, Dave Bowen, and Eric Borgerson
7th edition (2006) • \$15 • <http://cper.berkeley.edu>

and so on until the highest step, step 24, is reached.” The district claimed that the trial court’s order gave the teachers “non-negotiated” salary increases and granted them “unbargained for relief” that exceeded the court’s jurisdiction. The district’s position was that the proper remedy would have been to nullify the new schedule and reinstate the 27-step schedule.

The court disagreed, finding that the trial court properly severed the illegal portion of the agreement from

sever the void provision and enforce the remainder of the contract,” said the court.

Further, Ed. Code Sec. 44924 provides that “any contract or agreement, express or implied, made by any employee to waive the benefits of this chapter or any part thereof is null and void,” noted the court. In *United Teachers-L.A. v. Los Angeles Unified School Dist.* (1994) 24 Cal.App.4th 1510, 106 CPER 30, the court explained that Sec. 44924 “has consistently been employed to render null and void

conflicting contractual provisions and to essentially reform the contract or agreement to comply with the requirements of the controlling statute.” The court found that the same precepts apply in this case and that the trial court’s judgment enforcing the valid portion of the agreement while severing the invalid part was proper.

The Court of Appeal affirmed the trial court’s judgment in its entirety. (*Adair v. Stockton Unified School Dist.* [2008] 162 Cal.App.4th 1436.)

The trial court properly severed the illegal portion of the agreement from the legal portion.

the legal portion. It found no illegality in the contract’s elimination of steps 17 through 19 and then renumbering the steps. “Moreover,” said the court, “such a shortened schedule achieves the very goals that the District extols: It allows teachers to earn salary raises more quickly, reduces salary stagnation and promotes competition with other districts.” It is only the reassignment of teachers in steps 18 through 20 into step 17 that effects the uniformity violation and is, therefore, illegal. “It is settled that where a contract has both void and valid provisions, a court may

Legislature Wary of School Performance Bill That Would Weaken Sanctions

LAST MARCH, THE California Board of Education voted unanimously to adopt a plan to help 97 failing school districts meet the academic standards mandated by the federal No Child Left Behind Act. The districts serve more than one-third of the state’s K through 12 students and include the Los Angeles Unified School District. They face sanctions for the first time this year after failing to meet their NCLB achievement goals for three consecutive years.

The plan adopted by the state board was the result of a compromise between Governor Schwarzenegger and State Superintendent of Schools Jack O’Connell. It provides for a sliding scale of assistance to the districts, ranging from analysis by state intervention teams to revisions by districts of their own education plans. It also

provides for sanctions, including the appointment of a trustee to run the district in place of the local school board. Individual school districts are eligible to receive up to \$250,000 in federal funding under the plan.

Many school districts objected to that part of the plan that allows the state to appoint a trustee. The California Teachers Association also objected to giving those trustees broad authority over district operations and personnel, and it demanded more local control.

In response to these concerns, Senate President Pro Tem Donald Perata (D-Oakland) authored S.B. 606. This urgency legislation would amend Education Code Sec. 52055.57 and add Sec. 52055.56. The bill would restrict the authority of an appointed trustee:

he or she could only stay or veto decisions made by the school board. The trustee could not set policy or fire administrators.

The bill would modify existing law in other ways. Now, the State Department of Education targets local districts that are in danger of being determined as failing under the NCLB within two years. The department then notifies them of their status and provides them with criteria with which to conduct a voluntary self-assessment.

*S.B. 606 would
require a district
to adopt the recom-
mendations of an
intervention team.*

If the district is in fact identified as failing, it is subject to one or more sanctions recommended by the state superintendent and approved by the state board. S.B. 606 would require a district assistance and intervention team to complete a report and make recommendations for corrective actions to be adopted by the local district and would provide for an appeal procedure regarding the recommendations. In addition, it provides that a district which has been identified for corrective action under the NCLB would be subject to no more than one sanction in any three-year period. It also appro-

priates \$47 million from the Federal Trust Fund to the State Department of Education in order to implement the bill's provisions. These are the same funds earmarked for the failing districts under the Schwarzenegger-O'Connell plan.

The bill requires a two-thirds vote in each house to become law. The Senate passed it by a vote of 25 to 15. The Assembly amended and approved the legislation on the fourth roll call, without a vote to spare. The Senate subsequently refused to concur in the Assembly's amendments, but agreed to reconsider the matter. As CPER went to press, the bill was still pending.

Governor Schwarzenegger has threatened to veto S.B. 606 or any other bill that would diminish the

state's authority to improve student performance. "He's asking the legislature to approve the federal funds he has budgeted for these schools without encroaching on the state board's ability to do its job," said Schwarzenegger spokesperson Aaron McLear.

State Superintendent O'Connell has urged legislators to pass the bill, in spite of the fact that it weakens the plan he and the governor presented to the board of education. He has expressed concern that the state will lose the \$47 million in federal aid which is supposed to help improve the failing districts. The state has to decide how it will spend \$18 million of that money by September, or risk losing it altogether.

SFUSD Teachers to Receive Raises Thanks to Parcel Tax

WITH THE PASSAGE of Proposition A in the June election, San Francisco teachers will see a substantial increase in their paychecks, a bright spot in an otherwise dismal year for public education. The district initially expected next year to be a fiscal disaster in light of the state budget crisis, but the receipt of \$15 million from the city's "rainy day fund," combined with income from the new parcel tax, has turned things around.

Nearly 70 percent of city voters supported the \$198 annual parcel

tax, which will account for about \$29 million for the district each year. A memorandum of understanding between the teachers union, United Educators of San Francisco, and the district provides that most of the funds will go to teacher salaries and bonuses. All teachers will receive significant raises this coming school year, with an average increase of \$5,000. Retention bonuses will be paid after four and eight years, with more funds going to teachers in hard-to-staff schools and to those teaching special education.

Some teachers may receive a raise of up to \$11,000.

The funds will not be collected by the city until property taxes are paid in December. The union and the district will have to negotiate whether the raises will be retroactive to the start of the school year.

The rainy-day funds were used to secure the jobs of 535 teachers on the layoff list. There remain only 9 paraprofessionals at risk of losing their jobs, substantially less than the 50 projected earlier.

suspension of, or revoke the offender's credential without a hearing.

S.B. 1105 also would allow school districts increased access to allegations against teachers. Under existing law, charges against an applicant or holder of a credential must be presented to the commission. If adverse action is recommended after an investigation, the findings are available to the school districts to which the teacher has applied for employment for up to one year. The bill would allow the results of the investigation to be available for up to five years.

S.B. 1110, introduced by Senator Jack Scott (D-Altadena), would require automatic suspension of a

Legislature Poised to Pass Bills Regarding Teacher Criminal Conduct

TWO BILLS NOW pending in the California Legislature would allow the state to revoke the licenses of teachers who plead "no contest" to certain sex crimes and drug offenses or who have had

issued by the State Board of Education or the Commission on Teacher Credentialing is convicted of any sex offense by either a plea or verdict of guilty, the commission immediately suspends the credential. And, when the conviction becomes final or when imposition of the sentence is suspended, the credential is revoked. However, if a teacher accused of a sex crime pleads "no contest" to the offense, the credential is suspended until after a hearing by the commission, which then has the discretion to revoke or reinstate the credential. A "no contest" plea is a common legal agreement that allows the defendant to avoid a trial and leaves open the issue of civil liability, but still leads to a conviction on the criminal offense.

Margett's bill would treat a plea of "no contest" the same way as a plea or verdict of guilty, requiring the commission to suspend, terminate the

The report confirmed at least 313 cases in California in which teachers had been punished for sexual misconduct.

S.B. 1105 would treat a plea off 'no contest' the same way as a plea or verdict of guilty.

their licenses revoked in another state. Observers contemplate that both bills are likely to become law, even though they are opposed by the California Teachers Association.

S.B. 1105, introduced by Senator Bob Margett (R-Arcadia), and coauthored by Assembly Member Todd Spitzer (R-Orange), seeks to close what has been described as a "loophole" in the Education Code. Under existing law, whenever an individual who holds a credential

teacher's credential if he or she has had their license revoked for misconduct in another state. Under current law, teachers have been allowed to remain in the classroom while the credentialing committee investigates their case, which can take up to three years.

The Senate passed both bills by a unanimous vote. The Assembly Education Committee also approved the bills unanimously. As *CPER* went to press, both bills were pending in the Assembly.

The bills were introduced in reaction to an investigation by the Associated Press published last November. The AP reported that 2,570 teachers nationwide had had their credentials revoked, denied, surrendered, or sanctioned between 2001 and 2005 because of allegations of sexual misconduct. It also confirmed at least 313 cases in California in which teachers had been punished for sexual misconduct, including dozens involving pleas of “no contest.” An analysis given to the legislature by the credentialing commission indicated that a “no contest” plea is submitted by about 60 of the approximately 90 teachers each year who are convicted of a crime that would require mandatory suspension or revocation of their license.

CTA is joined by the American Civil Liberties Union and Equality California, a gay-rights organization, in opposing the bills. Some of the arguments raised in opposition are that parents involved in child custody suits could be affected and that the bills could unfairly punish gay men caught soliciting or having sex with other men in public places.

Higher Education

AFSCME's Service Unit Strikes Despite Court's Restraining Order; Still No Contract

THE AMERICAN Federation of State, County and Municipal Employees, Local 3299, which represents 20,000 workers at University of California campuses in the patient care technical and service workers bargaining units, began a five-day service unit strike. The job action began on July 14, two days after San Francisco Superior Court Judge Patrick J. Mahoney granted the Public Employment Relations Board's request for a temporary restraining order to enjoin the strike. The university views the strike as illegal and unprotected conduct. The union has said that, even if the court order is valid, it has complied with its requirements and the strike is not in conflict with it.

Negotiations for the patient care unit began in August 2007, with the service unit joining the talks in October. Both units' negotiations went to impasse in March 2008, and were assigned separate factfinders. Two months later, with no contract, both AFSCME units overwhelmingly voted to strike. The university requested a restraining order from PERB based on the potential danger to public health and safety should the patient care unit engage in a strike. PERB agreed with U.C. and issued a complaint. But

before the board went to the court to request a restraining order, AFSCME agreed to cancel the strike. The two sides issued a joint statement that they would return to the bargaining table on May 30. The parties met for the last time to bargain over a new service unit contract on June 3. Negotiations on the new patient care unit contract

Neither PERB nor the court cited authority for the principle that notice is required.

broke down on June 27.

On July 2, AFSCME gave notice to the university that the service unit planned to engage in a five-day, systemwide strike. Once again, the university asked PERB to enjoin the strike. On July 10, PERB issued a complaint alleging AFSCME violated Higher Education Employer-Employee Relations Act Secs. 3571.1(c) and/or 3571.1(d) when it notified U.C. that the service members planned to hold a five-day strike without specifying the exact dates. The complaint

further alleged that AFSCME violated HEERA when it "condoned, enticed, encouraged, and/or caused" members of the patient care unit to participate in the strike despite PERB's previous determination that a strike by patient care technicians would endanger public health and safety. PERB also alleged that AFSCME failed to negotiate in good faith because it had not engaged in bargaining for the service unit contract since June 3 and had ended bargaining over the patient care unit's contract on June 27, "even though the parties were close to reaching an agreement."

That same day, AFSCME announced that the five-day service unit strike would take place July 14 through July 18. PERB went to court to obtain a restraining order to enjoin the strike, and on July 11, Judge Mahoney issued a temporary restraining order. On Monday, July 14, despite the TRO, AFSCME began a strike at all 10 U.C. campuses, five medical centers, and the Lawrence Berkeley National Laboratory.

Temporary Restraining Order

According to AFSCME, Judge Mahoney's temporary restraining order did not prevent the service workers from engaging in the strike as planned. The judge's order specified that AFSCME, Local 3299, was enjoined from doing three things. The first was conducting a service unit strike against U.C. "without adequate notice of the exact dates of the strike." The second was engaging in

or encouraging a patient care technical unit strike against U.C. The third was continuing or refusing to rescind any strike or noticed strike with respect to the service unit strike scheduled to commence on July 14.

Of particular interest to AFSCME was the court's language that ordered AFSCME to refrain from engaging in a strike "without adequate notice of the exact dates." Neither PERB nor the court cited authority for the principle that notice, adequate or otherwise, is required, nor what would constitute adequate notice. Further, no mention was made of the notice AFSCME gave the university on July 10, that the strike would take place July 14 through 18.

Bill Sokol, of the law firm Weinberg, Roger & Rosenfeld, who was recently retained to represent AFSCME, told *CPER* that the strike is legal because the union gave notice, as the judge instructed, and it was adequate notice under the only California case that provides any direction on the issue. In that case, *San Ramon Valley USD* (1984) No. IR-46 62X CPER 1, PERB determined that the San Ramon Valley Education Association violated sections of the Educational Employment Relations Act when it held a series of unannounced one-day strikes during the school year. The board held that such intermittent "surprise" strikes constituted unlawful pressure tactics in breach of the union's duty to negotiate in good faith in violation of EERA Sec. 3543.6(c). PERB acknowledged that it could not determine what, as a mat-

ter of law, would constitute sufficient notice. But, based on the "facts of this case alone," the board determined that 60 hours would provide sufficient notice to the district to allow it to replace teachers, give adequate notice to parents, and provide constitutionally required quality education. With such notice, PERB instructed, the strikes would no longer constitute unlawful pressure tactics because the district

U.C. contends the strike is illegal.

would be able to provide quality education. Subsequently, PERB obtained a restraining order preventing the association from engaging in any further strikes without adequate notice, which the court defined as 60 hours.

Sokol said that whether *San Ramon* applies here is debatable. First, he notes, *San Ramon* was decided under EERA, not HEERA. Of equal importance, the decision expressly states that the 60 hours notice requirement was based on the facts of that case. Therefore, Sokol reasoned, even if a 60-hour notice requirement exists in any public sector area, least of all in higher education, the facts would have to be extremely close to those in *San Ramon* for the ruling to apply.

Sokol emphasized several factual differences between the circumstances in *San Ramon* and those in the current conflict between AFSCME and U.C.

While in *San Ramon* the association conducted several unannounced strikes, the AFSCME service unit is engaging in their second noticed, but first conducted, strike — the first strike notice in June was rescinded. Moreover, the strikes in *San Ramon* were given with overnight notice at best, some without even that much. To the contrary, in June, AFSCME served notice to the university that it would engage in a strike some time in the near future. Soon thereafter, on July 10, the union gave U.C. notice that the strike would begin on July 14. Finally, unlike the intermittent one-day strikes in *San Ramon*, the service unit noticed a five-day, uninterrupted, strike. And, even if it could be argued that the *San Ramon* ruling applies, AFSCME has provided adequate notice. According to Sokol, the union provided more than 84 hours notice, 24 hours more than what is considered adequate under *San Ramon*.

In its intervenor brief to the superior court, U.C.'s primary argument in support of the injunction is that AFSCME, in effect, called a patient care technician strike that it disguised as a service unit strike. The university based its argument on several AFSCME communications to the public and to its members. Further, U.C. contended that AFSCME's promise to its patient care members that it would provide full strike pay to any patient care technician who joins the picket line is a blatant admission of its encouragement that they strike.

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Pocket Guide to the Higher Education Employer- Employee Relations Act

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

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

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

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

The vast majority of the university's brief discussed the potential effect a patient care strike would have on U.C. medical centers and its patients. But the brief also included an argument focused on the amount of notice required. It relies on *San Ramon* for the principle that a strike without adequate notice is "an unlawful pressure tactic in breach of a union's duty to negotiate in good faith." According to the university, 80-hour notice would be inadequate in the healthcare setting — consistent with its assertion that the strike includes patient care technicians even if the union claims it does not. Further, the university contends that when the board in *San Ramon* said its decision was based on the facts of that case, it was referring to the number of

notice hours required, not the notice requirement itself. Therefore, according to U.C., notice is required in all cases. What constitutes *adequate notice* is dependent on the facts of the particular case. In a footnote, U.C. mentions that the analogous private sector healthcare rule under the National Labor Relations Act defines adequate notice as 10 days.

Nicole Savickas, human resources and labor relations communications coordinator at U.C.'s Office of the President, told *CPER* that the university maintains the judge's order enjoins any strike activity and, therefore, the strike is illegal. Savickas explained that each of the three sections of the court's order enjoined three separate activities. Thus, the court not only enjoined

the strike without adequate notice, but also *any* strike activity between July 14 and 18.

Sokol contended, however, that under common rules of interpretation, the more general provision must yield to the more specific. Here, the third provision is a general injunction against the strike. The more specific provision is the first, which enjoins a strike without adequate notice. According to Sokol, the injunction against the strike without adequate notice prevails, and since the union gave sufficient notice under the only arguably applicable case, the strike is not in conflict with the court's order.

The university maintains that the court order prohibits AFSCME from engaging in any strike activity

conducted by either bargaining unit. In light of the union's decision to strike despite a PERB complaint and the court's restraining order, the board may decide to declare the strike unlawful and seek to have the court hold the union in contempt.

Discipline for Strike Activity

Savickas stated that the university would not retaliate against employees for strike-related activities. She also said that any discipline would be evaluated at the local campus level. However, employees who are absent from work without authorization may be disciplined in accordance with their local campuses' rules. The *San*

PERB may decide to have the court hold the union in contempt.

Francisco Chronicle quoted Elizabeth Meyer, director of U.C. Davis labor and employee relations, as saying, "We're going to take appropriate discipline up to the fullest extent with the law and in accord with past practice." As of *CPER* press time, no employees had been disciplined for strike-related activity, and Savickas suggested that no discipline would be imposed until after an employee returns to work. Sokol said AFSCME service workers who are on strike would return to work on Saturday, July 19, when the strike ends.

Political Response

In a letter to the recently hired U.C. president, Mark Yudof, California State Senator Leland Yee (D-San Mateo/San Francisco) expressed his dismay that university officials are threatening disciplinary action against the striking workers. Senator Yee said he believed that adequate notice was given and that the workers have the right to strike for fair wages, working conditions, and basic equity. "If even one worker is retaliated against or disciplined for exercising their right to strike," he said, "I will do everything in my power to appropriately respond to the University." California State Senate Majority Leader Gloria Romero (D-Los Angeles) was joined by Senator Yee and Senator Don Perata (D-Oakland) in a separate letter to President Yudof expressing similar sentiments. That letter was signed by over a dozen other state senators including the newly appointed chancellor of California's community colleges, Senator Jack Scott (D-Alta Dena).

The university already had garnered negative publicity when several prominent figures, including President Bill Clinton and Assembly Member Fabian Nuñez, refused to deliver planned commencement speeches because of the ongoing conflict between AFSCME and U.C.

Where They Stand

Wages are at the heart of the dispute between AFSCME and the university. When negotiations be-

tween the AFSCME service unit and the university broke down in March, the parties were assigned a neutral factfinder. Her 41-page factfinding recommendation discussed the low wages that university service workers receive in exchange for their work. She noted that, according to the California Budget Project, an hourly wage of \$24.71 is needed to support a family with two children. Based on that projection, 99.6 percent of all service workers at U.C. are unable to care for themselves and two children without some type of assistance. As a result, 96 percent of U.C. service workers are income eligible for at least one form of public assistance.

Clinton and Nunez refused to deliver planned commencement speeches.

After the factfinding report was issued, the two sides went back to the table to try once more to reach an agreement. AFSCME proposed annual automatic step increases, and wage increases over the course of a three-year contract. The union proposed a 9 percent increase in the first year and 6 percent in each of the following two years. Further, the union demanded a \$15 minimum wage at every campus by the end of the third year of the contract. AFSCME has also proposed

overtime pay after 8, 10, and 12 hours in a workday, in addition to overtime pay after 40 hours in a workweek.

The university's most recent offer to the service unit included a minimum wage topping out at \$11.50 — possibly \$12 at certain campuses. U.C. did not propose specific increases through the life of the contract. Rather, it has suggested reopener negotiations on

U.C. did not claim an inability to pay higher wages.

both wages and benefits later this year, when the new state budget is passed, and subsequent negotiations in years two and three. The university has refused to provide overtime pay except for work in excess of the 40-hour workweek.

The patient care unit bargaining team and the university declared impasse in December 2007, after which the two sides engaged in unsuccessful mediation. In March 2008, the parties presented their positions to a different neutral factfinder. Like the service unit, wages are at the crux of the dispute. One of the first points this factfinder made was that U.C. did not claim an inability to pay higher wages. The two sides' continued negotiations include across-the-board wage increases, longevity based steps, and healthcare benefits.

Constitutional Amendment Would Give U.C. Employees Seat at Pension Table

LEGISLATORS HAVE taken aim at the only public pension system in the state that excludes employees from its governing board. The University of California Retirement System is under the sole authority of the U.C. Regents, with the only employee representation being four seats on an advisory board that has no decisionmaking capability. However, Assembly Constitutional Amendment 5, introduced by Assemblymember Anthony Portantino (D-La Cañada Flintridge), would create a new governing board for UCRS, one on which employees would make up the majority. Not surprisingly, the university strongly opposes the amendment.

Legislature's First Attempt

While UCRS has been largely successful — since 1990, neither the university nor its employees have had to contribute to the fund — it also has come under fire for what some consider unwise, and perhaps even underhanded, decisions in the recent past. Specifically called into question has been the regents' choice of outside consultants, some of whom have had connections to the regents' UCRP Advisory Board, along with shared political sympathies. When U.C. announced in 2006 that employee contributions may be necessary, employees became suspicious that the fund was faltering

due to mismanagement, and unions demanded joint governance over the retirement system. (See story in *CPER* No. 181, pp. 42-45.)

The role of the advisory board is merely to exchange ideas.

While the university has long operated a pension advisory board that includes, among others, two academic senate members and two non-academic senate members, the board has no authority to make decisions affecting the plans. The role of the advisory board, as the university describes it, is merely to exchange ideas with the U.C. president on matters concerning the retirement plans.

In response to union concerns over the direction the UCRS was taking, Senator Leland Yee (D-San Francisco) introduced Senate Concurrent Resolution 52, which urged U.C. to implement shared governance of the fund. But the resolution yielded minimal results. U.C. reactivated two employee seats on the nine-seat advisory board but did so in what Senator Yee called a "sham election." The advisory

board still lacks the authority to make pension plan decisions, a power that remains with the regents.

Assembly Constitutional Amendment 5

California State University employees and California's community college employees are members of CalPERS and CalSTRS, respectively, and both retirement systems are required by statute to seat employees on their governing boards. However, Article IX, Section 9, of the California Constitution endows the regents with "full powers of organization and government," with little legislative interference except in specific areas. Currently, the strongest statutory language with respect to UCRS is found in Gov. Code Sec. 7507.5. There, the legislature declares its intent that the regents provide written notice to the legislature of any changes to retirement plan benefits, contribution rates, or actuarial presumptions. Thus, any obligation to seat employees on the governing board of the retirement plan must be either self-imposed by the regents or forced through a constitutional amendment. SCR 52 was the legislature's attempt at persuading the regents to allow employees to have meaningful decisionmaking authority in the process without having to resort to a constitutional amendment. When the non-binding resolution failed to garner the result legislators were hoping for, an amendment to the Constitution was the only option.

As amended, ACA 5 creates a board of trustees to "govern the provision of retirement benefits to employees or retirees by the University of California and any trust or similar arrangement established by the University of California to fund

SCR 52 was the legislature's attempt to allow employees to have meaningful decisionmaking authority.

postemployment health benefits." It goes on to list the composition of the proposed board, which would consist of three members appointed by the regents, not necessarily regents themselves; three ex officio members, all of whom serve as regents; one retiree; three active faculty or staff members; one member of the academic senate; one nonacademic employee; and one employee represented by collective bargaining. The employee board members must be active participants in the retirement plan and elected by a plurality vote of their colleagues in their respective categories. ACA 5 requires that meetings of the new board be public, subject to the same exceptions and notice requirements

that currently apply to U.C. regents meetings.

University Opposition

Three days after ACA 5 was amended in the Assembly, U.C. Provost and Executive Vice President Rory Hume sent a letter to Assembly Member Portantino that voiced the university's opposition. According to Hume, "taking the authority for UCRS away from the Regents and giving it to a separate governing board not only threatens the ability of the University to provide the best pension benefits to its employees, but threatens the overall quality of the University of California."

At the top of the list of reasons for U.C.'s opposition to ACA 5 was that the current governance structure has proven effective and a new governing board is unnecessary. Hume repeated what has been the university's response since allegations of mismanagement and diminishing funds emerged years ago: the UCRP is fully funded at more than 100 percent of its obligations — 104 percent as of the last actuarial report in June 2007 — which is higher than STRS and PERS. At the time of the last valuation in June 2006, CalSTRS was 87 percent funded. CalPERS' last actuarial evaluation in June 2007 examined its three member categories. There are five plans within the "State" category, the aggregate of which is funded at 96.6 percent. However, in the "School" category, the plan is funded at 107.8 percent, three

points higher than the funded ratio for UCRP. The funded ratio for the third category, "Public Agency" was not provided for 2007, but in 2006 it was 92.7 percent.

Hume expressed concern that a new governing board would lack the expertise and prudence that the regents

The university fears a new governing board would lack expertise and prudence.

have provided since the fund's inception. Further, he asserted that employees already have a voice in their retirement plans, pointing to the UCRS advisory board. Hume also alluded to the possible creation of a new board that would replace the advisory board. It would include union-represented employees and "play an extended role in the oversight of the UCRS."

Hume alleged that ACA 5 would threaten academic quality at the university. According to the provost, the regents' control over the retirement plan allows U.C. to attract the "best and the brightest" faculty and staff. To have the affairs of the university managed separately from UCRS, he said, would break that link. Further, having plan members serve as board members might create a conflict of interest. Hume suggested that faculty, staff, retirees, and union members

may find it difficult to separate their own pecuniary interest from the long-term interests of the institution when making benefit, investment, and plan funding decisions.

Additionally, Hume warned that ACA 5 has the potential to run afoul of the state Constitution's requirement that U.C. remain "entirely independent of all political or sectarian influence." According to Hume, the proposed board has a "more overtly political make-up" that would lead to politicization of UCRS and threaten the independence of the university in managing its retirement programs' assets on behalf of its employees.

Finally, Hume expressed the university's concern that the amendment would subject UCRS to direct legislative control, something that is scarce

when it comes to the University of California. Specifically, a provision in ACA 5 states that the U.C. retirement plan "shall comply with any additional requirements that regulate the plan and those programs that are enacted by statute." Thus, the U.C. retirement system would ultimately be under the control of the legislature, an inherently political and sectarian institution. But perhaps more important, the provision takes even more control of the system away from the regents.

Before it can go before California voters, ACA 5 requires two-thirds approval in the Assembly and the Senate. If the proposed amendment is passed by a majority of voters, it would become law the day after the election.

PERB ALJ Concludes Pre-Impasse Unfair Practice Strikes Are Permissible Under HEERA

IN A CASE OF first impression, PERB Administrative Law Judge Donn Ginoza determined that the Higher Education Employer-Employee Relations Act permits strikes taken in reaction to an employer's unfair practice, even if the action occurs before an official declaration of impasse. Judge Ginoza found that the university unlawfully failed to bargain over staffing ratios and that the union gave notice of the strike as a result of U.C.'s bargaining conduct.

Formal negotiations between the California Nurses Association and the University of California began in January 2005, and the parties met at the bargaining table 24 times over 6 months. Two of the more contentious issues were the university's insistence on the inclusion of a no-strike clause that encompasses sympathy strikes and the union's insistence on the inclusion of statutory language regarding staffing ratios at the medical centers.

On June 16, 2005, CNA filed unfair practice charges against the

university. On July 8, 16 days after the parties' last bargaining session, CNA served the university with notice of a one-day job action, which the union described as an unfair practice strike, to take place on July 21, 2005. U.C. responded by filing its own unfair practice charges against the union on July 12, along with a request for injunctive relief to enjoin the strike.

PERB issued a complaint that CNA failed to meet and confer in good faith by calling for a one-day, systemwide strike, and granted the university's request to seek injunctive relief. Subsequently, the Sacramento Superior Court granted a temporary restraining order on July 20, enjoining the strike. The TRO was followed by a preliminary injunction on August 25, 2005, which prohibited the strike until the union and U.C. completed HEERA impasse procedures.

On September 29, 2005, PERB issued a complaint alleging that U.C. failed to meet and confer in good faith by refusing to bargain over proposals concerning the no-strike clause and nurse staffing ratios, and that it refused to provide information related to the generation of nurse staffing plans.

ALJ Decision

In his 62-page decision, the ALJ framed the key issue in the case as whether CNA's decision to call a one-day strike was based on the university's alleged unfair practices. According to the ALJ, if U.C. committed the unfair practices as the union alleged, it

violated its duty to meet and confer in good faith and the strike in response would potentially be lawful. If, however, the university committed no unfair practices, or if unfair practices were committed but they were not the motivation behind the strike, CNA would have failed to meet and confer in good faith because it gave notice of a strike prior to completion of impasse procedures.

U.C. argued that all unfair practice strikes violate HEERA if they occur before impasse.

The association asserted that U.C. violated HEERA by insisting to impasse on CNA's waiver of the statutory right to engage in sympathy strikes, refusing to bargain over minimum staffing ratios, and refusing to provide the union with information regarding the formulas and methodology of computerized patient classification systems for each of the U.C. campuses. Meanwhile, the university contended that because it had fulfilled all of its bargaining obligations, the usual defense to a pre-impasse strike did not exist and the association's failure to exhaust its impasse options constituted a per se HEERA violation. Addition-

ally, U.C. argued that notice of the strike and all unfair practice strikes be deemed violations of HEERA if they occur before exhaustion of impasse procedures.

Because PERB has not yet addressed the legality of strikes under HEERA, the ALJ explored precedent under EERA and the MMBA. He noted that the California Supreme Court, examining cases under the MMBA and EERA, has held that public employee strikes are not illegal unless expressly stated so by the legislature or unless the strike would result in imminent threat to public health and safety. The ALJ also observed that while HEERA is similar to EERA and the MMBA in that it neither expressly prohibits nor recognizes the right to strike, it does not include the language found in EERA Sec. 3549, which expressly disavows the intent to embody the protection afforded concerted activities set out in Labor Code Sec. 923.

After establishing the legality of strikes in the public sector, the ALJ examined a line of cases decided under EERA which establish that a pre-impasse strike carries a rebuttable presumption of union bad faith bargaining. That presumption may be rebutted, he explained, if the union can demonstrate that the strike was provoked by the employer's conduct, and that the union negotiated in good faith. Further, the ALJ found nothing in the statutory language to suggest that PERB should evaluate a pre-impasse strike under HEERA differently than a pre-impasse strike under EERA.

The university acknowledged PERB precedent that a pre-impasse strike creates a rebuttable presumption of illegality. Still, U.C. argued that CNA's planned strike violated HEERA regardless of the motivation behind it. It relied on PERB member Steve Porter's opinion in *Compton Unified School Dist.* (1987) No. IR-50, 72X CPER 1, in which he asserted that all strikes are illegal under EERA because they impinge on the school district's obligation to provide education. ALJ Ginoza read the holding in *Compton* to only stand for the rule that such a strike *may* be unlawful. And because the weight of precedence holds that public strikes are not per se illegal, the university's argument was rejected.

Even so, the ALJ explained, PERB has the authority to determine whether a particular strike is unprotected and/or illegal. The university argued that the strike should be determined to be unlawful regardless of the association's motives. The university based this argument on its assertion that the strike posed a threat to health and safety. However, the judge noted, it more strenuously argued that the strike is illegal because the motivation behind it was economical — to gain the upper hand at the bargaining table before impasse was declared — rather than purely in response to perceived unfair practices. Specifically, U.C. pointed to the potential economic harm faced by the university as a result of the strike and argued this called into question its utility as an unfair practice strike.

The ALJ found insufficient evidence of economic harm to justify prohibition of unfair practice strikes of a limited duration; CNA's noticed strike was for one day.

The ALJ questioned the utility of an unfair practice strike under HEERA, which contains impasse

The ALJ found insufficient evidence of economic harm.

procedures. However, he found that the unfair practice strike effectuates the purpose of HEERA by providing a means to "expeditiously remove unremedied unfair practices from the bargaining process without the protracted delay of subsequent litigation." Further, the ALJ observed, PERB retains jurisdiction to enjoin any unfair practice strike it deems unworthy of effectuating the statutory purposes.

The university asserted several other arguments claiming the unlawfulness of CNA's planned strike. The ALJ rejected U.C.'s contention that the threat or preparation for a strike before completion of impasse procedures was an unfair practice. The university relied on *South Bay Union School Dist.* (1990) No. 815, 86 CPER 43, where PERB issued a complaint on the theory that preparations for a strike leading to bargaining conces-

sions prior to completion of impasse procedures stated a prima facie case of surface bargaining. In *South Bay*, ALJ Ginoza observed, PERB determined that the district might have been able to show that the tentative agreement reached during strike preparations resulted from concessions forced by the union's threatened strike. In this case, he said, CNA waited until it perceived that the parties were at impasse, no negotiations were scheduled at the time the strike was noticed, and U.C. had submitted its last, best, and final offer.

The ALJ concluded that unfair practice strikes are permissible under HEERA. Further, CNA's noticed strike was neither per se unlawful nor unlawful under the facts of the case. However, because the strike came before the impasse procedures were exhausted, a presumption that the strike was unlawful remained. Accordingly, the association could rebut that presumption by demonstrating that the university committed unfair practices and the decision to strike was in response to those unfair practices.

Potential Unfair Practices

The primary unfair practice alleged was the university's failure to bargain in good faith. Under HEERA, lack of good faith can be shown in two ways. The first is by the totality of the circumstances during bargaining which demonstrates a lack of genuine intent to reach agreement through fair bargaining. The second, the ALJ

explained, is to prove discreet acts which have such potential to frustrate negotiations that they are considered unlawful without any determination of subjective bad faith on the part of the actor. The latter acts are considered per se violations of the duty to meet and confer in good faith.

CNA claimed the university failed to meet and confer in good faith through discrete acts.

CNA's original complaint alleged that a totality of circumstances constituted a failure to meet and confer in good faith. At the commencement of the hearing before the ALJ, the association amended its complaint to include the theory that the university failed to meet and confer in good faith through discrete acts.

CNA's primary contention was that there is a statutory right to engage in sympathy strikes and the university's insistence on the union's acceptance of that proposal to impasse demonstrated a failure to meet and confer in good faith. Although the ALJ rejected the university's contention that it never reached impasse on the issue, he explained, the fact that the parties had not mutually agreed they were at im-

passee or that PERB had not certified an impasse is without consequence. That is so because the association asserted that bargaining was obstructed by U.C.'s unfair practices which occurred at the bargaining table.

Turning to the lawfulness of U.C.'s insistence on a no-strike clause that included sympathy strikes, the ALJ referred to well-settled law permitting an employer to insist on a no-strike clause so long as it also provides binding grievance arbitration during the term of the contract. The ALJ reasoned that since the university never insisted on the *absence* of an arbitration provision, the no-strike proposal was not unlawful. However, U.C.'s insistence that it be prohibited may be unlawful. The ALJ also concluded that because of the high value placed on labor peace during the term of an agreement, the right to engage in sympathy strikes is not an absolute right and CNA could be asked to waive its members' individual right to engage in sympathy strikes. Thus, the university did not fail to meet and confer in good faith by insisting to impasse on the waiver of the sympathy strike right.

CNA also alleged that the university committed an unfair practice by refusing to bargain over staffing ratios at the medical centers. The university asserted that staffing ratios are outside the scope of representation. The ALJ noted that an issue may be outside scope when bargaining would significantly abridge the employer's managerial prerogatives. In some

instances, Ginoza explained, staffing ratios may involve the level of services provided to the public and might fall within the managerial prerogative. However, where the staffing level has a reasonably foreseeable impact on employee caseload, it is not a managerial prerogative.

Staffing ratios do not implicate decisions about the level of services.

Here, the ALJ found that the staffing ratios do not implicate decisions about the level of services. They are driven by the number of patients for which the nurses are responsible, and thus are more appropriately viewed as a matter of caseload. Accordingly, the ALJ found that the association's staffing ratio proposal constituted a subject within the scope of representation.

The university further asserted that because the association's proposal was to include statutory language in the text of the contract, it was a nonmandatory subject of bargaining. The ALJ agreed that there is no requirement that statutory language be included in a contract, even if the employer is bound by the statute. But the ALJ rejected the assertion that, as a result, it is a nonmandatory subject

of bargaining. The ALJ also turned aside U.C.'s argument that inclusion of statutory language would prevent arbitrators from considering cases submitted to them. The ALJ noted, "it appears beyond dispute that arbitrators are capable of deciding statutory issues; whether they should is a different question."

*The university refused
to bargain fully over
the disclosure
of formulas and
methodology.*

After examining notes from the bargaining sessions and witness's testimony at the hearing, the ALJ determined that at no time did the university propose substantive change to the proposed staffing ratio language, make any counterproposals, or affirmatively acknowledge its obligation to bargain over CNA's proposal. Consequently, the ALJ concluded that U.C. refused to bargain in good faith over the staffing ratios proposal and the conduct was sufficiently harmful to frustrate bargaining.

The ALJ also found that the university refused to bargain fully over the disclosure of formulas and methodology used to determine patient classification in the medical centers. While the university's software suppli-

ers made claims of confidentiality, the ALJ found that U.C. made no attempt to disclose the necessary information while protecting the companies' trade secrets.

Motivation Behind the Strike

As part of the union's rebuttal of presumed unlawfulness of the pre-impasse strike, the ALJ looked to the provocation and motivation for the strike. The ALJ cited six factors relevant to this assessment. They include the union's statements about the cause of the strike when the strike vote was taken, the content of picket signs and leaflets, the union's opposition to the unfair practices before the strike, the nature and the seriousness of the unfair practices, the proximity in time between the unfair practices and the strike, and the filing of unfair practice charges prior to the strike.

The ALJ found that each of these elements supported a finding that U.C.'s bargaining conduct caused the strike notice.

Therefore, because CNA pursued the strike for the lawful purpose of protesting the university's unfair practices, the union did not breach its duty to meet and confer in good faith when it noticed U.C. of its intent to engage in a one-day strike. Accordingly, the university's complaint was dismissed.

On May 22, the university filed exceptions to ALJ Ginoza's proposed decision.

State Employment

Prison Overcrowding Is Sufficient Emergency to Allow Out-of-State Inmate Transfers

NEARLY 3,900 prisoners legally can be housed in private prisons in other states, despite constitutional limitations on contracting out state services, an appellate court has ruled. With little judicial precedent to guide it, the court found that the governor's October 2006 proclamation was authorized by the Emergency Services Act, even though the emergency was under the exclusive control of the state government. Also, because sufficient numbers of guards are not available and prison overcrowding is an "urgent, temporary" situation, the state met exceptions to civil service laws that prohibit contracting out of public employee jobs, the court held. Two unions had characterized the emergency proclamation as an unauthorized power grab. (See prior story in *CPER* No. 181, pp. 46-49.)

Triple-Bunked in the Gym

California's prisons are designed to hold 83,000 inmates. In October 2005, however, the prison population reached double that number, prompting Governor Schwarzenegger to introduce legislation in early 2006 to address overcrowding. When the legislature failed to pass the bills, he called

a special session in June 2006 to enable lawmakers to focus on "the crisis." Still, the legislature failed to act.

In October 2006, the governor issued a proclamation invoking the Emergency Services Act. He explained that "all 33 CDCR prisons [were] at or above maximum operational capacity, and 29 of the prisons [were] so over-

The conditions placed both inmates and staff in 'extreme peril.'

crowded that the CDCR [was] required to house more than 15,000 inmates in conditions that pose substantial safety risks, namely, prison areas never designed or intended for inmate housing, including, but not limited to, common areas such as prison gymnasiums, dayrooms, and program rooms, with approximately 1,500 inmates sleeping in triple-bunks."

The governor described a myriad of security and health problems that had arisen from the overcrowded prisons: risks of violence due to cancelled educational and vocational programs,

and reduced visibility of prisoners in crowded rooms; risks of fires and disease from overburdened electrical, sewer, and wastewater systems; and inadequate mental health and medical care. Because the conditions placed both inmates and staff in "extreme peril," he directed the California Department of Corrections and Rehabilitation to enter into contracts necessary to transfer inmates to prisons in other states. Accordingly, the department transferred prisoners out of the state under a three-year contract with a private company. The contracts reserved the state's rights to reduce the number of inmates or terminate the contract before it expired.

The California Correctional Peace Officers Association and the Service Employees International Union, Local 1000, petitioned a lower court for an order prohibiting the transfers. The unions argued that the Emergency Services Act did not authorize the governor's declaration of emergency and that the contracts for services violated the civil service provisions of the California Constitution.

The trial court accepted the state's assertions that prison overcrowding had created conditions of extreme peril. But, it held that the act did not provide authority for the governor's proclamation because it was not designed to give the governor the power to act without legislative approval when emergencies are entirely within the control of state government. The court also held that the contracts for

services were illegal under the civil service provisions of the state Constitution. The state appealed.

Emergency Services Act

The appellate court disagreed with the trial court's narrow reading of the Emergency Services Act. The act applies not only to local emergencies, the court observed, but also to conditions of disaster or extreme peril "within the state." The relevant question, the court instructed, is not whether the condition is in an area that is within the exclusive control of the state. The statute allows emergency action when the disaster or perilous conditions

...by reason of their magnitude, are or are likely to be beyond the control of the services, personnel, equipment, and facilities of any single county, city and county, or city, and require the combined forces of a mutual aid region or regions to combat.

If a fire within a state park is threatening "extreme peril" to persons and property outside the park, the governor is not precluded from proclaiming a state of emergency, the court reasoned, without citing to any case law.

The court turned aside the unions' argument that provisions of the act show the legislature did not intend the act to apply to conditions solely within the control of the state government. Those provisions allow the governor to proclaim a state of emergency when asked by a local chief executive officer or board of supervisors, or when "he

finds that local authority is inadequate to cope with the emergency." The unions asserted this language indicated the legislature was contemplating emergencies that local entities would normally handle but that had become too large. The argument ignores the statute's applications to disasters and perils "within the state," the court chastised the unions. The statute "logically applies when an area within a local government's jurisdiction is 'likely to be affected' by an emergency condition in an area under the exclusive control of the state," said the court.

The state's reliance on counties to house state prisoners is 'akin to mutual aid.'

The unions also contended that provisions which allow the governor to direct state agencies to provide supplemental services to political subdivisions show the act was designed to address emergencies in a particular area, not a persistent crisis throughout the whole state, like the prison overcrowding problem. The court also dismissed this contention. "The purpose of [Government Code] section 8628 is to authorize...the use of services and equipment of the state to perform tasks...which the local government cannot perform because its resources have been depleted by the emergency," the court declared.

The court agreed that the emergency conditions listed in the statute, such as "air pollution, fire, flood, storm, epidemic, riot, drought, sudden and severe energy shortage,..." indicate the legislature intended to give the governor power over conditions which ordinarily would be handled by local governments except for their magnitude. But, the court pointed out that the list was not exclusive, and did not exclude conditions entirely on state controlled property.

The court also rejected the unions' argument that every other emergency proclamation by the governor has involved conditions which local government would have handled if not so widespread. Merely because past disasters and perilous conditions have been localized does not mean that the act is limited to those circumstances, the court reasoned.

The court concluded that the governor is authorized to proclaim a state of emergency "based on a condition occurring in a state prison." In fact, a section of the act allows a warden to remove prisoners from an institution when an emergency may endanger the lives of the inmates, observed the court.

In this case, the unions did not dispute the facts recited in the governor's proclamation. The trial court had found that the statutory criteria of "extreme peril to the safety of persons and property" and lack of local control over the crisis were satisfied. The third prerequisite, that the emergency con-

dition requires “the combined forces of a mutual aid region or regions to combat,” turns on “whether it is likely that local resources as well as state resources will be needed to combat the condition,” the appellate court advised.

The court concluded that overcrowding was a condition of sufficient magnitude to meet the third criterion. The crisis already had led CDCR to postpone the transfers of felons from county jails to state prisons upon conviction. The state’s reliance on counties to house state prisoners is “akin to mutual aid,” the court reasoned. Also, overcrowding existed throughout the state, showing that combined forces of mutual aid regions were needed to house state inmates. The delayed transfers had led one county to release county prisoners before the end of their sentences, which, the court

inferred, was likely to have required local law enforcement agencies to investigate crimes the released prisoners might have committed. The court also speculated that overcrowding likely would cause CDCR to move inmates or release them, which also would likely require a similar local response.

In addition, the governor’s concerns about transmission of infectious illnesses among prisoners and staff, and potentially to prison visitors, led the court to believe it likely that local public health resources would be needed to combat outbreaks. Mutual aid regions also are likely needed to respond to the pollution problems that overcrowded prisons cause, the court reasoned.

The three prerequisites were met, the court concluded. The governor did not exceed his authority by issuing the

proclamation, and the trial court’s ruling was in error.

Urgency Allows Contracts for Services

The unions relied on the civil service provisions of the state Constitution in their second challenge to the governor’s proclamation. Article VII of the Constitution makes nearly all state employees part of the civil service and mandates that they be hired based on merit. The Constitution does not explicitly ban contracting for services with the private sector, but the courts have long recognized that allowing private contracting would undermine the civil service system. The state’s workforce could become dominated by independent contractors chosen for reasons of political patronage rather than merit. The courts, therefore, have construed Article VII as prohibit-

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Pocket Guide to the Ralph C. Dills Act

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

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

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

ing contracting for services that state employees could perform adequately and competently.

The legislature has implemented Article VII in provisions of the Government Code, which lists exceptions to the general rule against contracting

CDCR presented evidence that it would take five years to hire enough officers.

out state services. The court found two of those exceptions applicable to this case.

Section 19130(b)(10) allows personal services contracting when “[t]he services are of such an urgent, temporary, or occasional nature that the delay incumbent in their implementation under civil service would frustrate their very purpose.” The court emphasized that there was an urgent need for additional prison facilities and services that could not be fulfilled quickly, since adequate prison housing units could not be constructed fast enough. Therefore, prisoners had to be sent to non-state facilities.

A second exception combined with the “urgent, temporary” need to justify contracting with prisoner services in other states. The statute allows contracts for services when “the services...

are not available within civil service [or] cannot be performed satisfactorily by civil services employees.” CDCR presented evidence that it would take five years to hire enough officers to oversee the prisoners. Correctional officer attrition and limitations on the number of new recruits the department is able to train each year have caused long-term staff shortages, the department asserted. Not only was there insufficient space for all the prisoners, there were too few guards. Even if there were enough officers, said the court, “state workers cannot be employed by private contractors in other states and retain their civil service status.”

Relying on State Personnel Board precedent, the unions countered that the urgency exception is not applicable because the state’s priorities created the urgency. And the SPB does not look merely at whether civil service employees are available, but whether the *nature* of the services is such that civil service employees are unable to perform them.

The court reminded the parties that it is not bound by SPB rulings. Besides, explained the court, the SPB cases cited by the unions did not support their position. In one case, an agency had not exhausted all available means of hiring civil service employees for the work. Here, not only would it take five years to hire enough officers, but there are insufficient facilities within the state to house the prisoners, the court said.

Recently, the court pointed out, the SPB has permitted contracting out of nursing services when the state was unable to recruit enough nurses — even though the recruitment problem was due to low salaries — because a federal court had imposed minimum

What matters is not who caused the emergency.

service standards on the department. That case undermined the unions’ position, pointed out the court, since CDCR was under similar federal judiciary direction to increase the number of beds and space in the prisons.

The court simply did not buy the unions’ argument that allowing private contracting when the state itself has created its own staffing and facilities problem undermines the civil service. “What matters is not who caused the emergency, but that the emergency exists, that adequate facilities must be provided, and that they must be provided now,” the court stated.

But its language indicates that the court was primarily focused on the lack of facilities. It would be impossible for the state to provide the adequate space overnight, the court emphasized. Also, “CDCR is not importing independent contractors to fill staffing shortages; it is exporting prisoners...due to a lack of facilities. Civil service employees

cannot adequately perform the nature of the services because of the absence of facilities in which to perform these services.”

Finally, the court pointed to the limited term of the contracts to buttress its conclusion. The contracts

permit early cancellation, the court observed. “Once the needed prisons are built, the state must staff them with civil servants,” it instructed. (*California Correctional Peace Officers Assn. v. Schwarzenegger* [2008] 163 Cal. App.4th 802.)

only Democratic legislator Don Perata (East Bay) sided with Maldonado, not his fellow Republicans who are advocating budget cuts and have pledged not to vote for tax increases.

The Citizens Committee frequently has voted against pay raises during budget crises. Elected officials received no increases from December 2001 to December 2005, during a period when most rank-and-file employees received only a 5 percent raise. But the commission often has hiked officials’ salaries disproportionately to civil service employees’ during good times.

Salary Squeeze for Most State Workers

FROM THE TOP DOWN, most state workers will see little or no pay increase this year. The California Citizens Compensation Commission froze pay for legislators and other state elected officials. There are no raises in sight for exempt employees, and the Department of Personnel Administration is limiting salary increases for Career Executive Appointees. Initial reports from the bargaining tables indicate that DPA plans to hold the line on any raises in 20 bargaining units where contracts are up for renewal. In one unit, where DPA recommended a 2007-08 increase for correctional officers, the legislature is refusing to appropriate the funding. Only officers represented by the California Association of Highway Patrolmen can be sure of a raise, thanks to a pay parity law. Meanwhile, pay has not kept pace with inflation for many state workers, and gasoline and food prices continue to rise.

Pay Cut Controversy

State employees’ salaries generally rise with the economic tides, but no

one expects salaries to fall when the state economy ebbs. Two members of the panel that sets elected officials’ salaries suggested in April, however, that salaries be slashed 10 percent to match the 10 percent across-the-board cuts to state programs that the governor was proposing at the time. A 10 percent reduction in a legislator’s salary would have amounted to an \$11,000 annual cut. Legislative leaders and other elected officials would have endured pay reductions of up to \$18,000. The governor does not accept his salary.

While state lawyers were scrambling to determine if a pay cut would be legal, Senator Abel Maldonado (R-Santa Maria) pushed a constitutional amendment he had introduced in March. He proposed to prohibit the Citizens Compensation Committee from recommending a pay increase for elected officials in any year that the legislative analyst has determined a state general fund operating deficit exists. Predictably, fellow legislators on the Rules Committee voted against the constitutional amendment. Ironically,

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In 2000, when state rank-and-file employees’ pay was raised 4 percent, legislative salaries spiked 26 percent. After the lid was lifted on officials’ salaries in 2005, their salaries jumped at least 14 percent over the next two years, while salaries of most non-public safety employees rose about 7 percent. In December 2007, officials received modest 2.75 percent increases, except for the attorney general and superintendent of public instruction, who benefited from 5 percent pay hikes.

In a close vote in June, the commission decided not to raise elected officials' salaries at the end of the year. The decision avoided an awkward inequity in implementation of the proposed 10 percent cut. Because pay cannot be reduced during a lawmaker's term, 20 senators would have been entitled to continue receiving higher salaries until the end of their terms in 2010, while the remaining legislators would have suffered a pay cut.

Lucrative Appointee Pay Frozen

The year 2007 was a banner year for the bank accounts of 49 appointed officials whose salaries are set by statute. Based on legislation passed in 2006, DPA substantially hiked their salaries in April 2007. (See story in *CPER* No. 185, pp. 58-60.) While directors of some departments received only a 12 percent raise, others saw their pay soar as much as 27 percent. Agency secretaries' salaries increased from \$142,582 to \$175,000. The extra costs of these raises were absorbed by the employees' agencies.

The law limits their compensation to 125 percent of the governor's salary, currently \$212,179. The only agency secretary paid higher than the governor has been the secretary of the Department of Corrections and Rehabilitation, who is paid \$225,000. Although, theoretically, appointee pay could rise this year — in line with elected officials' modest increases in December 2007 — DPA spokesperson Lynelle Jolley told *CPER* that there are

no plans to raise any exempt employees' pay, even those whose salaries are not set by statute. They did not fare as well last year as "statutory exempts." Non-statutory exempt employees generally received the same 3.4 percent raise that non-public safety civil service employees received effective July 1, 2007.

CEA Rules Reversed

The budget crisis has caused DPA to take back some control over salaries for employees in Career Executive

*The department has
no timeline for
announcing salary
increases for excluded
employees for the
2008-09 year.*

Assignments in March. Two years ago, DPA decided to allow individual agencies to set salaries for the 1,330 CEA employees, the highest-ranked civil servants. The major constraints were a \$9,830 cap on monthly pay for non-physician, non-attorney executives; a 10 percent limit on annual salary increases; and the like-pay-for-like-work principle in the Government Code. The maximum non-attorney, non-physician pay was adjusted to \$10,174 in September 2006, and the

maximum CEA rate was boosted to \$12,941. A few exceptions were added for attorneys and engineers whose salaries were barely higher than those they supervised.

In March, DPA limited annual increases to 5 percent, which is equivalent to the merit increase percentage that rank-and-file employees can receive. The maximum monthly pay rate for non-attorney, non-physician employees was raised to \$10,520. The salary of an employee above the maximum of the range for his or her appointed level was frozen. DPA is conducting an audit of CEA salaries to ensure that only attorneys, doctors, engineers, and others whose salaries DPA has individually approved are being paid above \$10,500 a month.

Other excluded employees, those who have representation but not bargaining rights, received increases similar to the raises of the rank-and-file they supervise. Those not in medical, public safety, engineering, or attorney positions received a 3.4 percent increase for the 2007-08 year. Highway patrol managers and supervisors were given a 6.1 percent increase, and engineering managers and supervisors saw their pay rise as much as 14 percent. DPA spokesperson Jolley told *CPER* that the department has no timeline for announcing salary increases for excluded employees for the 2008-09 year.

No Money on the Table

As reported in March by the *Sacramento Bee*, and in May by the *San*

San Francisco Chronicle, lower-paid state employees have not enjoyed the pay hikes given to those in the upper echelons of the government. The *Chronicle* found there are now nearly 1,000 employees earning over \$200,000, while there were only 8 in 2003. The *Bee* calculated that the median annual pay for the highest-paid 10 percent of state employees was \$107,580, a 25 percent increase in five years, while the median pay for the other 90 percent of state workers rose only 14 percent during that time. The wages of those in the lowest-paid 20 percent rose only 10.2 percent. The Consumer Price Index for the urban consumers in California has risen about 17.3 percent in the last five years.

Lower-paid employees likely will not catch up this year. Unions representing most of the state's rank-and-file employees report unusual resistance from DPA to any proposals that will cost the state money. Service Employees International Union, Local 1000, attempted to bargain a \$15 monthly differential for truck drivers in bargaining unit 11, but got nowhere.

The California Attorneys, Administrative Law Judges and Hearing Officers in State Employment indicates it has received no meaningful economic offer from DPA, despite bargaining for more than a year. The CASE contract expired June 30, 2007, although DPA agreed to increased employer health care contributions for 2008. (See story in *CPER* No. 186, pp. 46-50.)

Correctional officers represented by the California Correctional Peace Officers Association also are laboring without a raise for 2007-08. The state imposed its last, best, and final offer last September, after the legislature adjourned. (See story in *CPER* No. 186, pp. 43-46.) The offer included a 5 percent raise effective July 1, 2007, but the administration has not found any legislator willing to sponsor a bill to implement it. The legislative analyst issued her opinion in February that a wage increase was unnecessary for the officers, whose pay rose about 34 percent between July 2001 and July 2006. (See story in *CPER* No. 189, pp. 69-72.)

The only employees scheduled to receive a pay increase in July are highway patrol officers, represented by CAHP, and engineers and architects

represented by Professional Engineers in California Government. Both have parity agreements that call for salaries to be determined by reference to salaries for similar positions in other public jurisdictions. The highway patrol officers' parity agreement is buttressed by similar provisions in state law. CAHP estimates that officers will receive a 4.1 percent increase effective July 1, that will be paid as soon as the budget is passed. The language in the PECG MOU bill, however, reserved the legislature's right to look at survey data itself before appropriating funds to maintain comparability. But Bruce Blanning, PECG's executive director, told *CPER* that he does not anticipate any obstacles to the expected raise since most engineers and architects are not paid from the general fund.

SPB Fights Receiver's Physician Discipline Plan

THE FEDERAL COURT overseeing inmate medical care in California prisons decided in May that changes to physician peer review and discipline processes are constitutionally necessary. Despite the State Personnel Board's concerns about incursion on its constitutional duty to review disciplinary actions of state employees, the court upheld the proposal by the receiver that the SPB use the deferential "substantial evidence" standard for review of the

peer review panel's medical findings. But an order for the receiver to work with the SPB to revise some aspects of the procedure led to further disputes. Although the union that represents prison doctors has no objections to the receiver's plan, the receiver was unable to satisfy the SPB. As *CPER* went to press, the court rejected most of the SPB's contentions regarding the role of the board and its hearing officers in the discipline review process.

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Pocket Guide to the Basics of Labor Relations

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

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

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

By Rhonda Albey • 1st edition (2003) • \$12
<http://cper.berkeley.edu>

Inadequate Health Care

The Prison Law Office filed *Plata v. Schwarzenegger* seven years ago, alleging that the corrections department violated the prohibition against cruel and unusual punishment by not serving prisoners' serious medical needs. A settlement agreement in 2002 called for revised policies and procedures that would produce a minimally adequate level of medical care in California prisons. It subjected the department to periodic audits of inmate medical care. In October 2005, Judge Thelton Henderson determined that little progress had been made. He decided to appoint a receiver to reform the correctional system's medical program for inmates after he found that an average of one

preventable death was occurring in the prison system each week.

The court made numerous findings about the quality of physician performance in the prison medical system and the consequences of constitutionally inadequate care. Expert testimony indicated that 20 to 50 percent of prison doctors provided poor quality of care, and 20 percent had at least an adverse report on the federal government's National Practitioner Databank or a malpractice settlement on their record, if not a license restriction.

Before Receiver Robert Sillen was appointed in February 2006, the California Department of Corrections and Rehabilitation had attempted to implement a Quality Improvement in Correctional Medicine (QICM)

program — over the objection of the Union of American Physicians and Dentists, which represents state doctors. A peer review panel, the Professional Practices Executive Committee (PPEC), had been established, but the court found the QICM program had made little headway combating physician incompetence and indifference. (See story on pp. 64-66 re: UAPD's challenge to the QICM program.)

The receiver has reported that, even when physicians are removed from patient care duties, they often remain on the state payroll during disciplinary proceedings. The PPEC, which is comprised of physicians and other healthcare professionals, investigates patient deaths and complaints about physicians. It then makes recom-

mendations to the governing body, which had no medical members until the receiver recently required involvement of his chief medical officer. If the PPEC makes a recommendation that affects the staff privileges — the right to treat inmate patients — of a physician, the decision may be appealed first to an evidentiary hearing before the final decision by the governing body. A specially trained state administrative

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law judge presides over the hearing with a panel of physicians chosen by CDCR management, and the panel makes a recommendation to the governing body.

Because privileges have not been a condition of employment for CDCR physicians, a governing body decision to revoke privileges has not led to automatic termination. A separate disciplinary investigation and SPB hearing process has been required before a physician can be terminated. As a result, there are physicians on the payroll who are not allowed to treat patients.

In April 2007, the receiver filed a Motion for Waiver of State Law re:

Physician Clinical Competency Determinations. He proposed that PPEC recommendations proceed directly to the governing body, and that the due process evidentiary hearing occur after the governing body makes its decision on both privileging and employment, so that only one evidentiary hearing would be necessary. At the hearing, the ALJ would make evidentiary and procedural rulings, but the medical determinations and privileging decisions would be made by a three-physician judicial review committee (JRC). The SPB would review only whether the physician should be terminated, not whether his privilege to practice medicine would be revoked.

Over the last year, the receiver worked with UAPD, the Prison Law Office, and the SPB in an attempt to reach agreement on the procedures. A new receiver, Clark Kelso, was appointed in February. He also met with the SPB and incorporated suggestions that the ALJ be authorized to decide non-medical issues raised by physicians who have claimed the governing body's decision was motivated by bias, retaliation for whistleblowing, or a conflict of interest. In response to the SPB's insistence that it exercise meaningful review of disciplinary decisions, Kelso proposed that the SPB could review the employment related-decisions of the ALJ and JRC, but could not overturn the medical findings of the panel unless they were the result of a clear procedural error or evident bias, or were not supported by substantial

evidence. But that standard of review was not seen as sufficiently meaningful by the SPB. In May 2008, the parties informed the court they could not stipulate to new procedures, and the court, in *Plata v. Schwarzenegger* (N.D.Cal. 5-23-08) ___F. Supp.2d___, 2008 WL 2169347, issued a decision partially approving the receiver's proposals.

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SPB Review Limited

The court prefaced its decision by reiterating its finding in a prior prison health care case that "a meaningful peer review procedure is a necessary component of a constitutionally adequate health care system." Henderson observed that no one has disputed the current peer review system needs to be reformed. He also commented that the existence of both a peer review process and a disciplinary process devalues the PPEC's medical opinion that the physician is incompetent to practice medicine in the prisons, results in significant expense, exacerbates the problem of physician understaffing, and potentially leads to conflicting decisions by the governing body and the SPB.

Before deciding whether the substantial evidence standard proposed by the receiver was necessary to ensure constitutionally adequate prison health care delivery, the court had to address the SPB's argument that the inclusion of the peer review JRC in the hearing process would require a waiver of the state Constitution. Article VII of the Constitution requires that the SPB "review" disciplinary actions.

The Constitution 'does not set forth the standard under which the SPB shall review disciplinary actions.'

The SPB relied heavily on the California Supreme Court's decision in *State Personnel Board v. Department of Personnel Administration* (2005) 37 Cal.4th 512, 176 CPER 37. In that case, the SPB successfully argued that collective bargaining agreements which had established an alternate disciplinary appeal process through a grievance and arbitration procedure violated Article VII. The Supreme Court held, "It would be inimical to California's constitutionally mandated merit-based system of civil service... to wholly divest [the SPB] of authority to review employee disciplinary actions." The court found the SPB's exclusive authority to review disciplin-

ary decisions was a critical component of the civil service system, which the Constitution entrusted to a single agency. One of the collective bargaining agreements attempted to avoid any constitutional problem by providing that, if an employee chose the grievance procedure route through a board of adjustment and the board of adjustment could not reach a majority decision, the matter would proceed to arbitration. The arbitrator's decision would be subject to SPB review. But this collective bargaining agreement fared no better in the constitutional analysis.

Judge Henderson distinguished the arbitration hearings described in *SPB v. DPA* from the procedure proposed by the receiver. In *SPB v. DPA*, the parties could bypass entirely the SPB procedure. Since the receiver's proposed procedure would require an SPB ALJ hearing and SPB review in all cases involving employment status, compensation, or grade level, the court found that it would not be unconstitutional.

The federal court also rejected the SPB's contention that the substantial evidence standard of review for medical findings would violate the state Constitution. The state Constitution "does not set forth the standard under which the SPB shall review disciplinary actions, nor does it provide, for example, that the SPB must be allowed to make its own factual findings or weigh credibility of all witnesses," Judge Henderson wrote.

Therefore, no waiver of the California Constitution would be required before implementing the receiver's proposed procedures.

The court then addressed the SPB's argument that according the JRC findings "great weight," rather than reviewing them under the substantial evidence test, would be sufficient to ensure a constitutionally adequate inmate health care system.

The SPB's proposed 'great weight' standard was too amorphous.

The court found, however, that the SPB's proposed "great weight" standard was too amorphous. Because the SPB proposal contained no criteria defining when it would be appropriate for the SPB or ALJ to deviate from the JRC findings, the court found the great weight standard "functionally equivalent to giving no deference to the peer review panel's findings;...the SPB and its ALJs would be permitted to make their own determinations based on the evidence as to the medical competency issues raised." Since an adequate peer review system cannot allow a medically untrained person to reweigh the evidence for a panel of physician peers, the court said, the great weight standard would be constitutionally inadequate.

The court decided that the substantial evidence standard was constitutionally required for reviewing medical decisions of the JRC. The court approved the receiver's proposal that the SPB review the employment decision and consider non-medical defenses, such as whistleblower retaliation, while accepting medical findings that meet the substantial evidence standard.

Skirmish Continues

The court's May 23 order addressed other issues raised by the parties and UAPD, one of which appears inadvertently to have caused further turf battles between the receiver and the SPB. None of the parties had opposed the receiver's request that staff privileges be made a condition of em-

ployment. The court therefore granted the request, subject to the cautionary note that staff privileges could not be revoked without providing the employee a predeprivation opportunity to respond. The court also agreed with the Prison Law Office's request that the receiver redraft the procedures to match the final positions he had taken before the court on May 23.

The receiver completed a new draft of the procedures that it believed complied with the court's ruling. But, after a lengthy meeting failed to produce agreement on the proposal, the SPB filed objections to the receiver's policies and procedures. The objections prompted an impatient response from the receiver, who accused the SPB of "intentional misreading — bordering on outright disregard — of

the May 23 order." He scolded, "The time has come for the SPB's obstinacy and arrogance to end."

While the SPB's objections did not revisit its argument against the substantial evidence standard of review for medical decisions, the board asserted that the receiver had gone beyond the scope of the court's order by including privileging and employment decisions under the JRC's decisionmaking authority and subjecting them only to substantial evidence review. The board quoted the court's statements that peer review panel "medical" decisions would be subject to the substantial evidence standard of review. The board narrowly interpreted that phrase as referring only to decisions whether a physician's treatment of a patient was below the standard of care.

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Unfair Practices: California Public Sector

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

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

By Carol Vendrillo and Eric Borgerson • 4th edition (2006) • \$15
<http://cper.berkeley.edu>

The real bone of contention between the receiver and the SPB was the effect of the ruling that staff privileges are now a condition of a physician's employment. The receiver pointed out in his reply to the SPB's objections that he has always advocated that peer physicians make the privileging decision. Once staff privileges become a condition of employment, he asserted, the peer review panel's decision to revoke privileges necessarily becomes a decision to terminate employment. It seems that the SPB's understanding of the court's order was that, based on the medical findings of the JRC, the SPB would decide such questions as whether privileges should be revoked.

In its July order, the court described the SPB's interpretation as "flawed." "Because the privileging decision required medical expertise, such review must be under the substantial evidence standard," the court instructed. It revised the procedures to clarify that the JRC "shall also decide employment decisions adversely impacting employment status, grade level, benefits, and/or wages where those decisions are based on privileging conclusions and findings of fact relating to the standard of care."

Until the court approves an implementation plan and SPB ALJs are trained in privileging matters, state ALJs from the Office of Administrative Hearings will continue to preside over evidentiary hearings.

New Evaluation Program for Prison Doctors Not Negotiable

AS THE PRISON healthcare receiver nears implementation of a new peer review and disciplinary procedure, the Public Employment Relations Board finally has ruled on an unfair practice charge relating to the Quality Improvement in Correctional Medicine program that the California Department of Corrections and Rehabilitation unilaterally decided to implement in 2004, before the receiver was appointed. PERB adopted ALJ Fred D'Orazio's proposed decision that CDCR had no duty to negotiate before deciding on the QICM program because the department's decision was made primarily to implement a policy related to the quality of essential public services.

Physician Incompetence Found

In 2004, court experts told the federal district court that the inmate medical care system was "broken," despite the provisions of a 2002 stipulated settlement in *Plata v. Schwarzenegger*, which obligated the state to improve the system under court supervision. The experts blamed low minimum qualifications for physicians, the lack of qualified physicians in managerial ranks, and an inadequate peer review process that often failed to include medical care reviews when inmates died. They endorsed a suggestion by CDCR's acting medical director to use a physician evaluation program at

U.C. San Diego for the prison systems' doctors. In September, the Prison Law Office and CDCR stipulated to a patient care order that required CDCR to engage an outside entity to evaluate CDCR physicians. Physicians would be categorized as competent, competent pending remedial training, and not competent to provide care. Doctors in the last category were to be removed from any involvement with patient care.

The state's memorandum of understanding with the Union of American Physicians and Dentists contained physician evaluation procedures and peer review provisions. When notified of CDCR's agreement to bring in outside evaluators, UAPD filed an unfair practice charge contending that CDCR had the duty to negotiate before making the decision to change the evaluation procedures. The union also filed a motion to intervene in the lawsuit to protect its rights as the collective bargaining representative. (See story in *CPER* No. 170, pp. 55-57.) The state refused to consider any changes to the QICM program or the new peer review procedure, but it eventually reached agreement with UAPD on the effects of the unilaterally imposed program.

In the PERB proceeding, the ALJ rejected the state's assertion that UAPD's charge should be deferred to

arbitration. He also turned aside the state's defense that the ruling of the court, which found the prison health care system constitutionally inadequate, excused its refusal to bargain with UAPD before deciding on new evaluation and peer review procedures. The ALJ pointed out that the court, when denying UAPD's motion to modify the patient care order, had

The state did not dispute that it had refused to bargain about the decision to implement QICM.

explained the order did not abrogate collective bargaining rights or preclude the state from negotiating over the program. In addition, the court had relied on the state's assertion that it did not intend that the stipulated order would release it from its bargaining obligations. Because the court had stated that any failure to bargain claims should be raised before PERB, the ALJ found the *Plata* case did not bar PERB from adjudicating the union's unilateral change charge.

The ALJ found that CDCR had added a new component to the performance appraisal system set out in the MOU. The new competency evaluation affected a large number of

physicians, who were required to undergo evaluation and who risked loss of clinical privileges or a critical report to the California Medical Board.

The state did not dispute that it had refused to bargain about the decision to implement QICM. It insisted that it had a fundamental managerial right to make the decision and was not required to bargain over anything but the effects.

UAPD contended at the administrative hearing that the matter was within the scope of representation, and it pointed out that CDCR already had negotiated physician evaluation procedures. While the state acknowledged that the QICM decision affected the physicians' terms of employment, it asserted that California courts have made an exception to the bargaining obligation for decisions that are so fundamental to the government's role in providing public services that they should not be subject to negotiations.

Fundamental Policy Decision

The Dills Act excludes from the scope of representation "consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." Identical language in the Meyers-Milias-Brown Act has been applied by courts that have ruled on challenges to decisions made by local entities, the ALJ observed. In *Firefighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 23 CPER 54, the Supreme Court explained that whether a union staffing proposal was

bargainable depended on whether the proposal was primarily directed to maintaining a particular standard of fire prevention — a managerial prerogative — or was mainly concerned with workload and employee safety. In *Building Material and Construction Teamsters Union, Loc. 216 v. Farrell* (1986) 41 Cal.3d 651, 69 CPER 23, the court announced that a fundamental

PERB has twice held that criteria and procedures for evaluating teacher competency are a mandatory subject of bargaining.

managerial or policy decision is within the scope of representation only if the employer's need for unencumbered decisionmaking is outweighed by the benefit to employer-employee relations of bargaining. In the most recent case, *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 180 CPER 21, the Supreme Court found a policy designed to combat racial profiling to be outside the scope of representation because it did not have a significant impact on police officer employees.

PERB has used a similar approach when deciding whether a subject is negotiable or a management prerogative, the ALJ pointed out. Under the test announced in *Anaheim Union High School Dist.* (1981) PERB Dec. No. 177, 52 CPER 64, PERB has twice held that criteria and procedures for evaluating teacher competency are a mandatory subject of bargaining. In *Holtville Unified School Dist.* (1982) PERB Dec. No. 250, 55 CPER 34, the board found that a mandatory competency testing policy for teachers who reached the age of 70 concerned a fundamental aspect of the employer-employee relationship — termination — and collective bargaining would be a viable means of resolving the parties' concerns without interfering with managerial prerogative or achievement of the district's mission. For similar reasons, a policy to test the competency of teachers over 65 was held negotiable in *Walnut Valley Unified School Dist.* (1983) PERB Dec. No. 289, 57 CPER 63.

CDCR argued, however, that the *Holtville* and *Walnut Valley* cases were not applicable because PERB specifically had noted in both that there was no evidence teachers were likely to become incompetent at a specified age. Here, though, the federal court had found a constitutionally inadequate health care system. Court experts had laid the blame partially on the failure of the existing system to weed out numerous incompetent physicians. A lack of qualified management personnel made

it unlikely that in-house competency evaluations would work.

Under these extraordinary factual circumstances, the ALJ found the decision to establish the QICM program was not subject to bargaining. The decision had not been made primarily to affect working conditions, but to affect the quality and nature of prison health care. Although the QICM program affected negotiable terms of employment, the purpose was to establish constitutionally acceptable health care in the prisons. Unlike in *Holtville* and *Walnut Valley*, the decision was an attempt to remedy an identified deficiency in the healthcare system. The evidence was that an alternative to outside evaluation likely would not

successfully improve the quality of the physicians.

Because the right of CDCR to manage its operations and achieve its mission to provide a constitutionally adequate level of health care outweighed the benefits to be achieved by bargaining with UAPD, the ALJ found the department had no duty to bargain the decision to implement QICM. The board affirmed ALJ D'Orazio's proposed decision without further comment, and the unfair practice charge and complaint were dismissed. (*Union of American Physicians and Dentists v. State of California [Dept. of Corrections]* [6-27-08] PERB Dec. No. 1967-S.)

CAPS Sues to Enforce DPA's 'Like Pay for Like Work' Decision

SUPERVISORY SCIENTISTS have waited long enough for appropriate pay, the California Association of Professional Scientists decided. On June 27, the union filed a petition to force the Department of Personnel Administration, the Department of Finance, and the state controller to implement DPA Director David Gilb's April 28 decision that supervisory scientists' salaries should be comparable to the pay of state engineers in similar positions. Sufficient money is available to pay the higher salaries from existing 2007-08 salary augmentation appro-

priations, CAPS contends, and DPA and Finance must propose appropriations for increases to match any raises comparable engineers receive.

Demands Unmet

In November 2006, CAPS challenged the growing disparity between the salaries of supervisory scientists and engineers in comparable jobs. The engineers, represented by the Professional Engineers in California Government, had benefited from a negotiated agreement to raise their pay gradually, starting in July 2005, to an

amount commensurate with engineers in other public entities in California. Supervising engineers had been provided similar increases. By July 2006, the scientists' pay lag had reached up to 22 percent for some supervisors, whose salaries previously had been within 5 or 10 percent of comparable engineers. Last April, DPA issued its decision, which recommended higher salaries for 14 supervisory scientist classifications and would restore historical relationships between the salaries of the scientists and state supervisory engineers. (See story in *CPER* No. 190, pp. 48-50.) The decision was based on the "like pay for like work" provision of the Government Code.

DPA forwarded a copy of the decision to the Department of Finance for its determination whether the increases could be paid out of existing salary appropriations. CAPS followed up with a letter to Director of Finance Michael Genest, pointing out that the enacted 2007-08 budget included appropriations for salary increases that were unspent at that time. "Informally, we were told, 'No, there's no money,'" CAPS' Staff Director Christopher Voight told *CPER*.

When its appeal to the Department of Finance was unsuccessful, CAPS demanded that State Controller John Chiang pay 330 supervisory scientists the higher salaries that CAPS asserted had been set by DPA. Relying on *Tirapelle v. Davis* (1994) 20 Cal. App.4th 1317, CAPS contended:

The DPA's approval authority over the salaries of these supervisory scientists is set forth in Government Code section 19825 subdivision (a) which provides that such salaries are subject only to the approval of the DPA before they become effective and payable.

In *Tirapelle*, the Court of Appeal held that the controller could not refuse to pay salaries dictated by DPA, even pay reductions, as long as DPA acted within its authority in setting the compensation. CAPS asked the controller to pay the augmented salaries from unexhausted appropriations in the 2007-08 budget and, to the extent salaries could be paid out of existing appropriations, to make retroactive payments back to July 2005 to match the compensation of the relevant state supervisory engineers. Again CAPS was rebuffed.

Off to Court

In late June, the union went to the Sacramento Superior Court. CAPS asked the court for a declaration that, as determined in Gilb's decision, the scientists in the 14 supervisory classifications are entitled to salaries similar to those of comparable engineers for each year from 2005-06 through 2008-09. It also petitioned for a court order directing Gilb, Genest, and Chiang to perform their legal duties to implement Gilb's decision.

Voight's declaration filed with the court indicates that the salary augmentation account — the 9800 account — for the state's general fund contained nearly \$115 million on June 24, 2008,

and that two other funds used to pay scientist salaries contained another \$142 million. CAPS estimates it would cost only \$7.6 million this year to fund the higher salaries, and only about \$1.8 million of that money would come from the general fund.

The salary augmentation account for the general fund contained nearly \$115 million on June 24, 2008.

The Department of Finance "has a duty to determine whether the higher salaries can be paid within existing appropriations," CAPS asserted in its petition. Once the Finance Department makes that determination, Controller Chiang has a duty to pay the higher salaries, the union claimed. And, it contended, DPA, Gilb, Finance, and Genest must include in the proposed 2008-09 budget an augmentation that would allow increases to the salaries of the 14 supervisory scientist classifications to maintain their historical relationship with engineer pay.

DPA told *CPER* the department's position is that higher salaries for supervisory scientists in 2007-08 cannot be paid because "there isn't any money

in 9800 for this.” The department estimates that the higher salaries will cost an additional \$8.8 million of which \$2 million would come from the general

fund. DPA did not indicate whether it had recommended appropriation of funds for the scientist increases in the 2008-09 budget.

Legislature Set to Eliminate Rural Health Care Subsidy for Retirees

STATE RETIREES in rural areas are likely to have to cough up \$75 more each month in health care premiums in 2008-09, as lawmakers appear ready to cut a subsidy that retirees without access to health maintenance organizations have enjoyed since January 2000. Fortunately, rates for preferred provider organizations that are available in rural areas are not rising in 2009.

The Rural Health Care Equity Program provides benefits to employees and retirees in areas of California where no HMOs are available, such as certain locations in San Benito, Mono, and Trinity counties. HMO premiums are cheaper than those of preferred provider organizations, which do not restrict the patient’s choice of medical provider although they pay less to non-preferred providers.

The rural health equity subsidy is different for those enrolled in Medicare than for those who are not eligible for Medicare. Retirees who are not eligible receive up to \$500 annually in reimbursements of the annual deductibles they pay under PPO plans. The reimbursements only partially

compensate for the extra expense that is necessary when an HMO is not available in a retiree’s area. In addition to deductibles and higher copayments, a non-Medicare eligible retiree pays about \$70 for the cheapest two-party PPO premium, while Kaiser two-party coverage is free.

For most retired employees who are at least 65 years old, Medicare Part A is provided free by the federal government, but retirees must pay Medicare Part B premiums for outpatient medical care. Since some medical care is not covered by either Part A or Part B, retirees may choose to supplement Medicare coverage with other health insurance.

Eligible state retirees receive employer-paid health premium contributions that are sufficient to cover both supplemental insurance and a portion of the Part B premium, which varies on a sliding scale based on retiree income. Most retirees enrolled in Medicare Parts A and B pay no premiums for two-party coverage if they choose the Kaiser supplemental plan. But the cheapest PPO plan can cost over \$200

monthly for two-party coverage for retirees with high incomes. For state retirees who are enrolled in Medicare, the rural health care equity payment is \$75 a month to reimburse employees — but not their dependents — for Medicare Part B premiums.

In January, when the governor was forecasting a \$14.5 billion shortfall, he proposed slashing nearly every state expenditure by 10 percent in 2008-09.

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A 10 percent cut to the Rural Health Care Equity Program for retirees would have saved about \$500,000. But the economic picture had turned gloomier by the time the governor released his revised budget in May. To save \$5.5 million and cut less education funding, he proposed eliminating the rural health care program for retirees. The budget subcommittees for both the Senate and the Assembly quickly agreed to put language in a budget trailer bill that would defund the program, which is authorized by law until 2012. The rural health care subsidy is available to eligible state employees,

but the legislature is not proposing a change in the active employee program, which would be subject to collective bargaining for most rank-and-file employees.

Since both the Senate and Assembly concurred on elimination of the funding, “there would appear to be no natural way to reverse the action,” says Bryan Annis, a consultant to the Senate Budget Committee. But CSEA Retirees, an affiliate of the California State Employees Association, is fighting the cut. It is urging retirees to write the governor and their legislators to protest the action, which would affect about 7,900 of the 136,000 retired state employees who are eligible for employer health care contributions. In June, CSEA Retirees President Roger Marxen wrote Senator Mike Machado (D-Linden), the chair of the Senate budget subcommittee that approved the program’s elimination. He explained, “In many cases, these retirees were forced to move to California’s rural areas because that’s where their previous state job was located or because they needed to be near their families or caregivers. It is not their fault that more affordable HMOs are not located in rural areas closer to them.”

At the time *CPER* went to press, the retiree rural health care subsidy was still slated for elimination. The only good news is that PPO premium rates are not rising in January 2009, for the first time in a decade. HMO rates, however, are increasing about 6.6 percent.

Discrimination

United States Supreme Court Expands Protection Against Retaliation

IN TWO SEPARATE decisions issued on the same day, the United States Supreme Court strengthened the rights of employees to seek redress for acts of retaliation in response to complaints of discrimination in the workplace. In *CBOCS West v. Humphries*, the court found that 42 USC Sec. 1981, a civil rights law enacted shortly after the Civil War, encompasses retaliation claims. And, in *Gomez-Perez v. Potter, Postmaster General*, the court answered in the affirmative the question of whether the federal-sector provision of the Age Discrimination in Employment Act, Sec. 633a(a), prohibits retaliation.

The opinions were not unanimous, however. Justices Clarence Thomas and Antonin Scalia dissented in both cases, and Chief Justice John Roberts joined them in dissenting in the second case. Interestingly, Justice Samuel Alito, who usually agrees with Justices Thomas, Scalia, and Roberts, voted with the majority in both cases and authored the court's opinion in *Gomez-Perez*.

Factual Background

In *CBOCS*, Hedrick Humphries, assistant manager of a Cracker Barrel restaurant, claimed that he was fired

because he is black and because he had complained to managers that another assistant manager had fired another black employee for race-based reasons. He filed a lawsuit alleging violations of Title VII of the Civil Rights Act of 1964 and Sec. 1981. The trial court dismissed the case. The Seventh

The court was guided by its prior decisions interpreting similar language.

Circuit Court of Appeals upheld the dismissal of the Title VII allegations, agreeing with the trial court that Humphries had failed to pay filing fees on time. However, it reversed the trial court regarding the Sec. 1981 claims, holding that Sec. 1981 encompassed retaliation.

In the second case, Myrna Gomez-Perez worked for the United States Postal Service as a window distribution clerk. At the age of 45, her request for a transfer to another office closer to her sick mother was granted. Several weeks later, she asked to be transferred back

to her original position, but the request was denied. Gomez-Perez filed an administrative age discrimination complaint, after which she claimed she was subjected to various forms of retaliation.

Gomez-Perez filed a lawsuit alleging violations of the ADEA. The district court dismissed her case, finding that the United States had not waived its right to sovereign immunity under the statute. The First District Court of Appeals found that sovereign immunity had been waived, but upheld the lower court's decision on the grounds that the ADEA's prohibition of discrimination based on age as it applies to federal employees does not cover retaliation.

Supreme Court Decisions

In reaching the conclusion that both Sec. 1981 and Sec. 633a(a) of the ADEA include prohibitions against retaliation, the court was guided by its prior decisions interpreting similar language in other anti-discrimination statutes.

The majority in each case relied on *Sullivan v. Little Hunting Park, Inc.* (1969) 396 U.S. 229. In *Sullivan*, the Supreme Court ruled that a claim of retaliation could be brought under 42 USC Sec. 1982, which provides that "all citizens of the United States shall have the same right...as is enjoyed by white citizens...to inherit, purchase, lease, sell, hold, and convey real and personal property." Sullivan, a white man, had rented his house to Freeman, a black man, and assigned him a share

in the corporation, which permitted him to use a private park. The corporation refused to approve the share assignment because Freeman was black. When Sullivan protested, the corporation expelled him and took away his membership shares. The court held that Sullivan could bring a claim for retaliation under Sec. 1982, even though the statute did not expressly state that it prohibited retaliation.

The majority in both cases found additional support for their positions in *Jackson v. Birmingham Bd. of Educ.* (2005) 544 U.S. 167, 170 CPER 71, in which the court relied on *Sullivan* in interpreting Title IX of the Education Amendments of 1972. In *Jackson*, a public school teacher alleged that the school board had retaliated against him because he had complained about sex discrimination in the high school's

athletic program. Title IX states that "no person in the United States shall, on the basis of sex,...be subjected to discrimination under any education program or activity receiving Federal financial assistance." The court found that this provision prohibits retaliation, stating, "retaliation against a person because that person has complained of sex discrimination is another form of intentional discrimination."

The *CBOCS* majority opinion, authored by Justice Stephen Breyer, noted that the court has "long interpreted" Secs. 1981 and 1982 similarly because of their "common language, origin, and purposes." The only difference between the two, said the court, is that Sec. 1982 refers to the right to property and Sec. 1981 refers to the right to make and enforce contracts. The majority found that *Sullivan* and

Jackson, coupled with the "long line of related cases where we construe Secs. 1981 and 1982 similarly, lead us to conclude that the view that Sec. 1981 encompasses retaliation claims is indeed well embedded in the law." Therefore, the legal principle of *stare decisis*, meaning "to stand by that which is decided," strongly supports this conclusion, wrote Breyer.

The *Gomez-Perez* majority, in its opinion authored by Justice Samuel Alito, explained its decision by stating:

Following the reasoning of *Sullivan* and *Jackson*, we interpret the ADEA federal-sector provision's prohibition of "discrimination based on age" as likewise proscribing retaliation. The statutory language at issue here ("discrimination based on age") is not materially different from the language at issue in *Jackson* ("discrimination on

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the basis of sex”) and is the functional equivalent of the language at issue in *Sullivan*. . . . And the context in which the statutory language appears is the same in all three cases; that is, all three cases involve remedial provisions aimed at prohibiting discrimination.

Defendants’ positions. Neither majority was persuaded by the arguments of the defendants.

In *CBOCS*, the employer took the position that the plain text of Sec. 1981 “does not provide for a cause of action based on retaliation.” The court disagreed, pointing out that it had long held that Sec. 1982 provides for protection from retaliation even though the language of the statute does not specifically say so. Further, in *Jackson*, the court held that Title IX encompassed claims of retaliation despite the fact that the statute does not use the term “retaliation,” even though the same argument was made at the time that case was decided.

CBOCS also argued that the historical record of Sec. 1981 supports the conclusion that Congress did not intend for the statute to include retaliation. In *Patterson v. McClean Credit Union* (1989) 491 U.S. 164, 82 CPER 14, the court significantly limited the scope of Sec. 1981, holding that it did not apply to “conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions.” The court acknowledged that “since victims of an employer’s retaliation will often have opposed discriminatory

conduct taking place *after* the formation of a contract, *Patterson*’s holding, for a brief time, seems in practice to have foreclosed retaliation claims.” However, said the court, Congress superseded *Patterson* when it passed the Civil Rights Act of 1991 amending Sec. 1981 to add subsection (b), which defined the phrase “make and enforce contracts” as including “the making, performance, modification, and termination of contracts, and the

Overlap between Sec. 1981 and Title VII ‘reflects congressional design.’

enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.”

CBOCS argued that Congress did not intend to encompass retaliation in the 1991 amendment because it did not include an explicit anti-retaliation provision. The court was not persuaded. It reasoned that a far more plausible explanation was that, “given *Sullivan* and the new statutory language nullifying *Patterson*, there was no need for Congress to include explicit language about retaliation.” “After all, the 1991 amendments themselves make clear that Congress intended to supersede the result in *Patterson* and embrace pre-*Patterson* law,” said the court. It also pointed out that since 1991, the

Courts of Appeals have uniformly interpreted Sec. 1981 as encompassing retaliation actions.

CBOCS’ argument that Sec. 1981 should not be interpreted as prohibiting retaliation in order to avoid overlap with Title VII met a similar fate. The majority concluded the overlap between the two statutes “reflects congressional design.”

CBOCS cited *Burlington Northern and Santa Fe Railway Co. v. White* (2006) 548 U.S. 53, 179 CPER 68, a Title VII case, in support of its position. There, the court distinguished between discrimination that harms individuals because of their status and that which harms them because of their conduct. CBOCS argued that the court should apply the same distinction to Sec. 1981 and conclude that it only encompasses status-based discrimination. The majority, in rejecting this argument, said the court made the distinction in *Burlington* “to help explain why Congress might have wanted its explicit Title VII anti-retaliation provision to sweep more broadly (i.e., to include conduct *outside* the workplace) than its substantive Title VII (status-based) anti-discrimination provision.” “*Burlington* did not suggest that Congress must separate the two in all events,” it continued.

In *Gomez-Perez*, the employer defended the Court of Appeals’ attempt to distinguish *Jackson* from the case before it on three grounds: that the ADEA expressly creates a private right of action whereas Title IX does not; that retaliation claims play a more

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important role under Title IX than under the ADEA; and, that Title IX was adopted in response to the *Sullivan* decision while “there is no evidence in the legislative history that the ADEA’s federal sector provisions were adopted in a similar context.”

The majority was not persuaded by any of these arguments. It found the question of whether a statute confers a private right of action is unrelated to the question of whether the statute’s substantive prohibition includes a particular form of conduct. It also concluded that the court in *Jackson* based its holding on its interpretation of the text of Title IX, not on whether claims of retaliation are important. Finally, it said that *Jackson*’s reliance on *Sullivan* did not stem from any evidence in the legislative history, but rather on the fact that Congress enacted Title

IX just three years after *Sullivan* was decided and presumed that Congress was familiar with the decision, and “that it expected its enactment to be interpreted in conformity with it.” The majority noted that Sec. 633a of the ADEA was enacted only two years after Title IX and saw “no reason to think that Congress forgot about *Sullivan*” during that time.

The defendants also argued that, because the ADEA contains a provision specifically prohibiting retaliation against individuals who complain about discrimination in the private sector and no such explicit prohibition is contained in Sec. 633a, Congress must not have intended to prohibit retaliation in federal employment. The majority, dismissing this argument, pointed out that the two provisions were not considered or enacted

together and that the ADEA federal sector provision was not modeled after the private sector ADEA provision but rather after Title VII’s federal sector anti-discrimination provision. Once again, the majority referenced the fact that Congress enacted Sec. 633a(a) after *Sullivan* and can be presumed to have expected the section to be interpreted in conformity with that precedent.

The majority was similarly not impressed with the defendants’ arguments regarding the impact of other sections of the ADEA or speculation about the intent of Congress to have retaliation covered by civil service regulations, or the claim that sovereign immunity had not been waived.

The dissents. In his dissent in *CBOCS*, in which he was joined by Justice Scalia, Justice Thomas wrote that

the majority's holding "has no basis in the text" of Sec. 1981. "Retaliation is not discrimination based on race," he said. "When an individual is subjected to reprisal because he has complained about racial discrimination, the injury he suffers is not on account of his *race*; rather it is the result of his *conduct*." Thomas summarized his position by stating, "Because Sec. 1981 by its terms prohibits only discrimination based on race, and because retaliation is not discrimination based on race, Sec. 1981 does not provide an implied cause of action for retaliation."

Thomas also criticized the majority for retreating "behind the figleaf of ersatz *stare decisis*" because it could not justify its holding as a matter of statutory interpretation. He did not agree with the *Jackson* court's reading of *Sullivan* and, in fact, dissented from the majority opinion in *Jackson*. Thomas read *Sullivan* as a "third-party standing case" in which *Sullivan* was allowed to sue on behalf of Freeman, rather than under a "freestanding cause of action for retaliation." Even if the court in *Sullivan* did mean to hold that Sec. 1982 provides an implied cause of action for retaliation, said Thomas, it would have been in error, "because Sec. 1982, like Sec. 1981, prohibits only discrimination based on race, and retaliation is not discrimination based on race." And, he continued, such an erroneous holding should not now be extended to Sec. 1981 because "two wrongs do not make a right."

Chief Justice Roberts, in his dissent in *Gomez-Perez*, in which he was

joined by Justices Thomas and Scalia, explained that he had no problem voting with the majority in *CBOCS*, but could not do so in this case because "here the text and structure of the statute, the broader statutory scheme of which it is a part, and distinctions between federal and private sector employment convince me that Sec. 633a(a) does not provide a cause of action for retaliation." Pointing to a prior case in which the court relied on differences between the federal and private sector provisions of the ADEA to hold that a private sector plaintiff was entitled to trial by jury, while a federal sector plaintiff was not, Roberts concluded that "Congress deliberately chose to exclude retaliation claims from the ADEA's federal-sector provision." In his opinion, Congress intended for claims of retaliation in the federal workplace brought under the ADEA to be handled "through the established civil service system."

Holdings. The court affirmed the judgment of the Seventh Circuit Court

of Appeals in *CBOCS* and reversed the judgment of the First Circuit Court of Appeals in *Gomez-Perez*, sending that case back to the lower court for further proceedings.

Impact of the Decisions

The court's ruling in *CBOCS* means that employees who were precluded from filing retaliation claims under Title VII because they are independent contractors or because their employer has less than 15 employees, for example, can now seek redress under Sec. 1981. Further, there is no cap on punitive damages under Sec. 1981 while there is under Title VII.

The *Gomez-Perez* decision extends the protection against retaliation for age discrimination complaints from the private sector to all federal employees.

(*CBOCS West, Inc. v. Humphries* [5-27-08] 553 U.S.____, 128 S.Ct. 1951; *Gomez-Perez v. Potter* [5-27-08] ____U.S.____, 128 S.Ct. 1931.)

U.S. Supreme Court Rules for Workers in Age Bias Case

A DECISION BY THE United States Supreme Court will make it easier for workers to prevail in age discrimination cases brought under the Age Discrimination in Employment Act. The court has ruled that employers have the burden of proving that layoffs which disproportionately impact older

employees were based on reasonable factors other than age. In *Meacham v. Knolls Atomic Power Laboratory*, the court found, by a vote of seven to one, that an employer who claims the reasonable-factors-other-than-age (RFOA) defense must not only produce evidence raising the defense,

“but also persuade the fact finder of its merit.” Justice Clarence Thomas was the lone dissenter, and Justice Stephen Breyer did not participate in the decision.

Background

The employer, Knolls Atomic Power Laboratory, contracted with the federal government to maintain the country’s fleet of nuclear-powered warships. In 1996, the government ordered it to reduce its workforce, and 100 employees accepted the company’s buyout offer. The rest were involuntarily laid off.

The suit claimed the reduction had a discriminatory impact on ADEA-protected employees.

In order to select which workers would be subject to the “involuntary reduction in force,” managers were instructed to score their subordinates according to “performance,” “flexibility,” and “critical skills.” These scores were combined with points reflecting years of service, and those with the lowest scores were laid off.

Of the 31 employees laid off, 30 were at least 40 years old, the age at which ADEA protection begins. Twenty-eight of the laid-off employees

sued, alleging both disparate treatment and disparate impact discrimination under the ADEA. They claimed that Knolls “designed and implemented its workforce reduction process to eliminate older employees and that, regardless of intent, the process had a discriminatory impact on ADEA-protected employees.”

The jury found for the employees on the disparate impact claim, although not on the disparate treatment allegation. The Second Circuit Court of Appeals affirmed, but the Supreme Court vacated the decision and sent it back to the court for further proceedings. On remand, the Court of Appeals found in favor of Knolls, holding that the employees had not carried their burden of proof. The employees asked the Supreme Court to grant review, citing a conflict between the Court of Appeals decision in their case and that in a case where the Ninth Circuit had ruled that the employer had the burden of proving that its reliance on a factor other than age was reasonable. The Supreme Court granted certiorari.

Supreme Court’s Decision

Justice David Souter, writing for the majority, explained that the ADEA’s prohibitions against age discrimination are subject to exemptions set out at 29 USC Sec. 623(f), for certain employer practices “otherwise prohibited” under the act. The RFOA exemption is found at 29 USC(f)(1) along with the bona fide occupational qualification (BFOQ) exemption. This section provides that it is not a viola-

tion of the ADEA for an employer to take any action “where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age....”

The rule is that “the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits,” said Souter, quoting from *United States v. First City Nat. Bank of Houston* (1967) 386 U.S. 361. It is against the backdrop of “that longstanding convention” that

The burden of proving justification generally rests on one who claims its benefits.

Congress writes laws, Souter wrote, “and we respect it unless we have compelling reasons to think that Congress meant to put the burden of persuasion on the other side.”

Souter explained that, in prior cases, the court has given the affirmative defense construction to the BFOQ provision of the ADEA and to the exemption in the Equal Pay Act to pay differentials based on “any factor other than sex.” Further, the court has held that the application of an exemption under the Fair Labor Standards Act

is an affirmative defense which the employer must prove and has relied on Congress' directive "that the ADEA be enforced in accordance with the powers, remedies, and procedures of the FLSA," said Souter. "As against this interpretive background," he concluded, "there is no hint in the text that Congress meant Sec. 623(f)(1) to march out of step with either the general or

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specifically FLSA default rules placing the burden of proving an exemption on the party claiming it."

Souter also found support for the majority's holding in the "otherwise prohibited" language prefacing the BFOQ and the RFOA exemptions, noting that Congress used the exact same words when it amended the act to counteract the court's ruling in *Public Employees Retirement System v. Betts* (1989) 492 U.S. 158, 82 CPER 60, and specified that its original intent was for the ADEA's benefit provision, to be read as an affirmative defense. "The amendment in the aftermath of *Betts* shows that Congress understands the phrase the same way we naturally read it, as a clear signal that a defense to what is 'otherwise prohibited' is

an affirmative defense, entirely the responsibility of the party raising it," wrote Souter.

The court was not persuaded by Knolls' argument that the RFOA provision should be read as mere elaboration on an element of liability, which would place the burden of proof on the plaintiff. In other words, the plaintiff would have to show that the action complained of was taken "because of age." In response to this argument, Souter pointed to *Smith v. City of Jackson* (2005) 544 U.S. 288, 172 CPER 71, where the court made clear that "in the typical disparate-impact case, the employer's practice is 'without respect to age' and its adverse impact (though 'because of age') is 'attributable to a nonage factor'; so action based on a 'factor other than age' is the very premise for disparate-impact liability in the first place, not a negation of it or a defense to it."

Souter explained that the Court of Appeals' rationale for finding that the burden rested with the plaintiff was based on its reading of *City of Jackson*. Because the Supreme Court had decided in *City of Jackson* that there was no "business necessity" defense to the ADEA, the appellate court concluded incorrectly that the RFOA defense "replaces" the business necessity defense and "therefore must conform to its burden of persuasion resting on the complaining party."

The majority made it clear that the complaining party still must do more than point to a generalized policy that leads to a disparate impact. The

plaintiff must "isolate and identify the *specific* employment practices that are allegedly responsible for any observed statistical disparities." He observed:

Identifying a specific practice is not a trivial burden, and it ought to allay some of the concern raised by Knoll's *amici* [friends of the court briefs], who fear that recognizing an employer's burden of persuasion on an RFOA defense to impact claims will encourage strike suits or nudge plaintiffs with marginal cases into court, in turn inducing employers to alter business practices in order to avoid being sued.

But the majority also recognized the impact of its decision on businesses, stating:

That said, there is no denying that putting employers to the work of persuading factfinders that their choices are reasonable makes it harder and costlier to defend than if employers merely bore the burden of production; nor do we doubt that this will sometimes affect the way employers do business with their employees. But at the end of the day, *amici's* concerns have to be directed at Congress, which set the balance where it is, by both creating the RFOA exemption and writing it in the orthodox format of an affirmative defense. We have to read it the way Congress wrote it.

The court ordered the judgment of the Court of Appeals vacated and sent the case back to the appellate court for further proceedings consistent with its opinion. (*Meacham v. Knolls Atomic Power Laboratory* [6-29-08] ____ U.S. ____, 128 S.Ct. 1764.)

Supreme Court Finds Retirement System Does Not Violate ADEA

THE UNITED STATES Supreme Court, by a vote of five to four, has ruled that a Kentucky state retirement plan covering “hazardous position” employees does not discriminate against older workers in violation of the Age Discrimination in Employment Act, even though older workers are disproportionately impacted by its rules. In *Kentucky Retirement Systems, Inc. v. Equal Employment Opportunity Commission*, the court, divided along unusual lines, overturned the Sixth Circuit Court of Appeals decision to the contrary. Justice Stephen Breyer wrote the majority opinion in which he was joined by Chief Justice John Roberts and Justices John Paul Stevens, David Souter, and Clarence Thomas. Justice Anthony Kennedy wrote a dissenting opinion, in which Justices Antonin Scalia, Ruth Bader Ginsburg, and Samuel Alito joined.

Background

Kentucky has a special retirement plan for state and county employees who occupy hazardous positions. This group includes active-duty law enforcement officers, firefighters, paramedics, and workers in correctional facilities. An employee becomes eligible for “normal retirement” benefits after 20 years of service, or after five years of service provided that the employee has attained the age of 55. The amount of

the pension is calculated the same way under either route — the number of years of service times 2.5 percent times final retirement pay.

The plan also provides for retirement for employees who become disabled before becoming eligible for normal retirement. Where the employee becomes disabled after five years of service or in the line of service,

If Lickteig had become disabled before the age of 55, his benefits would have been greater.

he or she can retire immediately. But, in calculating the employee’s benefits, the Kentucky plan adds to the disabled employee’s actual years of service the number of years that the disabled employee would have had to continue working to become eligible for normal retirement.

Charles Lickteig, employed in a hazardous position, became eligible for retirement at the age of 55 but did not retire until he became disabled at age 61. Under the plan rules, his annual pension was calculated on the

basis of his actual 18 years of service without imputing any additional years, because he already had become eligible for retirement benefits at the time he became disabled.

Lickteig lodged a complaint of age discrimination with the Equal Employment Opportunity Commission, which filed a lawsuit against the state of Kentucky alleging discrimination in violation of the ADEA. The EEOC asserted that if Lickteig had become disabled *before* the age of 55, Kentucky would have included additional years in calculating his retirement benefits — the number of years he would have had to work to become eligible for normal retirement — and his benefits would have been greater than what he actually received. In other words, the only reason Lickteig did not accrue credit for additional years was because he became disabled after the age of 55.

The district court dismissed the case, but the Sixth Circuit Court of Appeals reversed the decision, finding that Kentucky’s plan did violate the ADEA. Kentucky petitioned the Supreme Court for review.

Supreme Court Decision

In concluding that Kentucky’s plan did not violate the ADEA, the majority relied heavily on its interpretation of the court’s decision in *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 100 CPER 49. According to the majority, in *Hazen Paper* “the Court explained that where, as here, a plaintiff claims age-related ‘disparate treatment’ (*i.e.*,

intentional discrimination ‘because of age’) the plaintiff must prove that age ‘*actually motivated* the employer’s decision.’” In that case, a 62-year-old employee with over 9 1/2 years of service was dismissed by the company in order to avoid paying benefits that would have vested after 10 years. The *Hazen Paper* court held that, without more evidence of intent, the company’s action would not support an ADEA claim because a dismissal based on pension status was not a dismissal “because of age.” In *Hazen Paper*, the court said that pension status and age were “analytically

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distinct” concepts, and that an employer could easily take into account one while ignoring the other.

“At the same time,” wrote Justice Breyer, “*Hazen Paper* indicated that discrimination on the basis of pension status could *sometimes* be unlawful under the ADEA, in particular where pension status served as a ‘proxy for age.’” As an example, he described the situation where an employer targeted employees with a particular pension status on the assumption that these employees are likely to be older. In such a case, “age, not pension status,

would have ‘actually motivated’ the employer’s decisionmaking.”

Breyer cited six factors on which the majority based its conclusion that the plan’s differences in treatment were not “actually motivated” by age.

First, age and pension status are “analytically distinct” concepts, explained Justice Breyer. “That is to say, one can easily conceive of decisions that are actually made ‘because of’ pension status and not age, even where pension status is itself based on age.” Under a pension plan where retirement eligibility commences at age 65, payment of a pension to a 70-year-old worker springs not from the fact that the worker is over 65, but simply because the worker has retired.

Second, the Kentucky plan involves a complex set of systemwide rules that concern not wages, but pension, a benefit the ADEA treats “somewhat more flexibly and leniently in respect to age.” The specific benefit at issue here, Breyer noted, is offered to all hazardous position workers on the same terms. Furthermore, Congress has, he stressed, approved programs that calculate permanent disability benefits using a formula that takes age into account, such as Social Security Disability Insurance benefits.

The third circumstance Breyer cited is the “clear non-age-related rationale for the disparity here at issue.” The “whole purpose” of the disability rules, he said, is to treat a disabled worker as if he had become disabled after he had become eligible for retire-

ment benefits. The only reason that age factors into the disability calculation is because the normal retirement rules include age as a consideration.

Fourth, wrote Breyer, Kentucky’s plan can actually work to the advantage of older workers. For example, a worker aged 45 with 10 years of service would get a 10-year boost in service whereas, under the plan, a worker aged 40 with 15 years of service would get only 5 additional years. “And that fact helps to confirm that the underlying motive is not an effort to discriminate ‘because...of age,’” he concluded.

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The fifth factor is that Kentucky’s plan does not rely on any stereotypical assumption about older workers that the ADEA was meant to eradicate.

And, finally, the majority said the plan does not “create treatment differences that are ‘actually motivated’ by age.” If Kentucky’s plan is found to be unlawful, it would have to increase the benefits available to disabled, pension-eligible workers without any criteria for determining how many additional years to impute to those pension-eligible workers aged 55 or older.

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The majority sought to distinguish its position in this case from other disparate treatment situations. "It bears emphasizing that our opinion in no way unsettles the rule that a statute or policy that facially discriminates based on age suffices to show disparate treatment under the ADEA," it said. "We are dealing today with the quite special case of differential treatment based on *pension status*, where pension status — with the explicit blessing of the ADEA — itself turns, in part, on age." In summary, Breyer wrote, "the rule we adopt today for dealing with this sort of case is clear: Where an employer adopts a pension plan that includes age as a factor, and that employer then treats employees differently based on pension status, a plaintiff, to state a disparate treatment claim under

the ADEA, must adduce sufficient evidence to show that the differential treatment was 'actually motivated' by *age*, not pension status."

The majority was not swayed by the EEOC's arguments to the contrary. It found that an amendment to the ADEA cited by the agency in support of its position "is beside the point" and that the agency's own statement in a compliance manual "lacks the necessary power to persuade us."

The Dissent

"The Court today ignores established rules for interpreting and enforcing one of the most important statutes Congress had enacted to protect the Nation's work force from age discrimination, the Age Discrimination in Employment Act of 1967,"

wrote Justice Kennedy in a strongly worded dissent. "In recent years employers and employees alike have been advised by this Court, by most Courts of Appeals, and by the agency charged with enforcing the Act, the Equal Employment Opportunity Commission (EEOC), that the most straightforward reading of the statute is the correct one: When an employer makes age a factor in an employee benefit plan in a formal, facial, deliberate, and explicit manner, to the detriment of older employees, this is a violation of the Act," he continued. "Disparate treatment on the basis of age is prohibited unless some exemption or defense provided in the Act applies."

The dissent found this to be a clear-cut case of age discrimination. Under Kentucky's plan, "there is no

question that, in many cases, a disabled worker over the age of 55 who has accumulated fewer than 20 years of service receives a lower monthly stipend than otherwise similarly situated workers who are under 55,” wrote Kennedy. “The Court concludes this result is something other than discrimination on the basis of age only by ignoring the statute and our past opinions.”

The dissent was critical of the majority’s reliance on Hazen Paper.

There is no support for the majority’s conclusion that an ADEA plaintiff must provide additional evidence that the employer acted with an “underlying motive” to treat older workers less favorably than younger workers in the language of the statute, instructed Kennedy. In fact, he noted, Congress amended the act to specifically provide that any employee benefit plan that discriminates against older workers is unlawful, except when the plan is a voluntary early retirement incentive plan or when the actual amount of payment made to an older worker is no less than that paid to a younger worker. Neither exception exists in this case.

In addition, Kennedy was critical of the majority’s reliance on *Hazen Paper* for the proposition that an em-

ployment practice discriminates only if it is actually motivated by age. *Hazen Paper* “identifies a decision made in reliance on a ‘facially discriminatory policy requiring adverse treatment of employees with a protected trait’ as a type of employment action that is ‘actually motivated’ by that trait,” instructed Kennedy. “The Court was right in *Hazen Paper* and is wrong here,” Kennedy concludes.

The Kentucky plan, contrary to that in *Hazen Paper*, merges age and pension status into one category. The majority, by misreading the language in *Hazen Paper*, has now created “a virtual safe harbor for policies that discriminate on the basis of pension status, even when pension status is tied directly to age and then linked to another type of benefit program,” he warned.

The majority’s attempt to limit its holding to cases in which age is not the only factor in determining

pension eligibility is not supported by precedent, according to Kennedy. “Here the Court seems to adopt a new definition of the term ‘discriminate’ by holding that there is no discrimination on the basis of a protected trait if the trait is one among several factors that bear upon how an employee is treated,” he wrote.

The dissent also criticized the majority’s argument that, because Kentucky’s plan was intended to help disabled workers, the discriminatory impact should be excused. “An otherwise discriminatory employment action cannot be rendered lawful because the employer’s motives were benign,” instructed Kennedy. Even if the Kentucky plan is good public policy, he wrote, “the answer is not for this Court to ignore its precedents and the plain text of the statute.” (*Kentucky Retirement Systems v. EEOC* [6-19-08] ____ U.S. ____, 128 S.Ct. 2361.)

No Discrimination Where Symptoms Do Not Constitute Physical Disability

THE SECOND District California Court of Appeal denied an employee’s claim of disability discrimination, finding that pain and numbness in his arms, fingers, shoulders, and feet did not constitute a “physical disability” under the state’s Fair Employment and Housing Act. In *Arteaga v. Brink’s, Inc.* the court also found that the employer had

a legitimate, nondiscriminatory reason for terminating him.

Factual Background

Carlos Arteaga worked as a messenger for Brink’s and was responsible for collecting all valuables placed in the armored vehicles, including significant amounts of cash. After Brink’s became

aware of a shortage in money that Arteaga had picked up from an ATM, it initiated an investigation and discovered that there had been a number of shortages on runs where Arteaga had been the guard or messenger.

Shortly after the employer informed him of the ongoing investigation, Arteaga complained to Brink's for the first time of pain and numbness in his arms, fingers, shoulders, and feet,

Arteaga failed to show that he had an actual disability.

and said he was experiencing a lot of stress. He was examined by a doctor who determined he was "okay." He sent Arteaga back to work with a full release.

On the following day, Arteaga asked to be demoted to the guard position so that he no longer would be responsible for any missing deposits. His request was denied.

Several days later, Arteaga complained of a rash on his face and body, and claimed this condition was work related. He was seen by a doctor who found the rash to be minor and non-industrial, and released Arteaga back to work.

Arteaga was terminated because Brink's had "lost confidence" in him as an employee due to several shortages

in cash that he removed from ATM machines.

At some point after his termination, Arteaga was diagnosed with carpal tunnel syndrome.

Arteaga sued Brink's, claiming that the company had failed to reasonably accommodate his disability, had terminated him because of his disability, and had retaliated against him by terminating him for filing a claim for workers' compensation. The trial court dismissed his case, and he appealed.

Court of Appeal Decision

The Second District found that Arteaga failed to establish a prima facie case of disability discrimination because he was unable to show that he had an actual disability. "His symptoms did not make the performance of his job duties difficult as compared to his unimpaired state or to a normal or average baseline," it said.

The court noted that Arteaga never exhibited any signs of a medical problem during the five years he was employed by the company, and never mentioned his pain or numbness to any coworker. He mentioned the symptoms to management a year after they appeared because he thought they were going away, and only after he learned he was under investigation. He testified that his symptoms limited only his ability to play soccer, "which is not a major life activity," said the court.

While the court cautioned that it was not belittling the pain Arteaga

experienced, it pointed out that these types of symptoms are often subjective, and that "an employer does not have to accept an employee's subjective belief that he is disabled and may rely on medical information in that respect." In this case, Arteaga had seen a doctor just seven months earlier and was found to be in good health. Further, Brink's sent him to a doctor after he complained of soreness and again after

Pain alone does not always constitute a disability.

he complained of a rash. That doctor found nothing wrong with him and sent him back to work.

In any case, said the court, "pain alone does not always constitute or establish a disability," relying on *Gearhart v. Sears, Roebuck & Co., Inc.* (D.Kan. 1998) 27 F.Supp.2d 1263. "An assessment must be made to determine how, if at all, the pain affects the specific employee." In this case, the court concluded, "the pain and numbness did not make work difficult for Arteaga."

"The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual,"

said the court, quoting the United States Supreme Court's decision in *Toyota Motor Mfg., Ky., Inc. v. Williams* (2002) 534 U.S. 184, 152 CPER 30. And, said the court, an individualized assessment of the effect of an impairment is particularly necessary when it is one whose symptoms vary widely from person to person. "Carpal tunnel syndrome," the court noted, "is just such a condition."

Here, said the court, the fact "that Arteaga was diagnosed with carpal tunnel syndrome after leaving Brink's does not mean he had a physical disability while there or, for that matter, at any time. The evidence establishes he was not disabled before or during his employment at Brink's."

The court recognized the FEHA requires that the employee's disease, disorder, or condition need only "limit" a major life activity. In contrast, the ADA requires that the limitation be *substantial*. The court did not seem to find that difference critical to its analysis.

Nor was the court persuaded by Arteaga's claim that Brink's discriminated against him by failing to accommodate his disability. An employer cannot be held liable for failing to accommodate a disability of which it has no knowledge, reasoned the court. Here, "Brink's had no knowledge of a disability because, as we have explained, Arteaga did not have one."

Arteaga also took the position that Brink's terminated him because it was concerned about a possible future

disability, in violation of the FEHA. The court dismissed this argument as well:

Arteaga discusses the FEHA's prohibition against *potential* disability discrimination as if the existence of the statute alone were sufficient to prove liability. But facts are needed to show that the statute was violated. Likewise, evidence that a discharged employee had *non*-disabling symptoms — pain and numbness — during his employment does not support an inference that the employer discharged him because of a potential disability. Something more must be shown. Otherwise, every headache would give rise to a triable claim.

Even if Arteaga had been able to establish a *prima facie* case of disability discrimination, Brink's produced a legitimate non-discriminatory reason for his discharge — management's loss of confidence in him. In the termination letter, the company underscored that the investigation revealed shortages of \$7,668 from ATM machines serviced only by Arteaga.

Arteaga argued that the temporal proximity of his discharge to the date he revealed his disability proved the reason given by the company was pretextual. "Not so," concluded the court. While temporal proximity may satisfy the first step of the burden-shifting process, it "is not sufficient to raise a triable issue as to pretext once the employer has offered evidence of a legitimate, non-discriminatory reason for the termination." "This is especially so where the employer raised questions about the employee's performance

before he disclosed his symptoms, and the subsequent termination was based on those performance issues."

The same reasoning led to the dismissal of Arteaga's claims of wrongful discharge and retaliation. (*Arteaga v. Brink's, Inc.* [5-28-08] 163 Cal. App.4th 327.

Public Employment Relations Board

Orders & Decisions

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

Dills Act Cases

Unfair Practice Rulings

No duty to negotiate decision to implement medical improvement program: CDCR.

(Union of American Physicians and Dentists v. State of California (Dept. of Corrections and Rehabilitation), No. 1967-S, 6-27-08; 2 pp. dec. + 53 pp. ALJ dec. By Chair Neuwald, with Members McKeag and Wesley.)

Holding: The charging party's unfair practice charge was dismissed because the California Department of Corrections and Rehabilitation's implementation of the Quality Improvement in Correctional Medicine program was related to a fundamental policy and therefore created no duty to negotiate. (See the State Employment section of this issue of *CPER*, pp. 64-66, for complete coverage of this decision.)

EERA Cases

Unfair Practice Rulings

Insisting on correct interpretation of law is not bad faith bargaining: Berkeley USD.

(Berkeley Council of Classified Employees v. Berkeley Unified School Dist., No. 1954, 4-21-08; 9 pp. dec. By Chair Neuwald, with Members McKeag and Wesley.)

Holding: An employee on leave from his or her normal duties to engage in union work under Education Code Sec. 45210 cannot receive released time under EERA Sec. 3543.1(c). And, the district's firm adherence to its bargaining proposal consistent with this statutory interpretation did not constitute bad faith bargaining.

Case summary: The district and the Berkeley Council of Classified Employees were parties to a collective bargaining agreement that expired on June 30, 2007. For many years, the union's president was on full-time leave of absence pursuant to Ed. Code Sec. 45210, and the union reimbursed the district for the full amount of salary and benefits provided to the president.

During negotiations for a successor collective bargaining agreement, the district proposed that the president's leave continue to be reimbursed by the union. The union believed that, under the released time provisions of EERA Sec. 3543.1(c), it was not required to reimburse the district for the time the president spent meeting and negotiating or processing grievances. In December 2006, the union declared impasse on this issue, and filed an unfair practice charge alleging that the district unilaterally changed the released time policy.

In an amended charge, the union argued that the district engaged in bad faith surface bargaining by refusing

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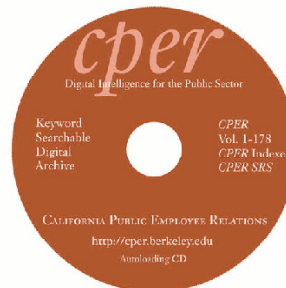
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to modify its position regarding leave of absence compensation. The board agent found no evidence of bad faith bargaining and dismissed the charge.

On appeal, the union argued that the district engaged in bad faith bargaining by taking a position inconsistent with its obligation under EERA to provide the union's president with reasonable periods of released time without loss of compensation. The union argued that the district refused to negotiate over what constitutes "reasonable time off" for negotiations and processing of grievances, despite the fact that this released time is mandatory.

Education Code Sec. 45210 mandates that classified school district employees be granted leaves of absence to serve as elected officers of local school district employee organizations or statewide or national employee organizations with which a local organization is affiliated. Under this provision, a school district continues to compensate its employee and is reimbursed by the union for the time the employee is on leave.

EERA Sec. 3543.1(c) states: "A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released time without loss of compensation when meeting and negotiating and for the processing of grievances." Citing *Anaheim Union High School Dist.* (1981) No. 177, 52 CPER 64, the board reiterated that "released time" is a mandatory subject of bargaining, and under the requirements of EERA, an employee continues to receive full compensation during reasonable periods of time excused from work for these purposes.

The board reasoned that the Education Code and the released time required by EERA have different purposes. The Education Code allows an employee to carry out his or her duties as a union officer while on leave from normal work duties. During that time, it is the union that directs the employee's duties.

In contrast, released time under EERA Sec. 3543.1(c) is reserved for employees who continue to carry out their normal work duties for the school district, but who are afforded reasonable paid time off to participate in negotiations and grievance processing.

The board found that, while it is not inconceivable that the duties performed by a union officer while on a leave of absence would include negotiations and grievance processing, as they apparently did with the union's president in the present case, the possible overlap does not change the fact that an employee who is on leave under Ed. Code Sec. 45210 is on leave from his or her normal work duties to serve as a union officer. Because such an employee is already on leave from his or her normal duties, "it stands to reason that released time (which is afforded to allow an employee time away from their normal duties) is not possible, as the employee is already on leave," the board explained. Therefore, the board affirmed the board agent's dismissal, and concluded that the district's decision to maintain a firm position regarding its released time proposal did not demonstrate bad faith bargaining.

Inadvertent filing error excuses late-filed appeal: CSEA.

(*Kern Community College Dist. v. California School Employees Assn. and Its Chaps.* 246, 336, 617, No. Ad-372, 4-21-08; 4 pp. dec. By Chair Neuwald, with Members Wesley and Rystrom.)

Holding: Good cause exists to excuse a late-filed appeal of a dismissal where an attorney relies on a trustworthy employee to file the appeal, but the employee inadvertently does not file the appeal on time.

Case summary: A board agent dismissed the district's underlying unfair practice charge on February 22, 2008. An appeal of the dismissal was due on March 13. The district did not file an appeal by this date, but a copy of the appeal was served on CSEA. On April 1, a board appeals assistant verbally dismissed the appeal. That same day, the district filed an appeal of the administrative dismissal as well as a copy of the appeal to the amended unfair practice charge dated March 13.

The district argued that good cause existed for the board to excuse its late filing. It asserted that the district's attorney completed the appeal on the due date and instructed her trusted and experienced secretary to file the appeal with

PERB. The secretary served the appeal on CSEA but did not file the document with PERB due to an inadvertent error. The district argued that CSEA was not prejudiced by the late filing as the union was timely served.

CSEA opposed acceptance of the untimely appeal, arguing that the delay was not of a short duration or based on excusable misinformation or circumstances beyond the district's control. Nor was it the result of clerical error.

Under PERB Reg. 32136, the board may excuse a late filing for good cause. In *Lodi Unified School Dist.* (2005) No. Ad-346, 173 CPER 81, the board said that good cause can be found where the justification was reasonable and credible. In *Lodi*, the board excused a late filing based on an attorney's plausible explanation that a trustworthy employee failed to file a response with PERB but timely served its response on the opposing party.

The board found the present facts similar to those in *Lodi* and concluded that the district's explanation for the late filing was reasonable and credible.

The board then had to evaluate whether there was prejudice to CSEA in excusing the late filing. Here, proof of service demonstrated that the district's appeal was properly and timely served on the union, and that the union requested from PERB an extension to file its reply on April 1. Therefore, the board concluded, the union was not prejudiced by the district's late filing and the district established good cause to excuse its late-filed appeal.

Untimely filed appeal dismissed: Newport-Mesa USD.

(*Katz v. Newport-Mesa Unified School Dist.*, No. Ad-373, 5-9-08; 3 pp. dec. By Member Wesley, with Members McKee and Dowdin Calvillo.)

Holding: Because the charging party did not demonstrate good cause to excuse the late-filed appeal, his charge was dismissed.

Case summary: On October 15, 2007, the charging party filed an unfair practice charge alleging that the school district discriminated against him because of his participation in protected activity. Two weeks later, a board agent

sent the charging party a warning letter, asserting that his charge was deficient. The agent tried to contact the charging party via telephone, but was told the charging party was unavailable because he was travelling. The agent dismissed the charge in November.

On March 5, 2008, the charging party submitted what he referred to as a first amended charge. A PERB appeals assistant notified the charging party that his appeal of the dismissal was untimely as it had been due on December 10, 2007. On April 1, 2008, the charging party appealed that decision, arguing that he was "traveling out of the country and unavailable for reasons of personal necessity" at the time the board agent reviewed his charge. He emphasized that he had not returned until March 2008, and the board agent was aware that he had not received the warning and dismissal letters. The charging party also stated that he had "compelling personal reasons of health for the long delay in filing his petition."

The district opposed the appeal, arguing that the charging party failed to show good cause under PERB Reg. 32136. The district contended that it would be prejudiced if the charging party were allowed to file a late appeal, as the allegations related to matters that occurred in 1999 and 2000, and many of the individuals named in the charge were no longer employed by the district.

The board explained that under PERB Reg. 32136, late filings may be excused by the board for good cause. Generally, good cause is shown where the late filing was caused by circumstances beyond the party's control and the justification was reasonable and credible. The board noted that the charging party did not explain or provide documentation for his claim that he was traveling because of "personal necessity." Thus, the board found the charging party's argument neither reasonable nor credible.

Citing *AFT College Staff Guild, Loc. 1521 (Mrvichin)* (2005) No. Ad-349, 174 CPER 89, the board emphasized that a party must explain how an illness precludes timely filing. The board held that the charging party's assertion that "reasons of health" caused the delay was not a sufficient explanation. Therefore, the board concluded that the

charging party did not demonstrate good cause to excuse the late-filed appeal and dismissed the charge.

Lack of justification for late filing of amended charge: Compton USD.

(*Body v. Compton Unified School Dist.*, No. Ad-374, 5-16-08; 4 pp. dec. By Member Rystrom, with Chair Neuwald and Member McKeag.)

Holding: The charging party's appeal was dismissed as untimely because she failed to show good cause for a late filing.

Case summary: The charging party sought to amend her unfair practice charge after it was dismissed by a board agent. Because PERB treats the charging party's request to file an amended charge as an appeal of the dismissal, it was required to be filed within 20 days of service of the dismissal. The charging party's appeal was filed 70 days after the deadline. Thus, the board explained, the charging party must show good cause for her late filing to be excused.

In support of her request to file a late amended charge, the charging party claimed that her attorney never received the B.A.'s warning letter and that the B.A.'s dismissal letter was not timely received.

The charging party's attorney presented evidence that the dismissal letter was addressed to "Lori Ann Bodi, c/o Donal E. Karpel, 9777 Wilshire Blvd., Suite 1000, Beverly Hills, CA 90212," noting the misspelling of the charging party's last name and his first name, and told the board that if mail does not contain one of the names of the attorneys in the business complex at 9777 Wilshire Blvd., it is returned to the post office. However, PERB pointed out that the attorney's last name was correctly included in the address. Therefore, the dismissal letter was adequately addressed to be received according to the requirements the attorney professed. Additionally, the board noted that the charging party did not offer any information regarding when, if late, the letter was received.

PERB also observed that the address — 9777 Wilshire Blvd. — matched that given by the charging party in both the unfair practice charge and the notice of appearance.

Further, the suite number and zip code matched those given by the charging party in documents she submitted to PERB. Accordingly, the board found that the board agent's letters were addressed to the correct address.

The board found that the charging party's excuse for the untimely filing was neither reasonable nor credible and therefore lacked justification. When a charging party fails to provide justification for a late filing, PERB is precluded from finding good cause to excuse it. Therefore, the charging party's appeal of her unfair practice charge was denied.

Failure to state prima facie case: LAUSD.

(*DePace v. Los Angeles Unified School Dist.*, No. 1963, 6-18-08; 9 pp. dec. By Member McKeag, with Chair Neuwald and Member Rystrom.)

Holding: The charging party's unfair practice charges were dismissed for failure to state a prima facie case.

Summary: The charging party was an employee at Los Angeles Unified School District and was represented by United Teachers of Los Angeles. When LAUSD implemented a new computerized payroll system, errors resulted in non-payment, underpayment, or overpayment to several unit members, as well as erroneous deductions from unit members' paychecks.

The charging party filed an unfair practice charge alleging the district violated EERA when it failed to provide readable pay stubs to its employees, failed to pay teachers in a timely manner, and did not resolve inaccuracies in paychecks. The charging party also alleged violations of the collective bargaining agreement with the district and Education Code Secs. 45038 and 45048.

The board agent dismissed each of the charges. First, the B.A. determined that the charging party failed to include a clear and concise statement of the facts and conduct alleged to constitute an unfair practice. The agent also found the charging party did not provide sufficient facts to conclude that LAUSD interfered with his exercise of protected rights or retaliated against him for engaging in such rights.

Addressing the charging party's alleged violations of Ed. Code Secs. 45038 and 45048, the board agent noted that

PERB has no jurisdiction to enforce the Education Code except as necessary to carry out its duty to administer EERA. Since PERB lacks jurisdiction to enforce the code, and the charging party failed to explain how it implicates LAUSD's responsibilities to him, the allegation was dismissed.

The B.A. also rejected the charging party's claim that the district violated the negotiated agreement. EERA Sec. 3541.5(b) states that PERB lacks the authority to enforce agreements between parties unless violation of the contract also would constitute a violation of EERA. Because the charging party did not establish a violation of EERA, the board agent concluded that PERB had no jurisdiction to address this allegation.

On appeal, the charging party essentially asked the board to reopen the record to permit late filing of documents for the agent's consideration. PERB considered this as an appeal of the dismissed charge and, after review, determined the dismissal of the case was proper and adopted the board agent's decision.

Representation Rulings

***Lompoc* upheld; managerial employees deemed inappropriate for bargaining unit: Grossmont-Cuyamaca CCDA.**

(*Grossmont-Cuyamaca Community College Dist. v. Grossmont-Cuyamaca Community College District Administrators Assn.*, No. 1958, 5-29-08; 39 pp. dec. By Member Rystrom, with Members McKeag and Wesley.)

Holding: Following the ruling in *Lompoc* that EERA Sec. 3540.1(g) must be read in the conjunctive, not in the disjunctive, the district demonstrated that four of the eight disputed positions are management employees because they have significant responsibilities for both formulating district policies and administering district programs. The remaining positions were found to be non-managerial and therefore were included in the bargaining unit.

Summary: The association filed a petition for recognition of a proposed unit of managerial employees and gained majority support for the unit. The district, which consists of Grossmont and Cuyamaca Community Colleges,

denied recognition based on the contention that certain proposed positions were managerial and/or confidential, and therefore inappropriate for the unit.

A board agent concluded that several disputed positions were managerial or confidential, but nine were properly included in the unit. The district appealed as to eight of the nine positions and requested that PERB overrule *Lompoc* (1977) No. 13, 33 CPER 42, and interpret Sec. 3540.1(g) in the disjunctive, rather than in the conjunctive.

As the board explained, Sec. 3540.1(g) defines a management employee as "an employee in a position having significant responsibilities for formulating district policies or administering district programs." According to the ruling in *Lompoc*, the legislature meant to use the word "and" in the definition. Thus, according to PERB, EERA requires that a management employee have significant responsibilities for both formulating district policies *and* administering district programs.

The board declined to reevaluate its interpretation of the language, asserting that the legislature agrees with its *Lompoc* decision. PERB emphasized that the legislature did not amend the section after the *Lompoc* ruling in 1977 and the language has gone unchanged since its enactment in 1975. This, according to the board, is an inference that it has interpreted Sec. 3540.1(g) consistent with the legislature's intent.

To apply the standard, the board turned to the specific positions in dispute and assessed whether the B.A. had appropriately applied the test in Sec. 3540.1(g) as interpreted in *Lompoc*.

First, the board considered two district-level positions. The B.A. found that the senior director of intergovernmental relations, economic development, and public information was not a management position due to her lack of authority to use independent judgment in determining district policies. PERB disagreed, noting the senior director reports directly to the district's chancellor and is a member of the chancellor's cabinet. The senior director plays a key role in the administration and her recommendations are routinely accepted. PERB observed that only the district

board approves and establishes district policy. Thus, in context, the senior director's recommendations to the board demonstrate that she has significant responsibilities for formulating district policy. Accordingly, the board determined the senior director is a management position and inappropriate for inclusion in the bargaining unit.

Next, the board examined the interim associate districtwide vice chancellor of academic, student, and planning services. The B.A. found that the position was not managerial because the incumbent lacked the authority to exercise independent judgment to formulate district policy. The evidence established that the district relied on the vice chancellor to provide recommendations, but not to formulate policy. The board rejected the B.A.'s finding because, under the B.A.'s analysis, the district board is the exclusive entity with the authority to formulate policy. That is "unworkable," said PERB, "because it fails to identify the full range of employees who are appropriately characterized as district managers." Thus, the board concluded that the position qualified as management.

The board then examined disputed positions that function at the college level. The board rejected the association's argument that only districtwide policy recommendations should be considered "district policies" for purposes of determining whether college-level positions have significant responsibility to formulate "district policy" under Sec. 3540.1(g). The legislature intended the term "district policies" to mean policies that are adopted by the district or made at the district level regardless of whether they have districtwide application, PERB concluded.

With that in mind, PERB examined the vice president of student services position at each college. The B.A. sided with the association and found that the vice presidents' authority is limited to the college level and is not districtwide, and that any recommendations they make regarding changes to districtwide policy are subject to several levels of review.

PERB disagreed with the agent and determined that the vice presidents of student services are management employees. The board cited their close alliance with man-

agement and their significant responsibility for formulating district policy. Further, the board found that multi-level review of the vice presidents' recommendations does not vitiate the policy recommendations from being evidence of managerial status. Keeping with its interpretation of "district policies," the board concluded the student services programs at individual colleges are district programs for purposes of EERA.

Next, the board reviewed the college-level administrative deans at each college. The district argued that the deans are program managers who effectively recommend policies and are analogous to the bistro manager in *Sacramento City Unified School Dist.* (2005) No. 1773, 174 CPER 88. The association insisted that *Sacramento* is not applicable because the administrative deans do not have complete autonomy over their operations, do not interact directly with the chancellor, and do not have the authority to accept or reject bids, like the bistro manager in *Sacramento*.

The board found the administrative deans at Cuyamaca and Grossmont colleges were management employees. It noted that the positions report directly to the college presidents and are members of the presidents' cabinets. At Cuyamaca College, the administrative dean oversees all aspects of the college's \$23 million budget and is authorized to move funds within or between departments. At that college, the administrative dean is also responsible for all college facilities including construction of new buildings and maintenance. At Grossmont College, the administrative dean is responsible for the operational services, including the business office, printing services, and maintenance facilities. PERB observed that both deans are required to serve as the acting president when the college president is absent.

The next college-level position evaluated was the senior dean of business and professional studies. The board agreed with the B.A.'s determination that the position is not managerial and repeated the B.A.'s finding that the senior dean operates under the direction of the vice president.

The board agreed with the B.A.'s finding that the dean of admission and records is not managerial. PERB cited the lack of significant responsibility to formulate district policy.

The incumbent deans adhere to a strict process and report directly to the vice president of student services.

The board also affirmed the board agent's determination that the dean of counseling, student development, and matriculation at Grossmont College was not a management employee. The incumbent reports directly to the vice president of student services and does not have authority to recommend ideas directly to the governing board.

The B.A. found that academic deans were not management employees because they do not have significant responsibilities for formulating district policies. The policies set by these deans are limited to their respective divisions, and they are basically the first-line supervisors for the faculty and many of the classified staff. Further, any policy recommendations that they may provide are subject to input and review by a myriad of shared-governance committees and constituent groups. The board agreed with the B.A.

PERB granted the inclusion of four of the eight disputed positions in the bargaining unit and denied inclusions of the remaining four. The case was remanded to the Office of the General Counsel for proceedings consistent with the decision.

Duty of Fair Representation Rulings

Leave to amend charge granted after inadvertent postal error: AFSCME Council 57.

(*Gregory v. AFSCME Council 57*, No. 1952, 4-11-08; 4 pp. dec. By Member Wesley with Chair Neuwald and Member Rystrom.)

Holding: Because of an inadvertent post office error, the charging party was allowed to file an amended charge after the board agent dismissed her charge.

Case summary: On January 16, 2007, the Oakland Unified School District sent the charging party a letter accusing her of abandoning her position as a paraprofessional with the district. On February 1, 2007, the charging party was terminated. No grievance was filed during the 20-day filing period delineated in the contract between AFSCME and the district. The charging party then charged AFSCME

with failure to provide adequate representation in violation of EERA.

After reviewing the charge, a board agent notified the charging party in a warning letter that she did not ask for union assistance until after the filing deadline and failed to cite facts that demonstrated the union's conduct was arbitrary, discriminatory, or in bad faith. The charging party was given until December 14, 2007, to file an amended charge. When one was not received, the charge was dismissed on December 17.

On appeal, the charging party sought leave to file an amended charge. She contended that she did not receive the board agent's warning letter until December 19. The mailing address provided on the charge was a post office box. According to the charging party, there was a dispute with the post office that resulted in the closure of her P.O. box. At first, mail addressed to that box was held. Eventually, mail was forwarded to the charging party's home address. The post office forwarded the warning letter on December 15.

PERB Reg. 32136 states that "a late filing may be excused at the discretion of the board for good cause only." The board has found good cause to excuse late filings in rare cases where inadvertent postal errors beyond the charging party's control prevent timely filing.

In this case, the charging party provided reasonable and credible evidence that she received the warning letter after the board agent dismissed her charge, in the form of a dated postal forwarding sticker and her sworn declaration that the postal delegates were out of her control. Therefore, the board found good cause existed to allow the charging party to file an amended charge.

Charges dismissed as untimely and unfounded: Sacramento City Teachers Assn.

(*Franz v. Sacramento City Teachers Assn.*, No. 1959, 5-20-08; 4 pp. dec. + 23 ALJ dec. By Member Dowdin Calvillo, with Chair Neuwald and Member Rystrom.)

Holding: The majority of the charging party's allegations were dismissed as untimely. The remaining allegations were dismissed because the evidence did not establish a

breach of the duty of fair representation. The continuing violation doctrine did not apply to any of the allegations.

Summary: The charging party, a part-time teacher for the Sacramento City Unified School District at Old Marshall Adult Education Center, filed an unfair practice charge against the Sacramento City Teachers Association, alleging that it breached its duty of fair representation under EERA Sec. 3544.9. According to the charging party, SCTA did not return phone calls inquiring about the status of her grievances and grievance hearings, did not inform her that a grievance hearing had been scheduled, failed to provide notice that the grievance was not moved to the next level, and misrepresented that a state mediator had been present at a grievance hearing.

The ALJ dismissed the allegations involving the association's failure to return phone calls and inform the teacher of its failure to move the grievance to the next level because the charges were filed more than six months after the alleged conduct occurred. The ALJ also determined that the association did not breach its duty of fair representation because the evidence established that a state mediator was in fact present at the teacher's grievance hearing. Thus, SCTA did not misrepresent his presence to the charging party.

On appeal, the charging party argued that her allegations were not time barred because the association's violations were ongoing. The teacher contended that on several occasions SCTA made management's arguments against her, and that the association and the district continued to collude against her during the PERB proceedings.

While PERB may not consider allegations of conduct that occurred more than six months before a charge was filed, a continuing violation may revive an earlier violation if it is of the same type that occurred outside of the limitations period and would constitute an independent unfair practice without reference to the prior violation.

PERB found that the doctrine did not apply here because the original charge did not include allegations of collusion between the association and the district. Further, the board determined that the continuing violation doctrine did not apply to any of the allegations that were included

in the charge because the evidence did not support any of those allegations.

Accordingly, the board adopted the ALJ's proposed decision and dismissed the charges.

Failure to state prima facie case: LAUSD.

(*DePace v. United Teachers of Los Angeles*, No. 1964, 6-18-08; 10 pp. dec. By Member McKeag, with Chair Neuwald and Member Wesley.)

Holding: The charges were dismissed for failure to state a prima facie case of a breach of the duty of representation.

Summary: The charging party was an employee at Los Angeles Unified School District and was represented by the United Teachers of Los Angeles. When LAUSD implemented a new computerized payroll system, errors in the system resulted in non-payment, underpayment, or overpayment to several unit members, as well as erroneous deductions from unit members' paychecks.

The charging party requested UTLA to file grievances regarding the paycheck errors in March and July 2007. UTLA declined to do so. Several months later, the union filed a grievance on behalf of all the affected unit members, after which the charging party again requested a grievance on his behalf and was again denied. The union also filed a lawsuit in superior court to compel LAUSD to correct the payroll errors. Eventually, the union and the district negotiated agreements for repayment, opened additional payroll centers, and corrected errors regarding unit member retirement accounts. The charging party alleged UTLA violated EERA, the collective bargaining agreement, and Education Code Secs. 45038 and 45048 when it refused to file grievances on his behalf.

The board agent determined that the six-month statute of limitations had expired with respect to the charging party's request to file a grievance in March 2007. Further, the B.A. found that the charging party did not establish that UTLA's decision with respect to his grievances was arbitrary, discriminatory, or made in bad faith. PERB has held that a party does not establish a breach of the duty where the

representative attempted to resolve disputes underlying the requested grievance for the benefit of the bargaining unit as a whole. Here, UTLA attempted to resolve the issue by pursuing an action in court, filing a grievance on behalf of the entire unit, and seeking the assistance of the Los Angeles County Superintendent of Schools. Accordingly, the B.A. concluded that the charging party did not establish that the union breached its duty to represent him.

The B.A. also dismissed the charging party's claim that UTLA violated the terms of the contract. EERA Sec. 3541.5(b) withholds from PERB the authority to enforce agreements between parties unless violation of the agreement also would constitute a violation of EERA. The board agent concluded that because the charging party did not establish a violation of the act, PERB did not have jurisdiction to address the allegation.

HEERA Cases

Unfair Practice Rulings

Decision to stop staffing instructors is not an unlawful unilateral change if contracting-out was not a factor: CSU (San Diego).

(*California Faculty Assn. v. Trustees of the California State University (San Diego)*, No. 1955-H, 4-24-08; 2 pp. dec. + 11 pp. ALJ dec. By Member McKeag, with Chair Neuwald and Member Rystrom.)

Holding: The charge was dismissed because the university did not contemporaneously decide to contract with San Diego City College to provide instruction for more remedial classes and to cut its own remedial classes.

Case summary: University students who lack basic competency in English and mathematics must enroll in remedial courses. Before 1984, SDSU fully staffed remedial courses with its own faculty. However, starting that year, SDSU entered into a series of agreements with San Diego City College, under which SDCC provided instructors for some of the remedial courses on the SDSU campus. Between 2000 and 2003, the university and the city college

entered into yearly memoranda of understanding regarding this staffing arrangement.

Until 2004, the majority of remedial classes were taught by SDSU's own faculty. That year, with class enrollment decreasing, university faculty taught only a small percentage of the remedial class sections.

In January 2004, citing budgetary constraints, SDSU announced that beginning in fall 2004, all remedial courses would be taught by city college instructors. In doing so, the charging party argued, SDSU had unlawfully and unilaterally increased the amount of work it contracted out.

Citing *San Diego Adult Educators v. Public Employment Relations Bd.* (1990) 223 Cal.App.3d 1124, 85 CPER 45, an administrative law judge explained that an employer may reduce unit work as a managerial decision without negotiating. But, the ALJ added, an employer may not contract out bargaining unit work or significantly increase the amount of work it contracts out without negotiating.

In *San Diego Adult Educators*, the Court of Appeal concluded that the community college district made an unlawful unilateral change when it "contemporaneously" decided to contract out minor language class instruction to an outside foundation and discontinue its own instruction of those classes. But, the court reasoned, the district had not illegally contracted out instruction for popular language classes because it had terminated that work before it contracted with the foundation.

In the present case, the ALJ found that the university had not decided "contemporaneously" to contract with city college for more remedial classes and reduce its own instruction of remedial classes. On the contrary, the ALJ found that SDSU and SDCC did not enter into an agreement for the 2004-05 school year until after SDSU's decision to cut its own classes was final.

The ALJ stressed that the central issue was whether SDSU's decision was dependent on or independent from its contract with SDCC. The ALJ cited testimony demonstrating that the decision was independent, and based on budget difficulties and a decrease in student demand for the remedial classes. The university would have cut the remedial

classes taught by its faculty members regardless of whether it contracted with SDCC, the ALJ concluded. Therefore, the ALJ dismissed the unfair practice charge.

The board adopted the ALJ's dismissal of the charge as a decision of the board itself.

MMBA Cases

Unfair Practice Rulings

Employer discipline in response to unprotected activity is not unfair practice: Carmichael Recreation and Park Dist.

(*AFSCME Loc. 146 v. Carmichael Recreation and Park Dist.*, No. 1953-M, 417-08; 26 pp. dec. By Chair Neuwald, with Members Rystrom and McKeag.)

Holding: The unfair practice charge was dismissed because the employer's actions toward the bargaining unit member were not responses to her protected activity.

Case summary: The charge alleged that the district interfered with protected employee rights, discriminated against an employee for engaging in protected activity, and refused to provide requested information.

On May 20, 2005, Penny Kelley, a district bookkeeper, filed a grievance with the district board on behalf of a secretary, Mardi Wally, alleging that the district's financial director, Ingrid Penney, retaliated against Wally for filing a grievance. Thereafter, Penney gave Kelley and Wally a *New Yorker* cartoon with a sketch of an employee staring at a pile of old computer monitors; the caption read, "I'm going to have to let some of you go." The administrative law judge found that Kelley's belief that the cartoon was threatening and retaliatory was unreasonable. Furthermore, the ALJ found that Penney had not known about the grievance until after she showed the cartoon to Kelley and Wally. Thus, the district's behavior did not amount to unlawful interference.

One month later, Kelley inquired about the status of an invoice needed to process a check. A district assistant replied that the senior recreation supervisor's office un-

successfully had been trying to send the invoice via facsimile. That afternoon, the senior recreation supervisor had a meeting about the invoice with Penney and the district administrator. The senior recreation supervisor allegedly spoke in a "loud, angry voice." An employee with an office adjacent to the meeting room testified she felt so uncomfortable because of the "tirade" that she left work early. That employee told Kelley that Penney and the senior recreation supervisor blamed Kelley for the problem. The supervisor and Penney denied that occurred, contending that Kelley would have been at the meeting if they thought she had done something wrong.

Kelley also alleged that while she was washing dishes in the break room, Penney came in, closed the door, trapped Kelley in a corner, and pulled her own top around her neck exposing her breasts. Penney allegedly then turned and showed Kelley her back, which was bruised and chapped as a result of "cupping," a form of holistic medicine. Penney denied exposing her breasts or trapping Kelley in the corner, and she explained that she showed Kelley her back because the two previously had discussed cupping. The ALJ found Penney's testimony more credible because, in a prior complaint, Kelley had not mentioned the exposure or being trapped, and had appeared melodramatic while testifying.

After leaving work that day, Kelley went to pick up her daughter from camp. While there, she repeatedly wanted to assure and be reassured by an office assistant that the invoice mishap was not her fault. At one point, Kelley allegedly said, "I should just go home and get my grandpa's rifle and shoot them all."

Kelley did not return to work the next day, and informed her supervisor that she would be off work for one week for stress-related reasons. On July 22, Kelley filed a complaint with the district board, describing the above events as misconduct on the part of the management staff.

On July 25, Sharon Reneau, the office assistant who heard the rifle comment, reported the remark to Penney and the district administrator. At the hearing before the ALJ, Kelley denied making the threat. She accused Reneau of fabricating the comment based on her close personal relation-

ship with the senior recreation supervisor. Five days later, the district placed Kelley on paid administrative leave pending a mental “fitness for duty” determination. The charging party argued that these actions were discriminatory and retaliatory, and taken in response to Kelley’s grievances.

The ALJ concluded that Kelley did make the rifle comment. She explained that the comment was reported within five business days, and that the delay could be explained by the fact that Reneau liked Kelley and did not want to get her in trouble.

The ALJ found that the only fact raising an inference of unlawful animus and retaliatory behavior on the part of the district was the close proximity between Kelley’s complaint on July 19 and her subsequent placement on paid administrative leave. However, the ALJ emphasized that management did not learn about the complaint until after it was told about the rifle comment.

The charging party also argued that management’s failure to ask Kelley if she made the threat revealed that only a cursory investigation took place. The ALJ noted, however, that Kelley was on leave and unavailable for questioning, and management actively sought corroboration of the events from witnesses. The ALJ concluded that all of the district actions were based on Kelley’s death threat. And, when she found the threat was made, the district produced a legitimate and substantial business justification for its actions.

The union filed a grievance on Kelley’s behalf, arguing that she should not have been placed on paid leave and requesting that she return to work. On September 6, Kelley underwent the fitness-for-duty exam and was found able to return. The district sent notice of its intent to impose a five-day suspension based on the rifle comment. Kelley requested a pre-disciplinary *Skelly* hearing. The union requested copies of documents relied on to issue the proposed discipline, including witness statements and the report made by the doctor who examined Kelley’s fitness for duty. The district did not provide its communications with the doctor.

Citing *State of California (Dept. of Food and Agriculture)* (1998) No. 1290-S, 133 CPER 66, the ALJ explained that an employer’s duty to provide information to exclusive represen-

tatives does not extend to individual employee requests. In *Los Angeles Unified School Dist.* (1990) No. 835, 86X CPER 14, PERB declined to incorporate *Skelly*’s due process requirements into the duties required by an employer under EERA. And, in *San Bernardino Unified School Dist.* (1998) No. 1270, 131 CPER 74, the board held that the employer’s failure to provide a witness list requested for a personnel commission disciplinary hearing did not violate EERA because the list did not relate to a mandatory subject of bargaining or grievance processing, and the matter arose in an “extra-contractual forum.” Here, the ALJ found the medical information was requested by the charging party solely to prepare for Kelley’s *Skelly* hearing, an extra-contractual forum. Under this precedent, the ALJ held that the union failed to show the information it sought was relevant and necessary to its representational duties.

In early 2006, after the district board reviewed Kelley’s nine complaints, the district’s risk manager recommended another fitness-for-duty evaluation.

The ALJ found it undisputed that Kelley engaged in protected activities by filing grievances and complaints in May, July, and August 2005; and, the union engaged in protected activities by filing two grievances and two unfair practice charges on behalf of Kelley in November 2005 and January 2006. Also, it was clear the district knew about these complaints. However, the ALJ held the charging party failed to establish that the district put the bookkeeper on paid administrative leave, required her to undergo two fitness-for-duty exams, or issued its suspension notice because of, or in retaliation for, protected activities. Thus, the ALJ dismissed the charging party’s unfair practice charge.

The board affirmed the dismissal and adopted the ALJ’s decision as that of the board itself.

Employer-employee relationship must be substantially affected to sustain charge of improper internal union conduct: SEIU Loc. 1292.

(*Marriott v. SEIU Loc. 1292*, No. 1956-M, 5-9-08; 17 pp. dec. By Member Rystrom, with Chair Neuwald and Member McKeag.)

Holding: Because the charging party failed to allege facts showing that her relationship with the county was substantially affected by SEIU's merger of its local unions or its failure to allow bargaining unit employees to vote on the merger, her charge was dismissed.

Case summary: The charging party is an employee in a "miscellaneous" bargaining unit in Tehama County; unit employees work in the departments of social and child services. From August 2004 through October 2006, employees in this unit voted to be jointly represented by Local 1292 and Stationary Engineers Local 39. On October 6, 2006, SEIU merged Local 1292 and several other locals into the North Regional Public Sector Local 1021 pursuant to a vote of thousands of SEIU members, most of whom were not county employees.

The charging party claimed that the merger violated bargaining unit members' rights under the act to join an employee organization of their own choosing. The charging party alleged that despite opposition to the merger, only one county employee, and no one from her unit, was allowed to vote. As a result of the merger, she argued, her bargaining representative no longer existed. In contrast to Local 1292, Local 1021 is a "huge union with headquarters hundreds of miles away." The charging party emphasized further differences between the two locals, such as dissimilarities in union bylaws related to elections and nominations, the ability of unit members to vote on these matters, and the lack of county representation on Local 1021's executive board.

The charging party alleged that prior to the merger, a representative of Local 1021 told her and other unit members that when Local 1021 took over, unit members would have to represent each other in disputes with management because a representative from Local 1021 would not be able to respond to their worksite in a timely manner.

A board agent dismissed the charge, finding that it failed to demonstrate how the merger violated the MMBA. On appeal, the charging party argued that the board agent erred in determining that Local 1292 and Local 1021 are the same employee organization within the meaning of Sec. 3502. She further contended that the agent erred in

concluding that the consolidation was an internal union activity not subject to scrutiny.

Citing *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 57 CPER 46, the board explained that the California Supreme Court has declared that the MMBA protects the right of employees to be represented by a union of their own choosing. In *City of Hayward v. United Public Employees* (1976) 54 Cal.App.3d 761, 28 CPER 19, the court recognized that employees may choose not to join or participate in the activities of any employee organization.

The board found the charging party did not allege that when the charging party's bargaining unit members chose their representatives in 2004, they were not afforded their rights. Instead, the charge claimed that the new local which resulted from the SEIU merger was not of the charging party's choosing. Thus, the board considered whether the charging party can challenge the consolidation of her local union with several other unions or SEIU's failure to give union members in her bargaining unit the right to vote on its decision to consolidate.

MMBA Sec. 3503 provides that "... employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership." Citing numerous PERB decisions, including *Service Employees International Union, Loc. 99 (Kimmatt)* (1979) No. 106, 44 CPER 56, the board reaffirmed that it will not interfere in the internal affairs between an employee organization and its members unless the action significantly impacts the member's relationship with his or her employer. Also, citing *Canton Sign Co.* (1969) 174 NLRB 906, the board recognized that unions have substantial discretion in management of their internal affairs; not every change to an organization's structure affects a member's relationship with the employer.

In *Kimmatt*, the charging party alleged that SEIU Local 99 thwarted his right to participate in the organization's activities by scheduling union meetings and elections when he could not attend. The board dismissed the charge and held there is no duty of fair representation as to strictly

internal union activities that have no substantial impact on the employer-employee relationship. Additionally, in *Kimmet*, the board held that EERA Secs. 3540 and 3543, which mirror MMBA Secs. 3500 and 3502, do not afford the right to have an employee organization structured in any particular way. Absent language comparable to the federal Labor-Management Reporting and Disclosure Act, the board in *Kimmet* found no basis to create a regulatory set of standards in governing a union's internal affairs.

The board also cited *California State Employees Assn. (Hutchinson et al.)* (1998) No. 1304-S, 139 CPER 62. There, PERB held that allegations the association misspent its resources, allowed officers to use internal processes fraudulently, and improperly altered the internal structure of the union did not involve conduct that impacted the employment relationship and thus was not subject to intervention by PERB.

Following this precedent, the board announced that under the MMBA, a local union member may challenge the parent union's consolidation decision, but only when that decision has a substantial affect on the employer-employee relationship. The board noted that the only allegations which related to the charging party's employer-employee relationship were the claims that, prior to consolidation, she was told employees would have to represent each other in disputes with management because a Local 1021 member would not be able to respond to her worksites in a timely manner. The board found this allegation speculative absent any assertion that this actually occurred. Thus, the board held that the charging party failed to make any factual allegations showing that SEIU's merger of its local unions had a substantial impact on her or her fellow bargaining unit members' relationship with Tehama County.

The board also announced that an employee may challenge the parent union's failure to afford its members the opportunity to vote for or against a consolidation of local unions only if the employee can demonstrate that such consolidation had a substantial impact on the employer-employee relationship. The board explained the MMBA contains no express provision that requires an employee

organization to permit union members to vote on consolidation or merger. In the past, PERB has refused to interfere in disputes between employees and their unions regarding union elections where there is no substantial affect on the employer-employee relationship. For example, in *Kimmet*, the board held that the rights to freely choose one's union do not allow PERB to scrutinize either the union's structure or elections for union officers unless a significant affect on the employee's relationship with the employer results.

Also, in *California School Employees Assn. and its Chap. 36 (Peterson)* (2004) No. 1733, 173 CPER 88, the board held that participation in union elections is an internal union affair. There, the board dismissed a charge that the union improperly denied an employee the opportunity to run for union office under its own constitution's election rules because no facts were alleged to support a finding that this conduct impacted the charging party's relationship with his employer. The charging party in *Peterson* argued that exclusion from participation in a union election is the same as dismissal from membership, a claim subject to review by PERB under EERA Sec. 3543.1(a). But the board rejected this argument. Finding the language in EERA Sec. 3543.1(a) to be the same as in MMBA Sec. 3503, the board found that the lack of opportunity to vote on the merger did not have a substantial impact on the employer-employee relationship, and dismissed the charge.

Failure to meet and confer over unilateral classification change found: South Placer Fire Protection Dist.

(*South Placer Fire Administrative Officers Assn. v. South Placer Fire Protection Dist.*, No. 1960-M, 6-10-08; 13 pp. dec. By Member Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: The district violated the MMBA and PERB regulation when it unilaterally removed the fire marshal classification from the battalion chiefs' bargaining unit without providing an opportunity to meet and confer.

Case summary: The charging party, which represents administrative officers in the South Placer Fire Protection District, filed an unfair practice charge alleging the district

violated MMBA Secs. 3503 and 3505, and PERB Regs. 32603(a), (b), and (c) when it failed to meet and confer before it unilaterally removed the fire marshal classification from the battalion chiefs bargaining unit. An administrative law judge's proposed decision agreed. The district filed exceptions and contended, among other things, that the fire marshal was not in the bargaining unit at the time it was reclassified and, therefore, there was no duty to meet and confer.

The charging party was recognized in 2003 as the exclusive representative of the battalion chiefs' bargaining unit containing the shift battalion chief, emergency medical services administrator, and fire marshal. The district's recognition of the exclusive representation stated the fire marshal would be included in the bargaining unit, "but only for so long as the job description adopted by the Governing Board of the District continues to include a requirement that the Fire Marshal act as a Duty Chief...."

In 2004, the district revised the fire marshal job description to include a provision that a fire marshal may act as a shift battalion chief. The revised description did not eliminate the requirement set out in the recognition letter that the fire marshal act as duty chief.

One year later, the district and the charging party signed an MOU that provided the charging party would be the exclusive representative of all classifications in the salary schedule, which included the fire marshal position. Soon after, when the charging party learned the district was negotiating directly with the fire marshal, it requested that it end direct negotiations with one of its represented members. The district believed the fire marshal was no longer within the bargaining unit. During negotiations on the successor MOU, the parties did not reach agreement on whether the fire marshal was in the bargaining unit, and no changes were made to the existing MOU.

In September 2005, the district's governing board approved, as recommended by the fire chief, that the fire marshal be reclassified to assistant chief with no change in duties. The assistant chief position is not in the battalion

chiefs' bargaining unit. In response, the charging party filed its unfair practice charge in March 2006.

First, PERB looked to the parties' MOU. The board noted that the MOU in effect when the fire marshal was removed from the bargaining unit was the same as the original agreement between the parties. The MOU plainly stated that the charging party was the exclusive representative of all positions listed in the salary schedule, which included the fire marshal. The MOU was in effect until December 2005, and the district made its unilateral change in September 2005. Thus, said the board, the fire marshal was in the bargaining unit, and the district's failure to meet and confer over removal of the position from the unit was a violation of the MMBA and the PERB regulation.

Notwithstanding the language in the MOU, the district asserted that the position could be included in the bargaining unit only if the fire marshal also acted as a duty chief, citing the condition in the original recognition letter. According to the district, when the job description was changed to permit the fire marshal to serve as shift battalion chief, the position no longer met the specified condition.

The board disagreed, first observing that the ALJ's proposed decision found that "shift battalion chief" and "duty chief" were synonymous terms. Further, even after the job description changed, the fire marshal continued to perform the tasks related to that of a duty chief. Additionally, PERB noted that the MOU in effect when the unilateral change took place imposed no conditions or limitations on the fire marshal's inclusion in the bargaining unit. Thus, the requirements of the original recognition letter could not be interpreted to be included in the MOU.

PERB dismissed the district's contention that the decision to reclassify the fire marshal "falls purely within the district's managerial prerogative." In support of this position, it pointed to Sec. 3.C. of the Employer-Employee Resolution. It allows the fire chief to modify the bargaining unit when a position change may eliminate the community of interest between the position and other positions in the unit. However, the board explained, even that section requires the chief to consult with the union before making

such a change. Further, PERB relied on *Building Material & Construction Teamsters Union v. Farrell* (1986) 41 Cal.3d 651, 68X CPER 10. There, the California Supreme Court held that similar provisions in a city charter did not alleviate the employer's duty to meet and confer when transferring work outside the bargaining unit. Also, the board again cited the language in the MOU which instructs that the contract will prevail over district policies, practices, and procedures where there is a conflict.

The board rejected the district's contention that the charging party had agreed the fire marshal position was outside the bargaining unit and had waived its right to bring an unfair practice charge. The district relied on a letter sent during negotiations in which the charging party listed conditions under which it would consider agreeing to removal of the fire marshal position from the unit. The board explained that the charging party was simply negotiating and never agreed to the position's removal. Further, said the board, the MOU stated that it could be modified only by a document signed by both parties, and there was no such document here.

PERB also dismissed the district's argument that the charge was untimely. While communications regarding the fire marshal position had taken place as early as March 2005, there was no clear intent to remove the position from the bargaining unit until September 2005. Therefore, the charge filed in January 2006 was timely.

Accordingly, PERB concluded that the district violated the MMBA and the PERB regulation when it removed the fire marshal position from the battalion chiefs' bargaining unit without providing the charging party the opportunity to meet and confer. The board ordered the district to return to the status quo that existed before the unilateral change.

Failure to establish new leave policy: County of Sonoma.

(*SEIU, Loc. 707 v. County of Sonoma*, No. 1962-M, 6-17-08; 18 pp. dec. By Member Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: The board reversed the ALJ's proposed decision and dismissed the unfair practice charge because the charging party failed to establish that the county implemented a new policy of placing employees on unpaid leave after an on-the-job injury.

Summary: In April 2002, an account clerk in the county's auditor-controller office, and a member of the clerical non-supervisory unit represented by SEIU, Local 707, was injured on the job and unable to perform her normal duties. She took a medical leave for nearly one year and received workers' compensation. When she returned to work, accommodations were made with respect to her injury. When pain forced her to be occasionally absent from work and to leave early, she gave the county a modified work schedule prepared by her physician.

The county informed the clerk that it could not provide sufficient accommodations to enable her to perform the essential functions of the job, and it designated her final day of work.

After receiving the letter, SEIU contended that, in order to remove the clerk from pay status, the county had to either send her to a county physician or take formal separation action against her pursuant to the county's Civil Service Commission rules. The union also asserted that the letter did not notify the clerk of her right to appeal, consistent with due process requirements.

In a second letter, the county clarified the clerk and her union could respond to the allegations that she could not perform the required work, and the county placed her on leave without pay. Her appeal to the commission was denied. However, her application for service-connected disability retirement was approved by the Sonoma County Employees' Retirement Board and applied retroactively to January 26, 2005.

Meanwhile, SEIU filed an unfair practice charge alleging that the county had no policy for treating employees who were no longer able to perform the essential functions of their job. The charge also alleged that the county unilaterally created a new policy in violation of the MMBA when it placed the clerk on leave without pay.

The administrative law judge found that the county did unilaterally adopt a new policy and failed to prove it had a clear policy regarding disabled employees. Additionally, the ALJ found that the county failed to adopt a policy addressing an employee's procedural due process rights, citing *Bostean v. Los Angeles School Dist.* (1983) 63 Cal.App.4th 95, 130 CPER 66. In that case, the court held an employee with a property right in her public employment must be given written notice of the charges and an opportunity to respond before being placed on involuntary leave without pay.

On appeal, the county asserted that SEIU had the burden of establishing a change in the existing practice and that the ALJ erroneously disregarded as its past practice the county's case-by-case approach of determining the level of due process accorded an employee placed on involuntary leave without pay.

First, citing *Riverside Sheriff's Assn. v. County of Riverside* (2003) 106 Cal.App.4th 1285, 159 CPER 22, PERB agreed that SEIU had the burden of proving all elements of a unilateral change and considered whether the union had demonstrated that the county breached or altered its written agreement or established past practices without affording the union an opportunity to bargain.

The board determined that SEIU failed to demonstrate the county created a new policy when it failed to send the clerk to a county physician pursuant to commission rule 12.3 as it had for other employees. PERB found that the commission rule requires the medical examination to take place before the employee's return to work and not afterwards. Here, PERB noted, the clerk had returned to work at the time the initial letter was sent informing her of her impending separation.

PERB also observed that once the county determined the clerk was unable to perform the essential functions of her position, the county's course of action was dictated by the County Employee Retirement Law, not the commission's rule or past practice. Under CERL, a "permanently incapacitated" county employee shall receive service-connected disability retirement and the county must apply for the disability retirement on the employee's behalf if she is "be-

lieved to be disabled." The county is not required to send the employee to a medical examination. Further, when the employer applies for disability retirement on behalf of the employee, the employee is not entitled to paid leave pending the determination of the retirement board. Here, the county placed the clerk on involuntary leave without pay; it did not terminate her. While the county did not follow the statute exactly, PERB explained its failure to do so was not a violation of the MMBA because it was not a breach of a written agreement or of its past practices.

The board also found that SEIU failed to show the county had an unequivocal and clearly enunciated past practice of sending employees to a medical examiner before placing them on leave without pay. The board relied on testimony and the county's disability guidelines, which focus on the employee's treating physician.

Finally, the board determined that the clerk received the requisite due process protections. She was given written notice of the contemplated action, the facts supporting the action, and an opportunity to present her version of the facts to the department head. Accordingly, the board dismissed the charge without leave to amend.

Trial Court Act Cases

Representation Rulings

Same union can represent management and non-management employees: Tehama Co. Superior Court.

(*Stationary Engineers Loc. 39 v. Tehama County Superior Court*, No. 1957-C, 5-27-08; 8 pp. dec. + 9 pp. ALJ prop. dec. By Member Rystrom, with Chair Neuwald and Member McKeag.)

Holding: The court violated the Trial Court Employment Protection and Governance Act when, based on the court's local rule, it rejected the union's petition for recognition as the representative of a bargaining unit composed of managerial employees.

Summary: At the time the unfair practice charge was filed, the charging party represented non-managerial

employees of the Tehama County Superior Court. The charging party filed a petition for recognition on behalf of a bargaining unit composed of managerial employees. The court denied the petition on the grounds that Article 3.0 of the court's Employer/Employee Relations Policy set out in its local rules prohibited the same employee organization from representing both managerial and non-managerial employees.

In its unfair practice charge, the union alleged that the court's local rule conflicts with Sec. 71637.1 of the Trial Court Act. That section permits a court to adopt reasonable rules for designating management and confidential employees, and for restricting those employees from representing any employee organization that represents other employees of the court. However, the section does not otherwise limit the right of employees to be *members* of an employee organization.

The administrative law judge rejected the court's argument that while the Trial Court Act may not specifically prohibit an employee organization from representing both management and non-management employees, the court's local rule is reasonable because representation of both groups is prohibited under HEERA, EERA, and the Dills Act. The ALJ noted that PERB generally will follow earlier decisions addressing similar issues and will exercise its decisional authority to harmonize statutes where appropriate. However, the ALJ explained, the board is not free to rewrite the statute. Here, the ALJ found that the language of the Trial Court Act is clear and the legislature's intent is unambiguous. Accordingly, the ALJ determined, "concepts developed under a statute with dissimilar language have no application here."

The ALJ referred to MMBA Sec. 3507.5, with language identical to Trial Court Act Sec. 71637.1, and cited *Reinbold v. City of Santa Monica* (1976) 63 Cal.App.3d 433. There, the court interpreted MMBA Sec. 3507.5 merely to preclude management from representing non-management employees, but not to preclude management from being represented by the same bargaining organization.

While the Trial Court Act permits the court to enact reasonable rules, the ALJ explained that the court's rules may not frustrate the declared policies and purpose of the act. The court's local rule expressly contradicts that portion of Sec. 71637.1 which states that the section does not limit the right of employees to be members of an employee organization.

The court filed exceptions to each of the ALJ's conclusions. The board adhered to the ALJ's interpretation of the legislature's intent. It noted that the inclusion of prohibitions on employee organizations representing both management and non-management employees found in EERA, HEERA, and the Dills Act was absent from the Trial Court Act. Likewise, the board noted the identical language in the Trial Court Act and the MMBA, and found this suggests a legislative intent that Trial Court Act Sec. 71637.1 be similarly interpreted.

Accordingly, with the additions described above, the board adopted the ALJ's proposed decision as its own.

Activity Reports

ALJ Proposed Decisions

Sacramento Regional Office — Final Decisions

SEIU Loc. 1000, CSEA v. State of California (Department of Motor Vehicles), Case SA-CE-1512-S. ALJ Bernard McMonigle. (Issued 4-25-08; final 5-27-08; HO-U-937-S.) The employee was improperly denied union representation when he was called into a meeting with supervisors to discuss the allegation of threatening a supervisor. A unilateral change was found where the employer prohibited the same employee from distributing union literature to employee in-baskets without the opportunity to negotiate a change in contract language or its effects. No violation was found for the employee termination where the responsible managers were unaware of union activity and would have taken the same action in any event. No violation was found for denial of access rights because past practice and contract language required advance notice.

Sacramento Area Fire Fighters, Loc. 522 v. City of Sacramento, Case SA-CE-360-M. ALJ Christine Bologna. (Issued 5-13-08; final 6-16-08; HO-U-938-M.) The charge was dismissed in part, and remanded for hearing on the merits. Allegations regarding the city's maintenance of a city council resolution was time-barred, as the "mere existence" of an allegedly unreasonable rule, standing alone, does not constitute a continuing violation. The union filed a petition for recognition of the bargaining unit, so the unfair practice charge, filed after city's denial of the petition to create a separate bargaining unit for battalion chiefs, is timely.

Woodland City Employees Assn. v. City of Woodland, Case SA-CE-466-M. ALJ Shawn Cloughesy. (Issued 5-30-08; final 6-24-08; HO-U-939-M.) The city unilaterally changed work hours of unit members in anticipation of opening the new community center. The change in work schedules caused by a change in hours of operation was made prior to completion of negotiations with the union. There was no business necessity or emergency that required negotiations to be completed in a short period of time. Return to the status quo was ordered.

Los Angeles Regional Office — Final Decisions

AFSCME Loc. 1902 v. Metropolitan Water Dist. of Southern California, Case LA-CE-309-M. ALJ Ann Weinman. (Issued

4-1-08; final 4-29-08; HO-U-936-M.) Job requirements are normally within the scope of representation. Here, the union waived the right to bargain by agreeing to clear contract language. The union did not, however, waive its right to bargain the effects of the change in job requirements. Two to three days notice before a job posting is an unreasonable amount of time for the union to decide whether to demand negotiations. The district is required to bargain the effects of the certification requirement for operator applicants.

Sacramento Regional Office — Decisions Not Final

Sacramento County Attorneys Assn. et. al v. County of Sacramento, Cases SA-CE-484-M, SA-CE-487-M, SA-CE-497-M, SA-CE-493-M. ALJ Bernard McMonigle. (Issued 5-30-08; exceptions filed 6-24-08.) The county unilaterally eliminated future retirement health benefits for current employees. Retirees are not protected by the Meyers-Milias-Brown Act. However, this change impacts future benefits of current employees who are covered by the act. Although not part of the collective bargaining agreement, and despite an annual employer disclaimer, the retiree health benefit program of over 20 years is an established practice concerning a matter within the scope of bargaining. The employer is directed to restore the status quo and reimburse affected employees for economic losses.

Modesto City Employees Assn. v. City of Modesto, Case SA-CE-469-M. ALJ Christine Bologna. (Issued 6-5-08; exceptions filed 6-27-08.) No violation was found in the denial of requests for representation. The requesting employee was the complainant, not the subject of the investigation, and was informed that no possibility of discipline existed. Other requests for representation were made during coaching sessions where the employee was given work performance direction and advised that discipline would not result from the meetings. No discrimination was found where the city was unable to complete the investigation of the employee's harassment complaint due to the employee's refusal to discuss the alleged violation without representation.

United Public Employees, Loc. 1 v. County of Sacramento, Case SA-CE-477-M. ALJ Bernard McMonigle. (Issued 6-13-08; exceptions due 7-08-08.) The county unilaterally eliminated future retirement health benefits of current employees. Retirees are not protected by the Meyers-Milias-Brown Act.

However, this change impacts future benefits for current employees, who are covered by the act. Although not a part of the collective bargaining agreement, and despite an annual employer disclaimer, the retiree health benefit program of over 20 years is an established practice concerning a matter within the scope of bargaining. In addition, the union may rely on the agreement's zipper clause to refuse to negotiate mid-term changes on matters within scope. The employer is directed to restore the status quo and reimburse affected employees for economic losses.

SEIU Loc. 1021 v. County of Sacramento, Case SA-CE-505-M. ALJ Bernard McMonigle. (Issued 6-16-08; exceptions due 7-11-08.) The county unilaterally eliminated future retirement health benefits for current employees. Retirees are not protected by the Meyers-Milias-Brown Act. However, this change impacts future benefits of current employees who are covered by the act. Although not a part of the collective bargaining agreement, and despite an annual employer disclaimer, the retiree health benefit program of over 20 years is an established practice that concerns a matter within the scope of bargaining. That parties also may have negotiated over the program is not reason to find the subject within scope. Bargaining does not transform a permissive subject into a mandatory subject of bargaining. The employer is directed to restore the status quo and reimburse affected employees for economic losses.

Gilley-Mosier v. County of Yolo, Case SA-CE-457-M. ALJ Shawn Cloughesy. (Issued 6-23-08; exceptions due 7-18-08.) No violation was found where an employee's involuntary reassignment was based on non-discriminatory reasons. The effect of allowing an employee to remain in a position with a salary differential was not authorized by the memorandum of understanding and exposed the county to differentials for similarly situated employees and supervisors. The transfer allowed the employee to keep the differential.

McKnight v. Fresno City Employees Assn., Case SA-CO-52-M. ALJ Bernard McMonigle. (Issued 6-24-08; exceptions due 7-21-08.) The union unlawfully caused agency fees to be deducted without providing the employee with a *Hudson* notice and later providing her with one that did not meet constitutional requirements set forth in PERB regulations. The union failed to appear at a formal PERB hearing on the same issue a

year earlier, and failed to file an answer to the complaint and appear at the PERB informal settlement conference in this case. No formal hearing was scheduled. Under PERB Reg. 32644, the failure to file an answer was deemed an admission to the truth of the material facts alleged in the complaint. The union was ordered to cease and desist collecting agency fees and to return fees collected.

Feger v. County of Tehama, Case SA-CE-500-M. ALJ Shawn Cloughesy. (Issued 6-30-08; exceptions due 7-21-08.) No retaliation was found when the county requested a new eligibility list because of a limited number of candidates, including an employee who testified at a disciplinary arbitration of a co-worker. The county's action was consistent with past practice. The employee's failure to comply with the union's information request was not a violation. The requested information was sought for a PERB hearing, an extra-contractual forum. The union should have used the PERB discovery process and filed a subpoena duces tecum.

San Francisco Regional Office — Decisions Not Final

Santa Clara County Registered Nurses Professional Assn. v. County of Santa Clara, Case SF-CE-229-M. ALJ Bernard McMonigle. (Issued 4-7-08; exceptions filed 6-02-08.) The county failed to bargain prior to placing initiatives affecting matters within the scope of bargaining on the ballot. Both prevailing wage and binding interest arbitration initiative proposals are matters within scope, and cannot be placed on the ballot by the county before fulfilling its duty to meet and confer. The county is not entitled to self-help where it believes the union submitted its own ballot measure in violation of its duty to bargain; it should have filed an unfair practice charge.

California Nurses Assn. v. Regents of the University of California; *Regents of the University of California v. California Nurses Assn.*, Cases SF-CE-762-H; SF-CO-124-H. ALJ Donn Ginoza. (Issued 4-18-08; Exceptions filed 5-22-08.) Violations by the university were found, but the complaint against the union was dismissed. The university did not bargain in good faith over staffing ratios where negotiability was not recognized and proposals were not made. The union's request for information on "formulas and methodology" of patient classification software was reasonable, and the university's denial of the request was a violation. The union's pre-impasse decision to strike (enjoined

by the court after PERB granted the injunctive relief request was provoked by the university's unfair practices and thus did not violate the union's obligation to bargain. Unfair practice strikes are valid under the Higher Education Employer-Employee Relations Act. No violation was found where the university bargained to impasse over a waiver of the union's right to engage in sympathy strikes. (See further discussion of this proposed decision in the Higher Education section of this issue, pp. 48-52.)

Los Angeles Regional Office — Decisions Not Final

Amalgamated Transit Union Loc. 1704 v. Omnitrans, Case LA-CE-358-M. ALJ Ann Weinman. (Issued 3-24-08; exceptions filed 4-18-08.) The employee was terminated in retaliation for union activities. MOU language allowing employee leave to conduct "authorized union business" means authorized by the union, not the employer. The employer's claim of a staffing shortage as a reason to deny union leave requests lacked supporting evidence. The employee's discharge, based on denials of leave and charged absences, also interfered with the right of the union to represent members. The employee must be reinstated with backpay.

Burbank City Employees Assn v. City of Burbank, Case LA-CE-326-M. ALJ Thomas Allen. (Issued 4-18-08; exceptions filed 6-2-08.) The city failed to provide necessary and relevant information requested by the union. PERB maintains a liberal discovery standard. Where the employee is disciplined (three-day suspension) for use of sick leave, the union is entitled to grievance-related information for the disciplinary arbitration. The city's response was untimely and inadequate. The arbitrator ensured that the union received the information. The city was ordered to cease and desist and to post notice of the violation.

Brewington v. County of Riverside, Case LA-CE-261-M. ALJ Ann Weinman. (Issued 4-25-08; exceptions filed 6-9-08.) The county took several adverse actions, including termination of employment in retaliation for the employee's protected activities. The timing of the adverse actions suggest unlawful animus. The county's allegations of workplace threats and other misconduct were not substantiated but were used as a pretext for termination. The inaccurate, unsubstantiated

investigative report was additional evidence of pretext and a retaliatory motive. The county was ordered to reinstate the employee with backpay.

Shelton v. San Bernardino County Public Defender, Case LA-CE-390-M. ALJ Thomas Allen. (Issued 5-12-08; exceptions due 6-2-08.) No violation was found where the employee demanded representation at a non-investigatory interview. The employee failed to produce evidence suggesting that her termination was retaliatory. The county presented ample evidence that the employee's termination was based on the failure to comply with orders to move her workstation.

Amalgamated Transit Union Loc. 1704 v. Omnitrans, Case LA-CE-323-M. ALJ Philip Callis. (Issued 5-27-08; exceptions filed 6-18-08.) The transit authority interfered with employee rights when it refused to allow an off-duty union officer access to a predominantly non-work area on the jobsite; this action also violated the union's right to represent members. The authority unilaterally changed its access rules. MOU language requiring prior permission before entry was inapplicable, and was triggered only when the union contacted bus drivers while out on their routes. The transit authority was ordered to pay attorney's fees and costs incurred in defending the union officer against criminal trespass charges.

Amalgamated Transit Union Loc. 1704 v. Omnitrans, Case LA-CE-372-M. ALJ Thomas Allen. (Issued 6-5-08; exceptions filed 6-27-08.) The transit authority rejected a grievance filed by the union because the grievance procedure generally referred to a grievant as an "employee." However, the union did not clearly and unmistakably waive its statutory right to file the grievance in its own name. The transit authority was ordered to process the union-filed grievances.

CFI-TNG/CWA v. Region 4 Court Interpreter Employment Relations Committee, Case LA-CE-17-I. ALJ Ann Weinman. (Issued 6-13-08; exceptions due 7-8-08.) The Trial Court Interpreter Employment and Labor Relations Act mandates that a trial court cannot provide independent contractors with better working conditions than court-employed interpreters. Here, the employer permitted contractors to leave the worksite early when their assigned case(s) finished, while employees were required to finish their shifts. Considering overall employment benefits, this policy did not establish more-favorable working

conditions for independent contractors than those provided to intermittent interpreters, and did not discourage intermittent interpreter applications.

Report of the Office of the General Counsel

Injunctive Relief Cases

Eleven requests for injunctive relief were filed during the period from March 1 through June 30, 2008. One of these was granted by the board; six were denied; three were withdrawn; and one, as of this report, is pending. (Another request, made during an earlier reporting period, is also pending.)

Requests granted

Regents of the University of California v. AFSCME Loc. 3299, IR No. 548, Case SF-CO-168-H. On May 27, 2008, the university filed a request for injunctive relief to enjoin planned strike activity at U.C. medical centers by two bargaining units represented by the union: the service unit and the patient care technical unit. On May 28, the board granted the request exclusively with regard to the patient care technical unit. The matter was subsequently withdrawn.

Requests denied

California Correctional Peace Officers Assn. v. State of California (DPA), IR No. 542, Case SA-CE-1665-S. On March 11, 2008, the union filed a request for injunctive relief to require the state to return to the bargaining table, post-implementation of the state's last, best, and final offer, due to alleged "changed circumstances." On March 18, the board denied the request.

Ulmschneider v. Los Banos Unified School Dist., IR No. 543, Case SA-CE-2460-E. On March 24, 2008, Ulmschneider filed a request for injunctive relief to require the district to reinstate him to his teaching position. On April 1, the board denied the request.

Hernandez v. SEIU Loc. 1000, IR No. 545, Case SA-CO-371-S. On April 25, 2008, Hernandez filed a request for injunctive relief to require the union to restore his union membership. On May 2, the board denied the request.

Los Angeles Unified School Dist. v. United Teachers of Los Angeles, IR No. 549, Case LA-CO-1348-E. On May 28, 2008, the district filed a request for injunctive relief to enjoin a planned one-hour job action by the union at district schools. On June 3, the board denied the request.

California Correctional Peace Officers Assn. v. State of California (DPA), IR No. 550, Case SA-CE-1688-S. On June 11, 2008, the union filed a request for injunctive relief to address alleged conduct by the state relative to local and side-letter agreements. On June 18, the board denied the request.

California Correctional Peace Officers Assn. v. State of California (DPA; DOCR), IR No. 551, Case SA-CE-1676-S. On June 18, 2008, the union filed a request for injunctive relief to address alleged conduct by the state related to closure of two juvenile facilities. On June 24, the board denied the request.

Requests withdrawn

Orange County Employees Assn. v. County of Orange, IR No. 544, Case LA-CE-448-M. On April 22, 2008, the union filed a request for injunctive relief to enjoin the county from making available to the media certain requested records. On April 24, the request was withdrawn.

Regents of the University of California v. AFSCME Loc. 3299, IR No. 546, Case SF-CO-168-H. On May 21, 2008, the university filed a request for injunctive relief to enjoin planned strike activity at U.C. medical centers by two bargaining units represented by the union: the service unit and the patient care technical unit. On May 25, the request was withdrawn.

AFSCME Loc. 3299 v. Regents of the University of California, IR No. 547, Cases SF-CE-862-H and SF-CE-858-H. On May 23, 2008, the union filed a request for injunctive relief to address alleged bad faith conduct by the university. On May 25 the request was withdrawn.

Requests pending

San Bernardino Public Employees Assn. v. City of Rancho Cucamonga, IR No. 552, Case LA-CE-461-M. On June 25, 2008, the union filed a request for injunctive relief to prevent the city from implementing certain local rule provisions and to require the city to recognize the union as the exclusive representative of a particular bargaining unit.

Sacramento County Deputy Sheriffs Assn v. County of Sacramento, IR. No. 526, Case SA-CE-485-M. On August 7, 2007, the union filed a request for injunctive relief against the county alleging it violated the MMBA by interfering with and dominating the union's ability to conduct business. On August 15, 2007, the board directed PERB staff to expeditiously process the underlying unfair practice charge and reserved its decisionmaking authority with respect to the request for injunctive relief pending the conduct of a prompt informal settlement conference and, if appropriate, a formal hearing before a PERB administrative law judge.

Litigation Activity

Three new litigation cases were opened during the period from March 1 through June 30, 2008.

California Teachers Assn. v. PERB; Journey Charter School, Court of Appeal, 4th Appellate District, Case No. G040106. (No. 1945.) In March 2008, the union filed a petition for review regarding the board's decision to reverse in part the ALJ's proposed decision (which found the charter school violated EERA by refusing to renew the contracts of three teachers in retaliation for their protected activity) and dismiss the case. In June, PERB filed the administrative record with the appellate court.

International Federation of Professional and Technical Engineers, Loc. 21, AFL-CIO v. PERB; San Francisco Unified School Dist., Court of Appeal, 1st Appellate District, Case No. A121202. (No. 1948.) In April 2008, the union filed a petition for writ of extraordinary relief regarding the board's decision to affirm the ALJ's dismissal and finding that the district did not violate the Educational Employment Relations Act by refusing to provide pay parity. The board found that EERA preempts the provisions of the city charter requiring the district to set wages for classified employees represented by the union at levels determined through interest arbitration proceedings for the same classifications. In June, PERB filed the administrative record with the appellate court.

Sacramento County Deputy Sheriffs Assn. v. PERB, Sacramento County Superior Court Case No. 34-2008-00010058. (No. SA-CE-485-M.) In May 2008, the union filed a petition for writ of mandamus to compel PERB "to withdraw the Charge filed on behalf of [the Union] and to dismiss the

Complaint issued." (This litigation relates to litigation pending in the Court of Appeal, 3d Appellate District, Case No. C057877.)

Personnel Changes

Erich Shiners was appointed as legal advisor to Board Member Alice Dowdin Calvillo on March 20, 2008. Since 2006, Shiners has served as an attorney at Renne Sloan Holtzman Sakai, representing public sector and non-profit employers in labor and employment litigation, arbitration, and negotiations. He has served as an adjunct instructor of Appellate Advocacy for McGeorge School of Law since 2004. In 2006, Shiners was a law clerk for Weinberg, Roger & Rosenfeld, and in 2005 was a judicial extern for the Honorable M. Kathleen Butz at the Third District Court of Appeal. Shiners also has been a law clerk at the National Labor Relations Board in Washington, D.C. and the Agricultural Labor Relations Board in Sacramento. He earned a Juris Doctorate degree from the University of the Pacific, McGeorge School of Law, and a Bachelor of Arts in history from California State University, Sacramento.

Precedential Decisions of the

Fair Employment and Housing Commission

California Code of Regulations Title 2, Sec. 7435, authorizes the Fair Employment and Housing Commission, an administrative agency charged with enforcing California's Fair Employment and Housing Act, to designate as precedential, any decision, or part of any decision, that contains a significant legal or policy determination of general application that is likely to recur. Once the commission has done so, the agency may rely on it as precedent and the parties may cite to it in their arguments to the commission and the courts.

One of the commission's decisions designated as precedential is summarized below.

Failure to promote and termination based solely on disability violate FEHA.

(*DFEH v. City of Fullerton*; *Montero* No. 08-04-p, 2-26-08; 1 pp. + 23 pp. ALJ dec.)

Holding: The city violated the FEHA by disqualifying the complainant from promotion and terminating his employment based solely on his disability.

Case summary: On December 17, 2004, the complainant filed a complaint with the DFEH against the City of Fullerton, alleging that the city discriminated against him based on his disability by denying promotion to a maintenance worker position, by denying reasonable accommodation, and by terminating his employment.

The complainant was employed as a laborer who cleaned city parking lots. The position had no benefits. In February 2004, the complainant applied for a maintenance worker position, which included benefits. In July, the city offered the complainant the position he sought on the condition that he successfully complete a post-offer-of-employment medical examination. The doctor who examined the complainant informed city management that the complainant had significant hearing loss in both ears and needed to contact his primary care physician about getting hearing aids.

In August, the complainant was informed that he did not qualify for the maintenance worker position because his hearing loss would cause a safety problem as the work, road repair and maintenance, required awareness of vehicular traffic. Also, for safety reasons, the complainant was not allowed to engage in his current duties without a fellow employee nearby.

After obtaining hearing aids, the complainant was reevaluated by the doctor, who found his hearing with the use of aids satisfactory. The complainant then asked the city street superintendent if he now would be appointed to the permanent maintenance worker position. The superintendent advised the complainant and his supervisor that he did not want him for the job. No explanation was offered, and another applicant was hired. Thereafter, the complainant refused to meet or interact with his supervisors and, on October, 18, 2004, was terminated because he "demonstrated negative attitude towards his supervisors and superintendent."

To prove disability discrimination under the FEHA, the DFEH must establish that the complainant was a qualified individual with a disability, who could perform the "essential functions" of the job with or without reasonable accommodation. The ALJ found that the complainant's hearing loss was a physical disability within the meaning of the act, and that the DFEH demonstrated the complainant was qualified for the position of maintenance worker and

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had the requisite ability to perform its essential functions. This was corroborated by the conditional offer extended to him, his supervisor's initial recommendation for promotion, and his success as a laborer, which involved similar duties. Also, the ALJ noted, after the complainant was fitted with hearing aids, the doctor believed he could execute the duties of his job both independently and as part of a team. Thus, the ALJ found, because the city refused to hire the complainant as a maintenance worker because of his hearing disability, the DFEH established employment discrimination subject to any affirmative defenses advanced by the city.

First, the city argued that the complainant's hearing disability could have posed a safety threat. Under the FEHA, an employer may refuse to hire an employee with a physical disability, even with a reasonable accommodation, when his performance would endanger his own health or safety, or the health or safety of others, the ALJ explained. The ALJ found no medical evidence that the complainant's hearing impairment precluded him from perceiving the flow of traffic. The ALJ emphasized that the examining doctor informed the city that the complainant could perform his job safely as long as he used hearing aids.

The city argued that denying the complainant the promotion was necessary for the safe and efficient operation of its business. The ALJ found the business necessity defense inapplicable to the current charge.

The ALJ found the city presented no factual basis for the bona fide occupation qualification defense because it failed to adopt a practice excluding all hearing disabled employees from its workforce. Moreover, the ALJ found, there was no credible evidence that all persons with such disabilities would be unable to safely and efficiently perform as maintenance workers.

Having rejected the city's defenses, the ALJ concluded that the city violated the FEHA by disqualifying the complainant from the maintenance worker position based solely on his disability, and that the city failed to determine whether there was effective reasonable accommodation for the complainant's disability.

The charge also alleged that the city's termination of the complainant was illegal. The city argued it had a unilateral right to fire the complainant as an at-will employee, and denied that his disability had any role in its decision to discharge him. The city contended it fired the complainant based on his negative attitude toward management, which surfaced around the time he started using the hearing aids.

The ALJ concluded it was only after the complainant's meeting with the superintendent that he became withdrawn and less communicative. Moreover, the ALJ explained, the complainant's attitude change was reasonably related to the city's continued stalling of his promotion, its failure to act properly under the FEHA, and its eventual refusal to promote him. Thus, the ALJ found a causal connection between the complainant's termination and his disability in violation of the FEHA.

The DFEH also asserted that the city failed to provide reasonable accommodation for the complainant. Initially, the city attempted to accommodate the complainant in his position as laborer by allowing him to "partner up" with another employee. However, the ALJ found the city failed to extend this or any other accommodation to the complainant in the context of his desire to promote to maintenance worker.

Finally, the DFEH charged the city with failing to take reasonable steps necessary to prevent discrimination. The ALJ found the city had no policy addressing reasonable accommodation and no procedures addressing employee requests for reasonable accommodation.

As for the remedy, the ALJ determined the complainant was entitled to backpay for wages he should have earned as a maintenance worker beginning in September 2004. The ALJ also found the complainant suffered emotional distress for over two years and ordered the city to pay \$45,000 in damages.

The commission voted to adopt the ALJ's decision.