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LETTER FROM THE EDITOR

Dear *CPER* Readers:

As we were putting the final touches on this issue of *CPER*, a plan to address the country's grave financial predicament had yet to be hammered out. Reasonable minds can —and do — differ over what is the best plan of action. But, a few things seem clear.

One is that the American people are not happy about being left holding the bag and taking the fall for Wall Street's mistakes and bad judgment. Lawmakers throughout the country — Republicans and Democrats alike — got an earful from their constituents back home. The message — taxpayers resent having to write the \$700 billion check.

Another thing that appears certain is that the scope of the economic crisis could be huge. It's a little scary to hear people comparing the current state of affairs to the "Great Depression." That's one likening I'd just as soon forego.

This issue includes stories that describe how the state's own financial problems — and the faulty budget process — have come home to roost on public sector employers and employees. Close to home, Governor Schwarzenegger reached into the university's budget and eliminated all funding for the Miguel Contreras Labor Program, a joint venture of the UCLA and UC Berkeley Labor Centers' Institutes for Research on Labor and Employment.

As the national economic blunders trickle down to make more trouble for the State of California and its cities, counties, school districts, and higher education institutions, we all will be tested. As practitioners, you're going to have to make hard decisions and become even more creative problem solvers.

During belt-tightening times like these, it is especially important to preserve and strengthen a dialogue that facilitates and encourages an exchange of ideas and, hopefully, some inventive solutions. The old cliché about thinking outside the box could not be more vital.

I hope that *CPER* can be a place to bring your good ideas and strategies to light with the goal of serving the entire public sector community on both sides of the bargaining table.

Please don't hesitate to call me and share your positive and innovative ideas during the challenging time ahead.

Sincerely,



Carol Vendrillo
CPER Editor

U.S. Supreme Court Rejects 'Class-of-One' Theory of Equal Protection

Melanie M. Poturica and David A. Urban

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PUBLIC SECTOR employers were on the brink of heightened judicial scrutiny until the United States Supreme Court rejected the “class of one” theory as a basis for an Equal Protection claim. This summer, in *Engquist v. Oregon Department of Agriculture*,¹ the United States Supreme Court decided a case of considerable importance to public sector employers. In *Engquist*, the court considered whether the United States Constitution’s Equal Protection Clause requires that every employment decision of state and federal agencies have a “rational basis.” If the court had found that Equal Protection did impose a rational basis requirement, then public sector employees, even at-will employees, could challenge the legitimacy and rationality of employment decisions in federal court.

Presumably at issue in this case were employment decisions to terminate, demote, discipline, or take other action. The plaintiff’s assertion was that if management made the employment decision based on subjective dislike of the employee, favoritism, or other reasons too petty to qualify as “rational,” the employer would be liable and possibly incur punitive damages in favor of the employee.

The vehicle for this proposed rational basis review was the “class-of-one” theory of equal protection. The *Engquist* case and the theories underlying it do not make easy reading for non-lawyers, or even for lawyers. Fortunately the proposed class-of-one theory in the context of public sector employment expired with the court’s *Engquist* decision. As a result, human resources officers and labor lawyers do not need to change their practices.

The *Engquist* case nevertheless merits careful study because it illustrates primary forces underlying developments in public sector employment law — the constitutional restrictions on the government as employer, the hesitancy of the judiciary to become embroiled in employment disputes, the need for the government employer to exercise some unfettered discretion in its operations, and the principle that judges

should have the ability to review alleged improper actions by the government as an employer.

Equal Protection and the ‘Rational Basis’ Test

The concept of equal protection dates back to the constitutional amendments following the Civil War. The Fourteenth Amendment of 1868 provides that “no state shall...deny to any person within its jurisdiction the equal protection of the laws.” Although equal protection applies only to the government, it applies to virtually all branches of it. The U.S. Supreme Court has interpreted equal protection to apply to any state actors, including districts, counties, and cities.²

The Supreme Court has established the following three levels of “scrutiny” for testing equal protection claims against government decisions: strict scrutiny, intermediate scrutiny, and rational basis review. Courts apply strict scrutiny when the government action in question discriminates against a suspect class, such as a racial group.³ Strict scrutiny also is invoked when no suspect class is implicated, but the government action impacts a fundamental right, such as the right to vote.⁴

Intermediate scrutiny is a less stringent but still searching test. It applies to government action that allegedly discriminates based on certain other specific classifications, such as gender.⁵

All other types of government actions are thought to be subject to rational basis review.⁶ A law survives rational basis review “so long as it bears a rational relation to some legitimate end.”⁷ This is a relatively easy test to satisfy. Essentially, a law will be upheld if there is any plausible basis for it. A court will, however, find a law lacking in a rational basis if it could have been motivated by nothing other than ill-will or prejudice against a particular group.⁸

The Class-of-One Theory of Equal Protection

The class-of-one theory of equal protection rests on a logical progression from the constitutional theories described above. Because all laws and government action rest on distinctions between organizations or persons, they all operate to sort persons into “classes” — for example, people who have not paid their taxes, people who are entitled to academic grants, or people who have purchased real property. Thus, the theory goes, because all laws and government decisions separate persons into “classes” to some extent, all laws and government decisions should be subject to “rational basis” review.

Under this theory, even a single person or organization can constitute a stand-alone “class” — the government under equal protection cannot single them out and treat them in a way that lacks a rational basis.

The Supreme Court recognized the class-of-one theory of equal protection in the regulatory context in *Village of Willowbrook v. Olech*.⁹ There, a municipality conditioned a property owner’s water service on a grant of a 33-foot easement, even though it required a 15-foot easement from every other property owner in the village.¹⁰ The court allowed the

owner to sue on the class-of-one theory, recognizing a cognizable claim when the “plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.”¹¹ Based on *Olech*, other federal courts applied the class-of-one theory in the regulatory context to forbid government actions that were arbitrary, irrational, or malicious.¹²

Courts began to extend the class-of-one theory to public employment.¹³ The apparent rationale in the First, Second, Fifth, Sixth, and Tenth Circuits was that every government action should be subject at least to “rational basis” review, including the myriad of employment decisions made by public sector employers. The *Engquist* case required the U.S. Court

Under the class-of-one theory, a single person or organization can constitute a stand-alone ‘class’ that the government cannot treat in a way that lacks a rational basis.

of Appeals for the Ninth Circuit (which hears appeals from federal courts in Western states including California, Arizona, Oregon, and Washington) to determine whether it would join these circuits in recognizing an extension of the doctrine to employment decisions.

The Facts of Engquist's Case

Plaintiff Anup Engquist, a native of India, was hired by Norma Corrigan and began work for the Oregon Department of Agriculture in 1992 as an international food standards specialist. Initially, she was responsible for developing a database of food regulations for different countries. Later, her work focused on marketing the department's certification services and consulting with its clients.

Engquist had "repeated difficulties" with a coworker, systems analyst Joseph Hyatt, and complained to Corrigan several times that Hyatt monitored her excessively and had made false statements about her. Corrigan met with Hyatt's supervisor, and Hyatt was required to attend diversity and anger-management training.

In June 2001, assistant director John Szczepanski assumed oversight of part of the organization. He allegedly informed a client he could not "control" Engquist, and that Engquist and Corrigan "would be gotten rid of." In the fall of 2001, Hyatt told a coworker that both he and Szczepanski were working to "get rid of" Corrigan and Engquist. Later, Engquist and Hyatt both applied for an open manager position. Although Engquist had a more extensive educational background and greater experience with customer service, Hyatt was offered the position instead. Szczepanski said he made the decision based on Hyatt's business experience and prior work as a chemist.

In January 2002, Engquist was told that her position was being eliminated due to a reorganization. Thereafter, she and Corrigan were laid off.

Engquist filed suit in federal district court, naming the department, Szczepanski, and Hyatt as defendants. She argued not only discrimination under Title VII and various civil rights statutes, but that the defendants had violated her equal protection rights under a class-of-one theory. The trial court opined that Engquist could succeed on that theory if she could prove "that she was singled out as a result of animosity on the part of Hyatt and Szczepanski" — i.e., "that their actions were spiteful efforts to punish her for reasons unrelated to any legitimate state objective" — and if she could demonstrate,

on the basis of that animosity, that "she was treated differently than others who were similarly situated."¹⁴

The jury hearing the equal protection claim concluded that the defendants were liable for violations of equal protection and substantive due process, and awarded Engquist \$175,000 in compensatory damages, which were not specifically tied to any particular successful claim; \$125,000 in punitive damages on the equal protection claim; and \$125,000 in punitive damages on the separate claim of contract interference.

The defendants appealed to the U.S. Court of Appeals for the Ninth Circuit, arguing against the viability of a class-of-one equal protection claim.

The Ninth Circuit departed from other federal circuits and held that the class-of-one theory did not apply in the context of government employment.

Ninth Circuit Decision

In *Engquist v. Oregon Department of Agriculture*, the Ninth Circuit, in a 2-1 decision, departed from other federal circuits and held that the class-of-one theory of equal protection did not apply in the context of government employment.¹⁵ The Ninth Circuit acknowledged that the U.S. Supreme Court had upheld a class-of-one equal protection challenge to state legislative and regulatory action in *Olech*,¹⁶ but it disagreed that the principle should extend to the employment context. In the majority opinion, Judge A. Wallace Tashima acknowledged that the Supreme Court often has afforded the government greater leeway when it acts as employer rather than regulator.

However, extending the class-of-one theory to public employment, Tashima concluded, would lead to extensive judicial interference with state employment practices and “completely invalidate the practice of public at-will employment.”¹⁷

Judge Stephen Reinhardt dissented, arguing that the class-of-one theory should apply because the doctrine provided needed protection against arbitrary and irrational public employment actions.¹⁸

The U.S. Supreme Court granted the department’s petition to hear the case in order to resolve whether a class-of-one theory was viable in the public context.

Practical Reasons Against ‘Rational Basis’ Review in Public Employment

Defendants and organizations who submitted *amici curiae* (“friends of the court”) briefs to the Supreme Court advanced a number of practical and public policy reasons against extension of the class-of-one theory to public employment.

Elimination of ‘at-will’ employment. Many employment relationships in the United States are considered “at will,” meaning that either the employee or employer can terminate the relationship for any reason. For example, California Labor Code Sec. 2922 provides that “[a]n employment, having no specified term, may be terminated at the will of either party on notice to the other.” Employment may be ended by either party “‘at any time without cause,’ for any or no reason, and subject to no procedure except the statutory requirement of notice.”¹⁹ In the public sector, the concept of “at-will” employment typically applies to probationary employees, certain high-level officials, and other types of employees, depending on the particular arrangement with the employer.

Applying the class-of-one theory of equal protection to public employment would effectively eliminate at-will employment by subjecting virtually all public personnel

decisions (e.g., hiring, firing, transfers, and promotions) to rational basis scrutiny. To prove a class-of-one claim, a plaintiff must establish only that (1) the government treated him or her differently from other similarly situated persons; (2) the difference in treatment was intentional; and (3) the difference in treatment was not rationally related to any legitimate government purpose.²⁰ This is not a high threshold to meet. In addition, nothing limits this theory of liability to employee terminations as opposed to other types of employment actions, including demotions or discipline.

If class-of-one equal protection were extended to public employment, a public employer that dismisses an employee (or makes any other personnel decisions such as discipline, hiring, promotion, or transfer), could be sued and forced to defend against an equal protection claim. In addition, aggrieved employees might be able to obtain punitive damages against individual defendants.²¹ The obligation to prove a “rational” and well-motivated reason for a termination directly contradicts the principle that either party to an employment relationship can end it for “any or no reason,” and, as a practical matter, would eliminate at-will public employment.

Existing protections for public employees. Application of the class-of-one theory to public employment is misguided because state and federal law already provide numerous due process protections for the vast majority of public employees against employment decisions lacking a rational basis. First, states often expressly recognize the right of public employees to engage in collective bargaining.²² As a result, there are countless memoranda of understanding and collective bargaining agreements between public employers in the State of California and the unions that represent their employees. Most of these agreements provide for notice, appeal rights, and other protections against arbitrary or irrational personnel decisions.

Judge Reinhardt argued that the doctrine should apply because it provided needed protection against arbitrary and irrational public employment actions.

The civil service rules of most public employers, including those in California, provide for “good cause” or “for cause” dismissals once an employee has completed his or her probationary employment period. Numerous counties and municipalities have created civil service commissions that provide a forum to independently review employee discipline and terminations (e.g., the Los Angeles County Civil Service Commission, Los Angeles City Civil Service Commission, City of Long Beach Civil Service Commission, City of Napa Civil Service Commission, County of Sonoma Civil Service Commission, City and County of San Francisco Civil Service Commission, and City of Coronado Civil Service Commission). Public employees who have these “for cause” rights are generally entitled to due process procedures before significant disciplinary action is implemented, as well as post-disciplinary appeal rights before a non-biased hearing officer or body, where the employer bears the burden of proof.²³

Furthermore, if an aggrieved employee still is unhappy with the outcome following the appeal, he or she can file a petition in state court to obtain writ review of the decision. Likewise, due process protections that provide for arbitration, as opposed to a hearing, will enable the employee to seek court review through a petition to vacate the arbitrator’s award.

These substantive and procedural due process safeguards are protections similar to, and arguably more effective than, rational-basis review as a defense against arbitrary and irrational employment decisions.

Extensive judicial involvement. Application of rational-basis review of public employment personnel decisions would invite enormous unwarranted judicial involvement in the internal workings of government organizations. It would impose great impracticalities and also impose a significant threat of liability that would disrupt those organizations’ personnel functions. The dissent in *Engquist*, which favored

adoption of the class-of-one theory, itself reveals the perils of the theory.

Attempting to describe the circumstances where a supervisor’s personal dislike of a subordinate would not violate equal protection, the dissent referred to dislike with “roots in the employee’s mediocre performance or lack of initiative, or in some other response to the individual not based on malice or irrationality, even if the employee has met the minimum requirements of the job.”²⁴ Given the subjective nature of most run-of-the-mill personnel decisions, determining whether the “dislike” of an employee is “rational” would be a very difficult task and, as such, would undoubtedly lead to unpredictable and inconsistent results. Failing to meet the rational-basis standard could mean substantial liability for the government agency, and maybe individual liability for the supervisor. This specter of liability would dissuade managers from taking necessary personnel actions.

The dissent also suggested that a plaintiff in a class-of-one employment case could show the lack of a rational basis by demonstrating that an asserted reason was merely a pretext for different treatment.²⁵ Unlike an ordinary class-based discrimination claim, where the

plaintiff must demonstrate some class-based animus in order to prevail,²⁶ under a class-of-one theory, a jury could find no rational basis — and therefore liability — simply because the jury disbelieved the employer’s proffered reason.

Contrary to the contentions of the plaintiff, class-of-one claims might not be difficult to prove, would be filed more frequently, and would demand increased judicial involvement in the public sector workplace.

The floodgates of litigation. Application of the class-of-one theory in public employment would greatly expand the number of claims public employees could file. Uncertainties that exist as to the scope of the cause of action would demand clarification through further litigation. For example, does an employer’s adverse action that violates anti-discrimination or

Given the subjective nature of most run-of-the-mill personnel decisions, determining whether the ‘dislike’ of an employee is ‘rational’ would be a difficult task.

wage and hour laws also lack a “rational basis”? Would this “concurrent” liability expose managers to personal liability or to punitive damages available under Section 1983? These and other questions demonstrate the potential for widespread expansion of “rational basis” review of public employment decisions, and hence increased litigation.

Supreme Court Decision

The U.S. Supreme Court agreed with the Ninth Circuit, and held that the class-of-one theory of equal protection does not apply in the context of public employment.²⁷

In an opinion by Chief Justice John Roberts, the court first observed a difference between the government exercising “the power to regulate or license, as lawmaker,” and the government acting “as proprietor, to manage [its] internal operation.”²⁸ In the context of public employment, the government has substantially greater leeway in dealing with citizen employees than when it is administering its sovereign power over citizens at large.²⁹ This means that, although government employees do not lose their constitutional rights when they go to work, those rights must be balanced against the realities of work in the context of government organizations. Moreover, whether the claimed employee right implicates the basic concerns of the relevant constitutional provisions should be balanced against whether the right can give way to the prerogatives of the government as employer.³⁰

The court distinguished the *Olech* line of cases, explaining that they did not involve employment but, rather, the regulation of property and taxation. In those cases, the government agency was asked to apply a clear standard against which exceptions, even for a single plaintiff, could readily be assessed. The fact that government regulators could treat individuals differently — even when given a particular standard to apply — raised a concern of arbitrary classification, which justified that the government agency be required to provide a “rational basis” justification.³¹

By contrast, the Supreme Court reasoned, state action in the employment context involves discretionary decisionmaking founded on numerous subjective, individualized assessments. Treating like individuals differently, in fact, constitutes an accepted exercise of the discretion granted governmental officials.³²

The court observed that acceptance of the class-of-one theory would directly contradict the long-standing principle of at-will employment in the public sector. Concerns for equal protection did not justify abrogation of a well-established feature of public employment.³³

Finally, the court was guided by the “common-sense realization that government offices could not function if every employment decision became a constitutional matter.”³⁴ If Engquist were correct, the court observed, “any personnel action in which a wronged employee can conjure up a claim of differential treatment will suddenly become the basis for a federal constitutional claim.”³⁵

Chief Justice Roberts’ opinion concluded by concisely weaving together each of the legal and public policy bases for rejecting the class-of-one theory in public employment:

Acceptance of the class-of-one theory would directly contradict the long-standing principle of ‘at-will’ employment in the public sector.

In short, ratifying a class-of-one theory of equal protection in the context of public employment would impermissibly constitutionalize the employee grievance. The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. Public employees typically have a variety of protections from just the sort of personnel actions about which Engquist complains, but the Equal Protection Clause is not one of them.³⁶

In a dissenting opinion authored by Justice John Paul Stevens, in which Justices David Souter and Ruth Bader Ginsburg joined, Justice Stephens argued that, out of concern for making a federal case out of every public employee grievance, the majority overreacted by negating any “rational basis” requirement whatsoever. Justice Stevens stated: “Today, the Court creates a new substantive rule excepting state employees from

the Fourteenth Amendment's protection against unequal and irrational treatment at the hands of the State. Even if some surgery were truly necessary to prevent governments from being forced to defend a multitude of equal protection 'class of one' claims, the Court should use a scalpel rather than a meat-axe.³⁷ Justice Stevens argued that applying a rational basis standard would not be onerous; all a public employer need do to defend itself is show any legitimate reason for the challenged decision. The employer need not have made the right choice in a particular circumstance; indeed a "choice among two or more rational alternatives" would satisfy the "rational basis" test.³⁸

Aftermath — The End of a Theory of Liability

In summary, the Supreme Court, in a 6-3 decision, rejected a basis for liability that would have substantially increased public sector employment litigation. As a result, it is tempting to say that human resources officials and managers need not concern themselves with the issues resolved in *Engquist*. Unfortunately, that is not the case. Public employers should never leave a record of decisionmaking that, in hindsight, mistakenly appears to rest on arbitrary, petty concerns or to lack a sufficient basis. To do so invites discrimination, retaliation, or other charges. In addition, although the Supreme Court declined to permit extensive judicial involvement in employment relations, a substantial number of jurists, including several federal circuits, believe that extensive judicial oversight is needed and appropriate in public sector employment. In the future, other sources of law besides equal protection might be found to provide the mechanism for such review. *

- 1 (2008) 128 S.Ct. 2146.
- 2 *Bolling v. Sharpe* (1954) 347 U.S. 497, 74 S.Ct. 693, 98 L. Ed. 884.
- 3 See *Grutter v. Bollinger* (2003) 539 U.S. 306, 326, 123 S.Ct. 2325, 156 L. Ed. 2d 304, 162 CPER 5.
- 4 See *Reynolds v. Sims* (1964) 377 U.S. 533, 562, 84 S.Ct. 1362, 12 L. Ed. 2d 506.
- 5 *Miss. Univ. for Women v. Hogan* (1982) 458 U.S. 718, 723, 102 S.Ct. 3331, 73 L. Ed. 2d 1090.
- 6 *Fitzgerald v. Racing Assn.* (2003) 539 U.S. 103, 106-07, 123 S.Ct. 2156, 156 L. Ed. 2d 97.
- 7 *Romer v. Evans* (1996) 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L. Ed. 2d 855, 111 CPER 57.
- 8 See, e. g., *Romer, supra*, 17 U.S. at 632; see generally *Tucson Woman's Clinic v. Eden* (9th Cir. 2004) 379 F.3d 531, 543-544.
- 9 (2000) 528 U.S. 562, 120 S.Ct. 1073, 145 L. Ed. 2d 1060.
- 10 *Id.* at 563.
- 11 *Id.* at 564.
- 12 See *Squaw Valley Development Co. v. Goldberg* (9th Cir. 2004) 375 F.3d 936, 944 (applying class-of-one theory to environmental regulation of ski resorts); *Valley Outdoor, Inc. v. City of Riverside* (9th Cir. 2006) 446 F.3d 948, 955 (applying theory to city's denial of billboard permits).
- 13 See *Scarborough v. Morgan County Board of Education* (6th Cir. 2006) 470 F.3d 250, 260-61; *Hill v. Borough of Kutztown* (3d Cir. 2006) 455 F.3d 225, 239; *Whiting v. Univ. of Miss.* (5th Cir. 2006) 451 F.3d 339, 348-50; *Neilson v. D'Angelis* (2d Cir. 2005) 409 F.3d 100, 104; *Levenstein v. Salafsky* (7th Cir. 2005) 414 F.3d 767, 775-76; *Campagna v. Mass. Department of Environmental Protection* (1st Cir. 2003) 334 F.3d 150, 156; *Bartell v. Aurora Public Schools* (10th Cir. 2001) 263 F.3d 1143, 1148-49.
- 14 *Engquist v. Oregon Dept. of Agriculture* (D.Or. 2004) 2004 WL 2066748, *5.
- 15 (9th Cir. 2007) 478 F.3d 985, 992-993
- 16 (2000) 528 U.S. 562, 120 S.Ct. 1073, 145 L. Ed. 2d 1060.
- 17 *Id.* at 993-96.
- 18 *Id.* at 1011-15 (Reinhardt, J., dissenting).
- 19 See *Guz v. Bechtel National, Inc.* (2000) 24 Cal. 4th 317, 335, 144 CPER 33; see also *Carter v. Escondido Union High School Dist.* (2007) 148 Cal. App. 4th 922, 929, 184 CPER 46 (at-will employment applied in public employment context). Of course, federal and state statutes prohibit employers from making employment decisions that discriminate or retaliate against employees for exercise of certain rights, e.g., Gov. Code Secs. 12940 et seq. (Fair Employment and

- Housing Act provisions regarding employment); Cal. Labor Code Sec. 1102.5 (prohibiting retaliation against whistleblowers).
- 20 *Olech, supra*, 528 U.S. at 564.
- 21 See *Smith v. Wade* (1983) 461 U.S. 30, 35, 103 S.Ct. 1625, 75 L. Ed. 2d 632.
- 22 E.g., Gov. Code Secs. 3500 et seq.
- 23 See *Duncan v. Department of Personnel Admin.* (2000) 77 Cal.App.4th 1166, 141 CPER 51.
- 24 *Engquist*, 478 F.3d at 1013 n.1.
- 25 *Id.* at 1013-14.
- 26 See, e.g., *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L. Ed. 2d 338, 100 CPER 49.
- 27 *Engquist, supra*, 128 S.Ct. at 2150-2157
- 28 *Id.* at 2151.
- 29 *Id.* (citing *O'Connor v. Ortega* [1987] 480 U.S. 709, 721-722, 107 S.Ct. 1492, 94 L. Ed. 2d 714, 73 CPER 73).
- 30 *Id.* at 2152 (citing *Connick v. Myers* [1983] 461 U.S. 138, 103 S.Ct. 1684, 75 L. Ed. 2d 708, CPER SRS 22).
- 31 *Id.* at 2152-54.
- 32 *Id.* at 2154-55.
- 33 *Id.*
- 34 *Id.* at 2156 (quoting *Connick, supra*, 461 U.S. at 143).
- 35 *Id.* at 2156.
- 36 *Id.* at 2157 (quoting *Connick, supra*, 461 U.S. at 154, and *Bishop v. Wood* (1976) 426 U.S. 341, 350, 96 S.Ct. 2074, 48 L. Ed. 2d 684).
- 37 *Engquist, supra*, 128 S.Ct. at 2158 (Stevens, J., dissenting).
- 38 *Id.* at 2159.

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Stereotypes and Decisionmaking: Reconciling Discrimination Law With Science

Jocelyn D. Larkin

UNTIL THE 1970s, major symphony orchestras were composed almost entirely of male musicians, even though talented females competed for spots during “open” auditions. But once orchestras implemented “blind” auditions, where a screen is placed between the musician and the hiring officials, the selection of female musicians increased dramatically.¹

The outcome of this unintended psychology experiment came as no surprise to students of employment decisionmaking. After more than 30 years of research, social scientists now understand that stereotypes influence all facets of judgment, from who will be hired to how one’s performance is evaluated. A key conclusion is that decisionmakers routinely rely on gender and racial stereotyping to make up their minds, but *without* necessarily being conscious that they are doing so. This “implicit” or “unwitting” bias can have a profound influence on workplace opportunities for female, minority, and older workers.

The law has long recognized that gender and racial stereotyping in the workplace can constitute illegal discrimination. However, most of these cases focus on overt or conscious reasons for decisions, rather than on subtle or implicit bias. Indeed, in the 40 years since the civil rights statutes were enacted, discrimination law has evolved based on the belief that at the time an employment decision is made, the decisionmaker is aware of his or her motive and can accurately report this reasoning at a later date. This legal model of workplace decisionmaking, however, conflicts with the scientific understanding of stereotyping and how decisions are actually made. It has been argued that “antidiscrimination doctrine lags far behind the psychological science of intergroup bias.”²

The body of research on stereotyping and intergroup bias is vast and a full explication of this research is beyond the scope of this article.³ What follows is an overview of the scientific and the legal issues, highlighting where law and science are

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at odds. With this understanding, practitioners can better frame discovery and legal theories, and identify circumstances where expert testimony is needed to contradict common misconceptions about decisionmaking and the influence of stereotypes.

Key Findings in the Science of Stereotyping

What stereotypes are and how they operate. Stereotypes are beliefs about a group's characteristics that are assumed to also characterize the individual members of the group. Individuals are categorized into demographic groups (e.g. gender, age, class, race), and our stereotypes about a group's characteristics influence how we perceive the individual.⁴ Stereotypes "tend to exaggerate both the perceived differences of members of different groups (e.g. men and women) and the perceived similarities of a particular man or woman to the general categories of *male* and *female*."⁵

Gender and race stereotypes are widely shared, and their content is very consistent across society. For example, men are consistently perceived as oriented toward action and achievement (i.e. agentic). Women are seen as nurturing and passive (i.e. communal).⁶ Blacks are negatively stereotyped as less intelligent and less hard-working than whites.⁷

Pertinent to employment litigation is the fact that stereotypes are associated with particular jobs and occupations. Stereotypically masculine traits generally are considered more valuable in the workplace than stereotypically female traits.⁸ Many jobs are still perceived as better suited to women (e.g. nurse, preschool teacher) or men (e.g. construction worker, truck driver).⁹ Research has found that discrimination is most likely to occur when the characteristics of the person do not fit with the stereotype of the job (i.e. lack of fit).¹⁰

Stereotypes are not necessarily negative. Asian-Americans often are stereotyped as "diligent and successful" at school and

work, although also assumed to be less socially skilled than whites.¹¹ In some cases, stereotypes may be "accurate" as a demographic matter (e.g. young people are more "tech savvy" than older people) but also may carry inaccurate attributions (e.g. older people are unable to learn technology).¹² Stereotypes can be descriptive (e.g. persons with disabilities are heroic) or prescriptive (e.g. persons with disabilities should not pursue careers in high-stress occupations).¹³

Whether stereotypes are activated depends on the context.¹⁴ Decisionmakers are more likely to rely on gender

stereotypes when they lack information on which to base a decision, when they are asked to evaluate individuals based on subjective criteria, when they lack motivation to reach an accurate decision, or when they work in an environment where stereotypes are considered acceptable (e.g. a sexualized environment).¹⁵

How stereotypes affect decisions in the workplace. Decisionmakers generally are unaware of how stereotypes affect their judgment.¹⁶ Experiments demonstrate that individuals "lack access to the mental

processes involved in evaluation and judgment, and are quite poor at accurately attributing the causes of their actions and decisions."¹⁷ Thus, unconscious stereotyping may bias judgments long before a promotion decision is made, so that the ostensibly objective data for choosing among candidates is already tainted. One researcher argues that "[i]t will be the rare employer indeed who can accurately identify the reasons why he hired or promoted one employee over another, fired another, or set salary increases as he did."¹⁸

Research confirms that "much inter-group discrimination is both unintentional and unconscious."¹⁹ This means a person "can be 'nonprejudiced' as a matter of conscious belief and yet remain vulnerable to the subtle cognitive and behavioral effects of implicit stereotypes."²⁰

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The subtle effect that stereotypes have on memory, perception, and judgment²¹ can, for example, affect an evaluator's recall: information that is consistent with stereotypes will be remembered, data that is inconsistent with the stereotype will not.²² So, a supervisor will notice that a new mother left early to care for a sick child, but not that she stayed late and solved a difficult technical problem.

Stereotypes influence how an employee's success or failure is understood. The strong sales record of a man will be attributed to hard work or skill, while the same achievement for a woman will be credited to "good luck."²³ A woman who is a self-promoter (i.e. highlights her strengths and successes) is seen as pushy, while a self-promoting man is a "go-getter" who knows his own worth.²⁴ One study found that successful performance by African-American managers was more likely to be attributed to help from others than to their own effort or ability, compared with the attributions for similar white managers.²⁵

Stereotypes cause us to gravitate to those who share our traits.²⁶ When evaluating employees, supervisors will apply standards more leniently to those in the "in-group." Those in the "out-group" will not get the benefit of the doubt.²⁷

Minimizing the influence of stereotyping on employment decisions. Fortunately, research suggests that with the right tools and motivation, stereotyping in employment decision-making can be minimized.

Decisionmakers are less likely to rely on stereotypes when they have adequate information, enough time, and the "motivation" to make accurate decisions.²⁸ Motivation can take the form of accountability, where decisionmakers expect to be asked to explain their choice of a particular candidate. Such "stereotype inhibitors" are already standard features in workplaces with effective human resources systems.

Discrimination Law and Stereotyping

As social scientists enhance their empirical understanding of how decisions are made and stereotypes operate, discrimination law must keep pace with these advances. Unfortunately, case law is inconsistent in its treatment of unconscious stereotyping.

The Supreme Court on conscious and unconscious stereotyping. The Supreme Court has held that gender and racial stereotyping can constitute illegal discrimination, and that

stereotypes persist in affecting equal opportunity. While the court has held that "subconscious" stereotyping exists and can be challenged at least under a disparate impact theory, the decision of *Price Waterhouse v. Hopkins*²⁹ — which involved a mixed-motive disparate treatment claim — arguably rests on an outdated model of purely conscious stereotyping.

In *Price Waterhouse*, the Supreme Court recognized sex stereotyping as a form of disparate treatment discrimination. Ann Hopkins, the only woman among 88 candidates for partnership in the accounting firm, was passed over because she lacked stereotypical feminine character traits. Despite a documented record of professional success, she was criticized for using profanity, and for being "overly aggressive" and "macho."³⁰ She was advised to walk, talk, and dress "more femininely," to wear makeup and jewelry, and to "take a course at charm school."³¹ The court left no doubt that such sex stereotyping was illegal:

As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."³²

The subtle effect that stereotypes have on memory, perception, and judgment can affect an evaluator's recall.

The court noted that both descriptive and prescriptive stereotypes can be an illegal motive for an employment decision: “an employer who acts on the basis of a belief that a woman *cannot be* aggressive, or that she *must not be*, has acted on the basis of gender.”³³

While recognizing that Title VII “tolerates no...discrimination, subtle or otherwise,”³⁴ the *Price Waterhouse* plurality assumed that reliance on stereotypes would be conscious, volitional, and contemporaneous with the actual decision:

In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer *at the moment of the decision* what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.³⁵

Legal scholars see this formulation as inconsistent with scientific understanding of how stereotyped thinking operates:

Decision makers are often *not* aware of the impact of a target’s social group membership on their judgments, and those biased judgments are often formed quite early in the social perception process, long before the moment that a decision about the target person is made.³⁶

A year before *Price Waterhouse*, in *Watson v. Fort Worth Bank & Trust*,³⁷ the Supreme Court acknowledged the “problem of subconscious stereotypes and prejudices” in employment decisions. In *Watson*, the question was whether a policy of “committing promotion decisions to the subjective discretion of supervisory employees” could be challenged under the disparate impact doctrine. The court found the delegation of subjective decisionmaking authority to lower-level managers could be reasonable, but it did not foreclose the possibility of discriminatory intent:

The courts have long held that a claim for disparate treatment requires proof of discriminatory intent.

It does not follow, however, that the particular supervisors to whom the discretion is delegated always act without discriminatory intent. Furthermore, even if one assumed that any such discrimination can be adequately policed through disparate treatment analysis, *the problem of subconscious stereotypes and prejudices would remain*....If an employer’s undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII’s proscription against discriminatory actions should not apply.³⁸

In using the term “subconscious stereotypes,” the Supreme Court recognized that stereotypes which operate outside the awareness of the decisionmaker would nonetheless be actionable under disparate impact analysis.

Without explicitly addressing the distinction between overt and implicit stereotyping, Chief Justice William Rehnquist highlighted the continuing danger of “subtle” gender stereotypes in a case involving discrimination based on family responsibilities:

Stereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men....Those perceptions... lead to subtle discrimination....The fault line between work and family [is] precisely where sex-based overgeneralization has been and remains the strongest.³⁹

The Supreme Court has not expressly addressed whether or how unconscious stereotypes will be weighed in disparate treatment cases.

Protection against employment discrimination caused by unwitting or unconscious bias. Does Title VII protect against adverse decisions based on unconscious bias? It is worthwhile to focus on what Title VII actually says. The statute requires proof of a *causal link* between the adverse action and the individual’s protected status:

[I]t shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.⁴⁰

While the statutory language focuses on causation, not intent or motive, courts have long held that a claim for *disparate treatment* requires proof of discriminatory intent.⁴¹ In contrast, claims for *disparate impact* — challenges to facially neutral policies that adversely affect a protected group and are not justified by business necessity — do not require proof of intent.⁴²

When Congress amended Title VII in 1991, it codified an alternative means of establishing liability, which expressly defined liability based on motive — specifically decisions motivated by both permissible and impermissible factors:

[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice.⁴³

While this amendment recognized that multiple factors could be at work, it continued to anticipate that these motives are easily identified and neatly catalogued.

Few lower courts have expressly addressed whether a decision caused by unconscious bias satisfies the requirement of discriminatory intent. In *Thomas v. Eastman Kodak*,⁴⁴ the First Circuit did so, concluding that disparate treatment was established when the decision was caused by unconscious bias:

The Supreme Court has long recognized that unlawful discrimination can stem from stereotypes and other types of cognitive biases, as well as from conscious animus....Stereotypes or cognitive biases based on race are as incompatible

with Title VII's mandate as stereotypes based on age or sex;... [t]he ultimate question is whether the employee has been treated disparately "because of race." *This is so regardless of whether the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias.*⁴⁵

The EEOC defines "intentional discrimination" to include reliance on unconscious stereotypes:

Intentional discrimination occurs when an employment decision is affected by the person's race. It includes not only racial animosity, but also conscious or unconscious stereotypes about the abilities, traits, or performance of individuals of certain racial groups.⁴⁶

A number of class action lawsuits have successfully challenged the use of subjective employment policies under both disparate treatment and disparate impact theories.⁴⁷ The theory of the plaintiffs, frequently supported by expert testimony, is that when managers are permitted to exercise unfettered subjective judgment about candidates for promotion, unconscious stereotypes are more likely to influence decisions:

The mere presence of subjectivity does not raise an inference of discrimination. But when discretionary, subjective decision making is supplemented by evidence that subconscious stereotypes and prejudice operate in a vacuum created by the absence of objective, validated criteria, causation can be found.⁴⁸

In the case of a class action lawsuit, the causal link is bolstered by statistical evidence of an adverse affect on the plaintiff group.

Since *Watson*, case law has begun to recognize the role of unconscious stereotypes and implicit bias in employment discrimination, but much more clarification is needed.

Disconnect between law and science. Legal scholars have identified several employment law doctrines where the law and social science are at odds.

The EEOC defines 'intentional discrimination' to include reliance on unconscious stereotypes.

The first example is the so-called “honest belief” rule. To satisfy the third step of the *McDonnell Douglas* framework, a plaintiff must show that the legitimate reasons offered by the defendant employer were not its true reasons, but were a pretext for discrimination. In *Reeves v. Sanderson Plumbing Products*,⁴⁹ the Supreme Court held that one way to show pretext was to demonstrate that the defendant’s explanation is unworthy of credence.

Some lower courts have construed the burden in pretext cases to require that a plaintiff prove “not only that the employer’s proffered reason is unworthy of credence, but also that the employer did not honestly believe the reason it gave.”⁵⁰ The plaintiff will not prevail if the decisionmaker “honestly believed in the non-discriminatory reasons it offered, even if the reasons are foolish or trivial or even baseless.”⁵¹

The premise of the honest belief rule is that a decisionmaker will know the reason for his or her decision and the reason will be either honest or an intentional lie. The science suggests that the answer is more complex:

[E]mpirical cognitive social psychology has demonstrated that the lay psychological theory that underlies the honest belief rule is woefully incomplete....A well-meaning but implicitly biased decision maker can believe that he is basing a judgment about a member of a stereotyped group on legitimate nondiscriminatory reasons when, in fact, the target’s group membership “caused” the decision maker to view the target in an unjustifiably negative light.⁵²

Where plaintiffs are required to prove the employer lied, claims of employment discrimination will be significantly more difficult to prove.⁵³

A second disconnect between the law and social science is referred to as “same actor inference.” In determining whether a discrimination plaintiff has offered sufficient evidence of

pretext to withstand a summary judgment motion to dismiss the case, many courts allow the employer the benefit of the same actor inference. If “the employee was hired and fired by the same person within a relatively short time span,” there is “a strong inference that the employer’s stated reason for acting against the employee is not pretextual.”⁵⁴ A “relatively short time span” has been interpreted to be as long as four years.⁵⁵

The stated rationale for the rule is that “[i]t hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job.”⁵⁶ The psychological premise underlying the same actor inference is that the decisionmaker has a prejudiced disposition and, in all circumstances, will act consistently with that disposition. Social science suggests this premise is deeply flawed. The psychological processes at work are far more complex and dependent on the context.⁵⁷

For example, a male lawyer hires an Asian female into a secretarial position. She performs well but fails to conform

to his prescriptive stereotypes for Asian women (i.e. she is neither quiet nor deferential). He may be unaware of his own biases but decides she is not a “good fit” and fires her. It is not the case that the lawyer dislikes all Asians or all women as the same actor inference would suggest. Rather, the secretary failed to conform to implicit race and gender stereotypes for Asian women. While she is a victim of discrimination, the same actor inference could defeat her cause of action.

Because the same actor inference is invoked to defeat many employment discrimination lawsuits, its mistaken presumption about human behavior is significant.

The third divergence between case law and social science is the “stray remarks doctrine.” It is rare for overtly prejudicial statements to be made in the workplace, and discrimination plaintiffs typically prove intent through circumstantial evi-

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dence. But, even in cases where such remarks are shown, some courts will discount the evidence as merely “stray remarks” if they are not made by the decisionmakers and/or are not contemporaneous with the adverse employment decision”:

“[I]solated comments that are no more than stray remarks in the workplace are insufficient to establish that a particular decision was motivated by discriminatory animus.”

However, a particular remark can provide an inference of discrimination when the remark was (1) made by the decision maker, (2) around the time of the decision, and (3) in reference to the adverse employment action.⁵⁸

The problem with this doctrine is that it relies on a presumption that remarks earlier in time are not evidence of the decisionmaker’s later intent. Again, this artificial line-drawing is inconsistent with scientific understanding about the decisionmaking process and the effects of bias.⁵⁹ This is not to say that every biased statement should give rise to an inference of discrimination. Some off-hand remarks should not be entitled to much weight. The point is, though, that judges should evaluate the weight to be given the evidence not based on arbitrary *legal* presumptions but on science.

Using the Science in Practice: Tips for Practitioners

While developments in employment law and social science continue to evolve, there are ways for employment practitioners to draw on this science in their daily practice.

Consider the science when advising clients about personnel practices. No system is guaranteed to eliminate the influence of unexamined bias. However, social science provides important insight into the practices that are most vulnerable to implicit prejudice and what factors will inhibit stereotyping.

Employers operating under subjective personnel criteria are particularly susceptible to the influence of unwitting bias. Conversely, decisionmakers benefit from processes that provide clear, written performance standards, accurate and timely information about candidates, sufficient time for informed decisionmaking, and accountability. Clients concerned with ensuring equal opportunity should choose or revise their personnel practices accordingly.

Employers operating under subjective personnel criteria are particularly susceptible to the influence of unwitting bias.

Use discovery to address issues of implicit bias.

Employment practitioners understand there is rarely a “smoking gun” in a discrimination case. Decisionmakers generally do not admit, either in depositions or written documents, that their selections were based on illegal factors. Indeed, disparate treatment cases are built on circumstantial evidence of discriminatory motive. In conducting discovery, practitioners should consider the ways in which unexamined stereotypes may have influenced a decision. For example, consider whether the supervisor was affected by recall bias when preparing an important performance evaluation for a client — remembering events that are consistent with

stereotypes about your client but forgetting those that are not. Investigate whether the comparator got the promotion because of a leniency bias, i.e. giving the benefit of the doubt to the in-group member, and not to your client. Understanding how stereotypes affect perception, memory, and judgment can improve the depth and quality of discovery.

Educate judges about implicit bias. Pretrial motions and trial briefs offer opportunities to educate judges about the implications of stereotypes, both expressed and unexamined.

Address the unexamined stereotypes of jurors. Litigators should identify and address misconceptions jurors may have about how decisions are made.⁶⁰ For example, jurors may believe a supervisor who is a member of a protected group would not discriminate against another member of the same

group. Or, a juror might assume that, unless a decisionmaker is consistently and overtly racist in all contexts (i.e. home, work, social life), he or she could not have discriminated based on race in an individual employment decision. Social science tells us that both of these assumptions are empirically wrong. Unless examined, they could influence a juror's evaluation of the evidence. A jury consultant can identify these attitudes and develop strategies for defusing them.

Use an expert in stereotyping. Expert witnesses can be an effective means of illuminating the content and mechanisms of stereotypes. In *Price Waterhouse*, the Supreme Court endorsed the plaintiff's use of expert testimony from a social psychologist who concluded that the partners' evaluations of Ann Hopkins reflected sex stereotyping.⁶¹ Her conclusion was based on both the overtly gender-based critiques, as well as gender neutral comments (e.g. "abrasive," "aggressive"). The testimony was admissible even though the expert "could not say with certainty whether any particular comment was the result of stereotyping."⁶²

Experts testify about what common stereotypes are and how such bias operates, both in general and in the workplace.⁶³ They address the vulnerability of an employer's processes to the influence of stereotypes and consider whether the corporate culture encourages or validates particular biases. Expert testimony will consider the presence or absence of employment practices that mitigate the influence of stereotypes.⁶⁴

Conclusion

Some legal scholars argue that antidiscrimination doctrine should better account for and protect those affected by implicitly biased employment decisions.⁶⁵ Others disagree.⁶⁶ One's view may depend on whether the purpose of the statute is to identify and punish overtly racist or sexist employers or to compensate those who have suffered from adverse employment actions caused by discrimination. Returning to the orchestra illustration, should anti-discrimination law focus on the orchestra directors with firmly held prejudices against female musicians? Or should the law focus on processes (like the screen) that recognize and minimize the unconscious bi-

ases of well-meaning decisionmakers, that may inhibit equal opportunity?

To ensure the promise of anti-discrimination law is fulfilled, legal models of decisionmaking in the workplace should recognize and incorporate the empirical scientific understanding about the influence of unwitting bias. *

1 Claudia Goldin & Cecilia Rouse, "Orchestrating Impartiality: The Impact of 'Blind' Auditions on Female Musicians," 90 *The Am. Econ. Rev.* 715, 717 (2000). While females represented less than 10 percent of new hires before 1970, that figure has risen to between 35 and 50 percent since the early 1980s in the most prestigious orchestras. *Id.*

2 Linda Krieger & Susan Fiske, "Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment," 94 *Cal. L. Rev.* 997, 1026 (2006).

3 For a useful summary of the science written for lawyers and judges, refer to *Modern Scientific Evidence: The Law and Science of Expert Testimony*, Vol. 2, David L. Faigman et al. eds. West (2002) West Publishing. The book includes a chapter on gender stereotyping (Jennifer S. Hunt et al., "Gender Stereotyping"). Professor Joan C. Williams also distilled the research in an excellent and very accessible article for practitioners, "The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the 'Cluelessness' Defense," 7 *Emp. Rts. and Emp. Policy J.* 401 (2003).

4 Jeannette N. Cleveland et al., *Women and Men in Organizations: Sex and Gender Issues at Work* 42-43 (Lawrence Erlbaum Assoc. 2000).

5 *Id.* at 43 (reference omitted).

6 Hunt et al., *supra* note 3 at 589.

7 Patricia G. Devine & Andrew J. Elliot, "Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited," 21 *Personality and Soc. Psych. Bull.* 1139, 1144 (1995)

8 Williams, *supra* note 3, at 407-408.

9 Cleveland et al., *supra* note 4, at 160-64.

- 10 Cleveland et al, *supra* note 4, at 164.
- 11 Monica Lin et al., "Stereotype Content Model Explains Prejudice for an Envied Outgroup: Scale of Anti-Asian American Stereotypes," 31 *Personality and Soc. Psych. Bull.* 34, 35 (2005).
- 12 See Hunt et al., *supra* note 3, at 615-16.
- 13 Williams, *supra* note 3, at 406.
- 14 Williams, *supra* note 3, at 447; Hunt, et al., *supra* note 3 at 609-10.
- 15 Hunt et al., *supra* note 3 at 602.
- 16 Linda Krieger, "The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity," 47 *Stan. L. Rev.* 1161, 1214-15 (1995).
- 17 *Id.*
- 18 *Id.*
- 19 Linda Krieger, "Civil Rights Perestroika: Intergroup Relations After Affirmative Action," 86 *Cal. L. Rev.* 1251, 1332 (1998).
- 20 Krieger & Fiske, *supra* note 3, at 1033.
- 21 *Id.*
- 22 Williams, *supra* note 3, at 410.
- 23 Hunt et al., *supra* note 3, at 593.
- 24 Williams, *supra* note 3, at 425.
- 25 J.H. Greenhaus and S. Parasuraman, "Job Performance Attributions and Career Advancement Prospects: An Examination of Gender and Race Effects," 55 *Org. Behavior and Human Dec. Processes* 273, 285-88 (1991).
- 26 Perdue et al., "Us and Them: Social Categorization and the Process of Intergroup Bias," 59 *Journal of Personality and Soc. Psych.*, 475-486 (1990).
- 27 Williams, *supra* note 3, at 415.
- 28 Hunt et al., *supra* note 3, at 602.
- 29 (1989) 490 U.S. 228.
- 30 *Id.* at 235.
- 31 *Id.*
- 32 *Id.* at 251 (quoting *Los Angeles Dept. of Water and Power v. Manhart* [1978] 435 U.S. 702, 707 n. 13).
- 33 *Id.* at 250 (emphases added).
- 34 *Id.* at 243 (quoting *McDonnell-Douglas Corp. v. Green* [1973] 411 U.S. 792, 801).
- 35 *Id.* at 250 (emphasis added).
- 36 Krieger & Fiske, *supra* note 2, at 1010.
- 37 (1988) 487 U.S. 977, 990-991.
- 38 *Id.* at 990-91 (emphasis added).
- 39 *Nevada Dept of Human Resources v. Hibbs* (2003) 538 U.S. 721, 723, 736 (under Family and Medical Leave Act).
- 40 42 USC Sec. 2000e-2(a)(1) (emphasis added).
- 41 *Burlington Industries v. Ellerth* (1998) 524 U.S. 742, 768 (1998) ("A disparate treatment claim required a plaintiff to prove an adverse employment consequence and discriminatory intent by his employer.").
- 42 *International Brotherhood of Teamsters v. United States* (1977) 431 U.S. 324, 335.
- 43 42 USC Sec. 2000e-2(m) (emphasis added).
- 44 (1st Cir. 1999) 183 F.3d 38
- 45 *Id.* at 58-59 (citations omitted and emphasis added); see *Pitre v. W. Elec. Co.* (10th Cir. 1988) 843 F. 2d 1262, 1273; *Brooks v. Woodline Motor Freight, Inc.* (8th Cir. 1988) 852 F.2d 1061, 1064; *EEOC v. Inland Marine Indust.* (9th Cir. 1984) 729 F.2d 1229, 1235-36; *Sycock v. Milwaukee Boiler Mfg. Co.* (7th Cir. 1981) 665 F.2d 149, 155.45
- 46 EEOC, *Questions and Answers About Race and Color Discrimination in Employment*, http://www.eeoc.gov/policy/docs/qanda_race_color.html.
- 47 *McClain v. Lufkin Industries* (E.D. Tex. August 29, 2005) No. 9:97-CV-063, Slip Op. at 12, aff'd in relevant part (5th Cir. 2008) 519 F.3d 264; *Stender v. Lucky Stores* (N.D. Cal. 1991) 803 F. Supp. 259, 335 (liability under both disparate treatment and disparate impact). See *Dukes v. Wal-Mart Stores* (9th Cir. 2007) 509 F.3d 1168 (affirmed class certification in disparate treatment and disparate impact challenge to subjective decision-making); *Butler v. Home Depot, Inc.* (N.D. Cal. August 29, 1997) 1997 WL 605754 (denying summary judgment on class claims challenging subjective criteria under disparate treatment and disparate impact theories).
- 48 *McClain, supra* at note 46, slip op. at 12.
- 49 (2000) 530 U.S. 133, 147.
- 50 Krieger & Fiske, *supra* note 2, at 1034.
- 51 *Jackson v. E.J. Brach Corp.* (7th Cir. 1999) 176 F.3d 971, 984.
- 52 Krieger & Fiske, *supra* note 4, at 1038. 52
- 53 See e.g. *Millbrook v. IBP, Inc.* (7th Cir. 2002) 280 F.3d 1169, 1175.
- 54 *Antonio v. Synergy Network Inc.* (10th Cir. 2006) 458 F.3d 1177, 1183, quoting *Proud v. Stone* (4th Cir. 1991) 945 F.2d 796, 797-98 (cataloging circuits that have adopted the "same actor" inference).
- 55 *Brown v. CSI Logic* (5th Cir. 1996) 82 F.3d 651, 658.
- 56 *Proud v. Stone, supra*, 945 F.2d 796 (quoting Donohue & Siegelman, "The Changing Nature of Employment Discrimination Litigation," 43 *Stan.L.Rev.* 983, 1017 [1991]).
- 57 Krieger & Fiske, *supra* note 2, at 1039-1052.

58 *Hemsworth v. Quotesmith Com., Inc.* (7th Cir. 2007) 476 F.3d 487, 491 (quoting *Merillat v. Metal Spinners, Inc.* [7th Cir. 2006] 470 F.3d 685, 690).

59 Krieger, *supra* note 16, at 1183-84.

60 Gary Blasi, "Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology," 49 *UCLA Law Rev.* 1241, 1273-1281 (2002).

61 Dr. Susan Fiske.

62 *Price Waterhouse, supra*, 490 U.S. at 236.

63 See, e.g., *International Healthcare Exch. v. Global Healthcare Exch.* (S.D.N.Y. 2007) 470 F. Supp. 2d 345, 355.

64 *Ellis v. Costco Wholesale* (N.D. Cal. 2007) 240 F.R.D. 627, 649; *Stender v. Lucky Stores* (N.D. Cal. 1992) 803 F. Supp. 259, 301-303; cf. *EEOC v. Morgan Stanley & Co.* (S.D.N.Y. 2004) 324

F. Supp. 2d 451, 462 ("[Expert applying social framework analysis] may properly testify about gender stereotypes, and about how these stereotypes may have affected decisions at Morgan Stanley. He may also testify regarding whether policies and practices relating to gender bias might affect employees' utilization of an equal employment opportunity program, but may not seek to show that alleged deficiencies in such a program are evidence of discrimination.").

65 Melissa Hart, "Subjective Decisionmaking and Unconscious Discrimination," 56 *Ala. L. Rev.* 741 (2005); Krieger, *supra* note 16; Krieger & Fiske, *supra* note 2; Krieger, *supra* note 16.

66 Amy Wax, "Discrimination as Accident," 74 *Ind. L. J.* 1129, 1132-33 (1999) (arguing against the imposition of liability for unconscious discrimination).

Recent Developments

Public Schools

Algebra Mandate Exacerbates Teacher Shortage

THE CALIFORNIA State Board of Education's decision to require all eighth-graders to take Algebra 1 starting in 2011 adds a tremendous burden to already understaffed middle and elementary schools, according to many educators, including State Superintendent of Schools Jack O'Connell and the California Teachers Association. The board issued its surprise decision on July 9, with little notice or opportunity for comment.

The board's ruling was in reaction to pressure from federal officials and from Governor Schwarzenegger. The federal Department of Education ordered a change in the way California tested eighth-graders in math, finding that the current system violates the federal No Child Left Behind Act. In 1997, the state board of education set a goal of having all eighth-graders learn Algebra 1 by 2014. The ratio of eighth-graders who took Algebra 1 went from 16 percent in 2000 to 52 percent today. The state standardized test taken by those students is different than that taken by general math students.

The federal Department of Education found that the test given to general math students was out of compliance with the NCLB because

it measured only sixth- and seventh-grade material, and did not include algebra even though the state established algebra as eighth-grade material. The statewide requirements and the test have to match, according to the NCLB. The department ordered Cali-

The test given to general math students was out of compliance with the NCLB.

fornia to either include some Algebra 1 material in the general math exam or require all students to take the Algebra 1 test. Failure to comply by the end of July would have disqualified California from some federal programs and would have resulted in placing most middle schools on a list of failing campuses.

Favoring the education department's first option, O'Connell proposed the board develop an exam to be given to all general math eighth-graders that would include some algebra. It seemed as if the board would adopt O'Connell's test, called "Algebra Lite" by some critics, until 24-hours before

the board was to meet, when Governor Schwarzenegger sent the board a letter. Favoring option two, he urged the board to make Algebra 1 the test for all eighth-graders. The board agreed, and ordered that all eighth-graders be required to take Algebra 1 within three years, making California the first state to do so.

The action caused an outcry from administrators and teachers. O'Connell claims that it will cost at least \$3.1 billion to institute the plan, and has pushed Schwarzenegger to come up with the money. In O'Connell's opinion, it is unfair and unproductive to expect students to take Algebra 1 when schools lack the resources to teach it. He noted that, even among those students who have taken Algebra 1, only two out of five scored in the proficient level on the state test. And, among the eighth-graders in general math, 86 percent of African-American students and 84 percent of Latino students score below proficient on the state test, he said.

"Forcing all eighth-grade students to take a standardized algebra test is another one-size-fits-all approach that punishes students and public schools, and a step backward for California's standards and accountability system," said CTA President David A. Sanchez. "It is another outlandish example of the No Child Left Behind Act and of political leaders making irresponsible decisions that will hurt our kids."

The board's requirement puts a tremendous amount of pressure on all

schools, from kindergarten through high school. Kathy Woods, president of the California Mathematics Council, which represents about 10,000 math instructors, said there are simply not enough math teachers to teach Algebra 1 to all eighth-graders. According to the Center for the Future of Teaching and Learning, a non-profit corporation located in Santa Cruz, more than 33,000 new math and science teachers

*California has begun
to offer a new
credential to teach
Algebra 1.*

will be needed at the middle and high school levels in the next 10 years, due to attrition and retirement alone. The board's new directive will require at least 3,000 additional eighth-grade algebra teachers within three years.

A study commissioned by the center in 2007 found that about three out of every ten students who have taken Algebra 1 in middle school were taught by teachers who were not fully credentialed or who were teaching outside their field of training. "In math, it really matters that teachers know the subject matter well," said Margaret Gaston, president and executive director of the center. "The need is such that recruiting new teachers alone will not be enough," she continued. "We also really need to retrain the teachers

we have." Elementary school teachers must be taught to get younger children prepared for Algebra 1. Training and recruiting of high school teachers must be undertaken in anticipation of more students taking higher-level math courses.

There are indications that additional trained math teachers are on the way. The California State University System, which produces many of the state's teachers, instituted the Mathematics and Science Teacher Initiative three years ago. In 2002-03, only 349 credentialed math teachers graduated from the state college system. In 2006-07, that number increased to 788. California has begun to offer a new credential that authorizes an individual to teach Algebra 1, Geometry,

and Algebra 2 in the middle or high school grades. Two hundred and sixty-one students pursued this credential in 2006-07.

The California School Boards Association and the Association of California School Administrators have filed a lawsuit alleging the board of education failed to give adequate notice that it would be making such a big change in public policy and that school districts did not have the opportunity to voice their concerns. The groups also allege that board members exceeded their authority because setting the state's curriculum is the purview of the legislature. They are asking that the court declare the board's Algebra 1 mandate "null and void." *

New Budget Leaves Schools Short

THE BUDGET has been signed and it is "a disaster" for the state's public schools, according to David Sanchez, president of the California Teachers Association. While this year's budget provides for the minimum allowed under Proposition 98, approximately \$58 billion, the \$2 billion increase from last year will not even cover inflation.

School districts were hoping for a budget increase of 5.66 percent this year instead of the .7 percent provided. The difference is about \$3 billion, according to Jennifer Kuhn, an analyst at the state Legislative Analyst's Office.

This "reduction in the cost-of-living adjustment will further tighten the vise on local school budgets as districts across the state face increased costs for supplies, food, transportation and employee health care costs," said Superintendent of Instruction Jack O'Connell.

There is some good news from "the glass is half full" perspective. Proposition 98 was not suspended, as Governor Schwarzenegger threatened to do earlier this year. He also said he would cut approximately \$4.8 billion from the school budget, but that did



Education is when you read the fine print. Experience is what you get if you don't.

— Pete Seeger, folksinger

Talk about fine print! Certificated K-12 employees and representatives, and public school employers — including governing board members, human resources personnel, administrators, and their legal representatives — must 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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Pocket Guide to K-12 Certificated Employee Classification and Dismissal

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

<http://cper.berkeley.edu>

not come to pass. And, the districts hold out hope that cost-of-living funds will be restored in the event money becomes available.

Educators found nothing in the budget to celebrate, however. “This gimmick-filled budget...will hurt public schools, colleges, health care, working families and communities for years,” said Sanchez in a CTA press release. “This budget cuts \$3 billion from public education this year and never restores those funds,” he continued. “It gives the governor new powers to cut funding for some education programs mid-year, undermines Proposition 98...and will certainly guarantee that the amount California spends on its students remains locked at the bottom nationwide.”

Marty Hittelman, president of the California Federation of Teach-

ers, said that the budget “fails to provide adequate education funding. It undermines vital health and human services that students need to achieve their best.” California School Boards Association Executive Director Scott Plotkin was more concise in his criticism, stating, “School districts are going to do a lot of cutting. It’s a mess.” Superintendent O’Connell said the new budget is so bad that “we need to begin having serious discussions for next year’s budget right away — like today.”

The biggest criticism leveled by educators is that the legislature failed to bring in any new money. Opponents successfully blocked all attempts to raise revenues, including the governor’s proposal to increase the sales tax and the Democrats’ plan to raise taxes on the wealthiest Californians. “The

only group that refused to compromise was the Republican caucus,” said Hittelman. “As a result of their ideological inflexibility,” the budget “is only a temporary fix, and it will hurt millions of Californians,” he warned. And, echoed Sanchez, “Failing to provide any new revenues, this ‘new deal’ budget is no real budget at all.”

Schools and community colleges suffered as a result of the 85-day delay in the passage of the budget, and the effects will be felt for many months. During the budget impasse, schools received only about 70 percent of what was owed to them, with billions of dollars withheld from special education, books, libraries, adult education, and transportation. Many districts laid off teachers and support staff because of uncertainty about how much money

they would have available for salaries. Some closed schools because they could not be sure that they would have the funds to keep them open.

CTA's directors and top executive staff reportedly are contemplating new political strategies as part of the budget fallout. One proposal under consider-

ation is a referendum on the March ballot that would block corporate tax cuts and allocate the increased funds to schools. Also a possibility is a freeze on CTA's contributions to political candidates during the upcoming November election. *

UTLA Declares Impasse in Contract Negotiations with LAUSD

AFTER MORE than a year of "reopener" talks authorized by provisions of the 2006-09 contract between the Los Angeles Unified School District and United Teachers of Los Angeles, the parties asked the Public Employment Relations Board for a formal decla-

The district claims that the union's demand is untenable.

ration of impasse. The request was granted on September 18, and the parties will proceed to mediation this month.

Negotiation topics that have reached impasse focused on salary, school safety, and working conditions. Health benefits are negotiated jointly with seven other unions. Although there has been no agreement reached on that issue either, negotiations are proceeding and impasse has not yet been declared.

LAUSD has refused to agree to any raise for UTLA's 48,000 bargaining unit members. The district claims that the union's demand for a 6 percent raise is untenable, and notes that teachers received a 6 percent raise in 2006-07. It says that it already has cut \$427 million from its 2008-09 budget to address its deficit. The district also said, in a press release announcing the impasse and pending mediation, that "increased benefit costs for current and retired employees are by contract part of total compensation. Escalating costs — pushing the District's total burden to almost \$1 billion per year — must be considered along with salary negotiations."

The union argues that LAUSD received a 4.53 percent cost-of-living adjustment from the state for 2007-08, none of which was passed along to union members. On its website, <http://www.utla.net>, the union says that "the issue is not one of fund availability, but of priorities." It claims that LAUSD spent \$845 million on outside contrac-

tors, 89 percent of which had nothing to do with education, and spent an additional \$135 million to fix its new computerized payroll system. UTLA provides figures on its website to back up its claim that non-school expenditures increased by more than 16 percent from 2005-06 to 2006-07.

UTLA also points to other school districts in the Los Angeles area that it says used their state cost-of-living increases to offer employees raises of from 2 to 5 percent, specifically naming Burbank, Glendale, Long Beach, and Pasadena. "If they can afford it, so can LAUSD," UTLA claims.

When contacted by CPER for specifics on its safety and working

UTLA says the district did not pass along a state cost-of-living adjustment.

condition proposals, UTLA President A.J. Duffy explained that there were a number of issues to be resolved. For example, he cited the presence of toxins at many schools, requiring employees to run the water twice a day to make drinking water safe for students. He also said there are situations where teachers are located in bungalows without any means of communicating with the office. The union wants LAUSD to supply these teachers with

cell phones. Being forced to work at sites where asbestos abatement is being conducted also concerns the union. Duffy said the district just spent \$1.288 million to beef up security at the main office, but refuses to spend anything for safety at the schools. Union spokesperson Marla Eby informed *CPER* that LAUSD has made it clear that it will not agree to any new safety regulations or changes in working conditions that require an expenditure of funds.

It is not yet known how the new state budget will affect negotiations. According to Duffy, it will give the district approximately \$60 to \$70 million more than anticipated.

The district remains hopeful that mediation will help break the impasse. "This is a positive and important step for us," said Superintendent David L.

Brewer III, referring to the appointment of a mediator. "The children of Los Angeles and their families need their teachers. Our number-one priority at LAUSD must be doing the right thing for children, and that means doing everything we can to reach agreement with our dedicated teachers. I am very hopeful this mediation process will lead to an agreement soon that is in the best interest of our children, our teachers and the entire school district."

During negotiations, the union has been outraged by provisions in the 2008-09 LAUSD budget to cancel paid professional development days and implement four mandatory unpaid furlough days. UTLA calculates that these measures would cut salaries by 3.5 percent. It filed an unfair practice

charge with PERB, alleging that the proposal to eliminate paid professional development days is a mandatory subject of bargaining. The union accused the district of violating the Educational Employment Relations Act by failing to bargain in good faith, interfering with the rights of bargaining unit employees, and denying UTLA the right to represent bargaining unit employees. PERB issued a complaint against LAUSD on September 18. If the parties are unable to reach a settlement, a hearing is likely to occur within 90 to 180 days, according to the union.

UTLA takes the position that the district's mandatory furlough proposal violates a provision of the current contract that sets the number of employee paid work days.

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Experience is a hard teacher because she gives the test first, and the lesson afterwards.

— Vernon Sanders Law, baseball player

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

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Pocket Guide to the Educational Employment Relations Act

By Bonnie Bogue, Carol Vendrillo, Dave Bowen and Eric Borgerson • 7th edition (2006) • \$15

<http://cper.berkeley.edu>

Duffy told *CPER* the union is creating an escalating time line that will culminate in a call for a strike at

the end of January or beginning of February if the district continues to refuse to meet its demands. *

Education Code Payments Are Part of Temporary Disability Benefits

THE FIRST District Court of Appeal ruled that payments to an injured employee by a school district under Education Code Sec. 44043 are, in part, temporary disability benefits under workers' compensation laws. Therefore, reasoned the court in *Mt. Diablo Unified School Dist. v. Workers'*

Temporary disability commenced with the first Sec. 44043 payment.

Compensation Appeals Board, the two-year time limit for receipt of workers' compensation benefits begins to run when the teacher receives the first Sec. 44043 payment, which augments workers' compensation benefits with accrued leave.

Nicole Rollick, a special education assistant, suffered a work-related injury. The school district, which was self-insured for workers' compensation, began paying Rollick benefits under Sec. 44043. This section directs a district to pay an injured employee

receiving temporary disability benefits his or her normal wages by supplementing the disability benefits with the employee's accrued leave time.

In Rollick's case, after two years, the district asked the Workers' Compensation Appeals Board for an order terminating her payments based on Labor Code Sec. 4656. This statute mandates termination of disability benefits two years from the date payments commence. Rollick objected, claiming that she had not begun receiving temporary disability payments until after the district stopped paying the Sec. 44043 benefits.

A workers' compensation judge found that the Sec. 44043 payments were not temporary disability payments within the meaning of the Labor Code and that the two-year period had not begun to run with the first Sec. 44043 payment. The district's petition requesting review by the Court of Appeal was granted.

Court of Appeal Decision

Under Sec. 44043, when a school district employee with available leave time is disabled and receiving temporary disability benefits under the work-

ers' compensation laws, the employee endorses his or her disability check and gives it to the school district, explained the court. In turn the school district pays the employee his or her normal wage as long as the employee has accrued leave available.

The court agreed with the district that entitlement to Sec. 44043 benefits is contingent on payment of workers' compensation temporary disability payments. An employee is entitled to

*Rollick received
all that she was
entitled to.*

use his or her accumulated leave time which, when *added* to the workers' compensation benefits, provides for a full day's wage or salary. Logically, then, the date that the temporary disability starts cannot be any later than the first payment under Sec. 44043, it noted. "Further, each subsequent section 44043 payment is contingent on receipt of a temporary disability check and consists, in part, of temporary disability benefits. The fact the school district issues a single check combining temporary disability and leave benefits does not change the essence of the underlying payments," said the court.

The court was not swayed by Rollick's contention that, because the district did not follow the procedure

outlined in the code by issuing the disability check to her and then having her endorse it back to the district, the district cannot argue that temporary disability commenced with the first Sec. 44043 payment. Rollick's position was that she was not receiving disability benefits, but instead simply received full salary from the district.

The court reasoned that to accept Rollick's argument would be to "elevate form over substance." Noting that Rollick received all that she was entitled to, the court explained, "Although the Legislature has set forth a certain procedure to follow in section 44043, we do not believe it would be concerned with a slight administrative deviation that is mutually beneficial to the parties and achieves the same end result. To conclude otherwise would lead to an absurd result."

The court annulled the opinion of the WCAB and sent it back for further proceedings. (*Mt. Diablo Unified School Dist. v. Workers' Compensation Appeals Bd.* [2008] 165 Cal.App.4th 1164.) *

Local Government

PERB Jurisdictional Issue Heads to Supreme Court

FIRST, THERE was the decision of the Sixth District Court of Appeal in *City of San Jose*, holding that the Public Employment Relations Board has exclusive jurisdiction to determine whether certain “essential employees” will be allowed to participate in a strike.

Score one for PERB.

Then, in *County of Contra Costa*, the Second District Court of Appeal ruled to the contrary. It concluded that there is no reason to defer to PERB’s expertise, particularly when the record does not suggest that any party had committed an unlawful labor practice.

Score one for the superior courts.

The third case, *County of Sacramento v. AFSCME*, was before the Third District Court of Appeal. There, the court ruled that PERB has exclusive jurisdiction over strike activity arising under the Meyers-Milias-Brown Act, siding with its learned Sixth Circuit brethren in *San Jose*.

However, the California Supreme Court has granted review in the *City of San Jose* case and deferred briefing in the *Contra Costa* case pending the decision in *San Jose*, thereby signaling that the PERB jurisdictional issue will be put to rest by the high court.

County of Sacramento

In 2006, while engaged in collective bargaining, several unions representing county employees threatened a strike. On July 18, 2006, United Public Employees, Local No. 1, whose contract had expired on June 30, 2006, in-

The appellate court viewed the question to be one of exhaustion of administrative remedies.

formed the county that it would strike on September 1, 2006, if its contract demands were not met. On August 3 and again on August 24, Local 1 told the county the strike would begin on September 5.

On August 31, the county sought an injunction against AFSCME Local 146, UPE Local 1, Teamsters Local No. 228, International Union of Operating Engineers Stationary Local 39, AFL-CIO, and the Construction Trades Council. It requested that the Sacramento superior court issue an

order enjoining the unions from participating, or in any way encouraging certain essential county employees from participating, in the anticipated strike. The county named nearly 200 employees whose jobs were alleged to be critical to the provision of essential county services. The court granted the county’s application for a temporary restraining order, concluding that injunctive relief was justified by the threat to public health and safety.

PERB, which had been permitted by the court to intervene in the action, along with the unions, challenged the court’s injunctive relief order and asserted that the board had exclusive jurisdiction over the strike.

The appellate court viewed the question before it to be one of exhaustion of administrative remedies — whether an administrative remedy is available through PERB for the strike activity challenged by the county in its superior court actions.

PERB Jurisdiction Over Strikes

To answer the question, the court first reviewed the history of PERB’s role in the public sector collective bargaining process. It traced public employees’ organizational rights back to the Brown Act, followed by the MMBA, the Educational Employment Relations Act, the Dills Act, and the subsequent laws targeting other categories of public employees.

With citation to *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, the court took note of PERB's traditional jurisdiction over strikes that potentially amount to an unfair labor practice under EERA. "The result of these cases was to establish PERB's exclusive initial jurisdiction over any activity that is arguably protected or arguably prohibited by the EERA. Where such activity is at issue," said the court, "it is for PERB to determine in the first instance whether the activity in fact falls within the scope of the EERA and, if so, what remedy is appropriate."

In 2001, the legislature vested PERB with exclusive jurisdiction over violations of the MMBA.

The court also reviewed the Supreme Court's seminal decision in *County Sanitation Dist. No. 2 v. Los Angeles County Employees Assn.* (1985) 38 Cal.3d 564, 65 CPER 2, announcing that "the common law prohibition against all public employee strikes is no longer supportable." The court recognized, however, that "there are certain essential public services, the disruption of which would seriously threaten the public health or safety."

As to those employees, the court said, a strike may be found to be illegal and may be enjoined.

At the time of the *County Sanitation* decision, PERB did not have jurisdiction over MMBA matters. But that changed in 2001, when the legislature vested PERB with exclusive jurisdiction over violations of the MMBA.

It is relatively clear, said the court, that the amendments to Government Code Sec. 3309(b) gave PERB jurisdiction over all claims arising under the MMBA and over the initial determination whether a claim arises under the MMBA. "However," the appellate court asked, "does this mean PERB has exclusive initial jurisdiction to determine whether every claim arising between employers and employees or employee unions arise under the MMBA?"

The court concluded that PERB's exclusive jurisdiction "is not all-inclusive." It then returned to the factors outlined in *San Diego Teachers* and *El Rancho* to ascertain whether PERB's jurisdiction extended to this case, where the county claimed a threatened strike would harm public health and safety.

First, the court found that PERB properly could find that the strike was an unfair practice under the MMBA. "The issue is not whether the conduct in fact violates the act in question, but whether it arguably does so....Whether the activity is in fact protected or prohibited is for PERB to decide, not the court." Also, the superior court ignored the alternative basis for finding

PERB jurisdiction, i.e., that the activity is arguably protected.

The Court of Appeal chastised the superior court for its "contradictory" conclusion that the strike was legal notwithstanding the fact that certain employees were enjoined from participating in it because of a threat to public health and safety. "It is a matter of semantics to say a strike is legal yet may be enjoined," said the court. "The fact that certain employees may be prohibited from participating in a strike necessarily makes the strike illegal as to those employees." Returning to the language of *County Sanitation*,

The court concluded that PERB's exclusive jurisdiction 'is not all-inclusive.'

the court reiterated, "In other words, when a strike by public employees threatens public health or safety, it becomes illegal."

The court brushed aside the county's assertion that it never alleged the strike was illegal. "The question here is not whether the complaining party expressly alleged an unfair labor practice but whether the underlying conduct challenged is arguably protected or arguably prohibited." Nor was the court persuaded by the county's claim that no unfair labor practice is implicated where the county

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seeks to stop essential employees from striking. "There is no reason to treat a strike by essential employees any differently than a strike by nonessential employees. Either way, the strike is arguably an attempt to put pressure on the employer rather than bargain in good faith, i.e., arguably prohibited. The only difference is that a strike by essential employees may exert even greater pressure on the employer."

Adequacy of PERB Relief

The court next considered whether PERB could furnish relief equivalent to that provided by a trial court. It rejected the county's argument that an injunction sought by PERB would reflect only a narrow concern for the negotiating process, and would ignore strike-caused harm to the public. Bolstered by the decision in *San Diego Teachers*, the Court of Appeal said, "PERB's interests extend to protection of the public at large....Where the County sought an injunction prohibiting the unions from ordering or encouraging certain employees from participating in the strike, there is no reason to believe PERB is not well suited to fashion an appropriate remedy that would minimize disruption of public services while protecting the parties' collective bargaining rights." Recognizing PERB's exclusive jurisdiction does not usurp the county's legal responsibility to protect the public health and safety, the court noted. It merely changes the forum in which the county must seek assistance.

The court addressed the county's argument that PERB procedures are not well-suited to deciding whether public health and safety are threatened and whether injunctive relief should be sought. After reviewing PERB regulations setting out the procedures and the time lines operative in an injunctive relief case, the court instructed:

We do not find the foregoing procedures unreasonable or unworkable. A party seeking an injunction from PERB must give advance notice, but so must a party seeking judicial relief. Although PERB's general counsel has up to five days to investigate the matter and make a recommendation to PERB, or 24 hours where a strike is already in progress, such action may be expedited. Likewise, PERB action on a recommendation may be expedited where appropriate. In this case, the County had ample time before the threatened strike to seek PERB assistance, and there is no reason to believe that assistance would not have been forthcoming in a timely manner.

Legislative Intent

The court found clear language granting PERB jurisdiction to determine whether a claim arises under the MMBA. And, based on well-established case law at the time of the amendment, it noted that PERB has jurisdiction to determine if conduct that is arguably protected or arguably prohibited falls under one of the acts it administers. The court saw no intent on the part

of the legislature to withhold from PERB jurisdiction over strikes that threaten public health and safety. A reference to *County Sanitation* that was removed from subsequent versions of the legislation does not demonstrate that the legislature did not intend for consideration of health and safety issues to be delegated to PERB.

The court also took note of the recent assembly bill, A.B. 553, which would have asserted in no uncertain

*Recognizing PERB's
exclusive jurisdiction
does not usurp
the county's legal
responsibility.*

terms that PERB has exclusive jurisdiction to determine whether to seek injunctive relief in the face of an MMBA strike. The county pointed to the governor's veto message of this bill, stating that it is "imperative that local governments have access to immediate injunctive relief from superior courts during strike situations....There is no reason to force decisions on injunctive relief into the slower PERB process." Noting that A.B. 553's stated intent was to clarify "existing law," the court concluded that the legislation "actually reflects the Legislature's understanding that PERB already has exclusive jurisdiction over strikes, work stop-

pages and lockouts involving public employees, notwithstanding the Governor's contrary assumption."

Local Concern Doctrine

Finally, the court dismissed the county's contention that it be excused from exhausting its administrative remedy before PERB under the "local concern doctrine." Applying the test articulated in *Pittsburg USD v. CSEA* (1985) 166 Cal.App.3d 875, 65 CPER 43, the court concluded that the exercise of superior court authority over the strike activity at issue here would entail a risk of interfering with the

tise in determining whether a given strike that threatens public health and safety may nevertheless amount to a collective bargaining tactic that could be protected or prohibited by the MMBA." Acknowledging PERB jurisdiction, concluded the court, will advance the legislature's purpose in creating an expert body with responsibility to develop and apply a comprehensive, consistent scheme

regulating public employer-employee relations." (*County of Sacramento v. AFSCME Local 146 et al.* [2008] 165 Cal.App.4th 401.)

Attorney Margot Rosenberg of Leonard Carder in Oakland represents United Public Employees, Loc. No. 1. She told *CPER* that the county has petitioned for review in this case and the union will not oppose their petition. *

Resolution of this matter goes to the very heart of labor law and PERB's jurisdiction.

regulatory jurisdiction of PERB. The county's assertions in superior court "go to the right of public employees to strike in order to exert pressure on the employer to accede to their contract demands," the court underscored. "The fact that essential employees are involved merely goes to the amount of pressure exerted. Resolution of this matter goes to the very heart of labor law and PERB's jurisdiction."

The court added that, while both PERB and the courts are equipped to consider issues relating to public health and safety, "PERB has specific exper-

Implementation of Financial Disclosure Rules Blocked by Ninth Circuit

THE LOS ANGELES Police Commission hoped to comply with a final provision of a consent decree the city had agreed to back in 2000 in order to root out corruption in the police force. Eight years ago, threatened with a federal lawsuit by the U.S. Department of Justice, which saw a pattern and practice of civil rights violations, the city council signed off on a package of reforms. These included the agreement to require "regular and periodic financial disclosures by all LAPD officers and other LAPD employees who routinely handle valuable contraband or cash."

The plan adopted by the police commission in December 2007 requires approximately 600 anti-gang and narcotics officers who regularly handle drugs, money, and other contraband to disclose personal financial data to the department. Officers would have to reveal any outside income, real estate holdings, stocks, debts, and bank

balances — including accounts the officer shares with family members and others. Officers currently assigned to these units would be excused from compliance with the disclosure requirements until two years after the measure takes effect.

The Los Angeles Police Protective League calls the requirement an invasion of privacy.

The Los Angeles Police Protective League vigorously opposes the requirement as an invasion of privacy and questions whether the financial disclosures would improve chances of identifying corrupt officers. League president Tim Sands argued that the disclosure rule would expose officers

to potential identity theft and warned that over 500 officers were willing to leave the specialized units rather than take the risk of sharing their financial information.

In February, when the plan had been approved by the police commission, the union filed a lawsuit to block its implementation, arguing that release of the officers' financial information violates state privacy laws. In addition, the union launched a radio campaign and urged the city council to intervene by asserting jurisdiction over the matter.

In an unusual move, the council voted unanimously in January to review the police commission's policy. Mayor Antonio Villariagosa was criti-

cal of the council's action, arguing that, since the disclose requirement is mandated by the consent decree, the city has no choice but to comply.

An editorial in the *Los Angeles Times* called the council vote "particularly stupid" and charged that it was obstructing the inevitable.

At a subsequent meeting of the council, civic leaders accused the lawmakers of undermining the police commission's authority. Those who voiced support for the disclosure rules included former U.S. Secretary of State Warren Christopher and Los Angeles Area Chamber of Commerce President Gary Toebben. Despite urging by Councilman Jack Weiss, who heads the council's public safety

committee, the council was unwilling to vote to recommend that the commission's plan be rejected.

In August, U.S. District Court Judge Gary Feess issued a 26-page opinion that rejected the League's request for a preliminary injunction to bar implementation of the police commission's plan. Judge Feess found that the financial disclosure requirements will lay down a baseline or starting point for investigations into officers who appear to be "living beyond their means." Judge Feess concluded that the union had failed to prove it was likely to succeed on the merits of its lawsuit or that it was in the public interest for the court to block the plan.

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We are always saying: "Let the Law take its Course," but what we really mean is: "Let the Law take OUR Course."

— Will Roger, humorist

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

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

Pocket Guide to the Meyers-Milias-Brown Act

By Bonnie Bogue, Carol Vendrillo, Marla Taylor and Eric Borgerson • 13th edition (2006) • \$15

<http://cper.berkeley.edu>

The League quickly appealed Feess' ruling, and on September 12, the Ninth Circuit Court of Appeals issued a temporary injunction halting implementation of the reforms. The

court did not rule on the merits of the League's lawsuit. A panel of Ninth Circuit judges will hear the appeal on December 8. *

Meal Period Provision in County MOU Trumps Labor Code, IWC Wage Orders

THE CALIFORNIA Constitution extends to charter counties the authority to set compensation for its employees. This implies that a charter county like Los Angeles can determine wages as a matter of local concern. Therefore, concluded the Second District Court of Appeal, when a county adopts a charter that provides for the right to set wages, the local rule trumps conflicting state laws. Here, provisions in the county's memorandum of understanding with the union representing its probation officers that addresses meal periods takes precedence over any contrary statutory provisions.

Probation officer Vi Dimon alleged that the county violated provisions of the Labor Code and the wage orders promulgated by the Industrial Welfare Commission by failing to provide county probation officers with meal periods or pay them for meal periods they missed. In response, the county asserted that, as a charter county, it has authority to set compensation and conditions of employment, and has done so in an MOU with the union representing the probation of-

icers. When the trial court dismissed Dimon's lawsuit, she appealed.

Article XI, Sec. 4, of the California Constitution conveys to charter counties the power to prescribe compensation to employees. Article III of the Los Angeles charter conveys to the board of supervisors the duty to provide for the compensation of county employees. Based on these enactments, the Court of Appeal reasoned that the legislature lacks the authority to provide for compensation of county employees. "In other words," said the court, "the determination of wages to be paid to employees of charter counties is a matter of local rather than statewide concern." Therefore, said the court, when a county like Los Angeles adopts a charter that recognizes the county's right to provide for the compensation of employees, those provisions "trump conflicting state laws."

The court relied on *Curcini v. County of Alameda* (2008) 164 Cal. App.4th 629, 191 CPER 29, which reached the same result. (See CPER No. 191, pp. 29-31, for a summary of that case.)

In addition, the Court of Appeal looked to *In re Work Uniform Cases* (2005) 133 Cal.App.4th 328, 175 CPER 59, where the court rejected the argument that Labor Code provisions which require payment for the purchase and maintenance of uniforms were controlling. The court reasoned that payment for work uniforms was part of an employee's compensation and should be considered like any other payment of wages, compensation, or benefits.

The Court of Appeal found these cases applied with equal force to bar Dimon's lawsuit.

The county entered into an MOU that specifically covers meal periods.

The court also dismissed the contention that the meal period provisions of state law fill the gap left by the county charter, which does not specifically address meal periods. There is no requirement that a specific compensation provision be found in the charter itself, said the court. Government Code Sec. 25300 directs that compensation, tenure, appointment, and conditions of employment of county employees can be addressed by county ordinance or by resolution of the board of supervisors. "That is precisely what happened here," the court observed. The county entered

into an MOU that specifically covers meal periods, and the board of supervisors unanimously voted to approve it. Consequently, said the court, there is no void in the county's compensation scheme to be filled by state Labor Code provisions.

Dimon also argued that collective bargaining agreements are not exempt from Labor Code provisions or wage

*IWC's wage order
impermissibly
regulates employee
compensation.*

orders regulating meal periods. "This argument is nothing more than an attempt to make an end-run around the home rule doctrine," the court said, "which bars application of contrary state law when a charter county has addressed a question of employee compensation."

Finally, the court confronted the assertion that the legislature may regulate matters of statewide concern even if it impinges on a county's constitutional powers. Dimon claimed that meal periods are a matter of statewide concern because they increase worker safety. In support of this proposition, she relied on the general observation made in *Murphy v. Kenneth Cole Productions* (2007) 40 Cal.4th 1094, 184 CPER 85 — that employees who are denied rest and meal periods face

greater risk of work-related accidents, especially low-wage workers who perform manual labor. The court found that this statement did not support Dimon's abstract argument that state law reflects a matter of statewide concern about worker safety as applied to *deputy probation officers*.

The court contrasted the substantive labor law provisions with the procedural safeguards of the Public Safety Officers Procedural Bill of Rights Act, upheld as to a charter city in *Baggett v. Gates* (1982) 32 Cal.3d 128, 55 CPER 23, and the meet and confer requirements of the Meyers-Milias-Brown act, found to apply to a charter city in *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, CPER SRS No. 28.

"A substantive law, on the other hand, takes away a charter county's ability to establish local salaries and control working conditions," the court noted. The statutory meal period provisions would divest the county of its ability to provide for and regulate meal periods and prescribe the remedy for violations of its regulations, concluded the court, and would impinge "more than a limited extent on its authority as a charter county."

The court also found that the IWC's wage orders likewise impermissibly regulate employee compensation, a matter within the county's exclusive constitutional purview. (*Dimon v. County of Los Angeles* [9-16-08] B202409 [2d Dist.] ___ Cal.App.4th ___, 2008 DJDAR 14589.) *

Benefit Eligibility Demands Six-Month Tenure With County

UNDER THE TERMS of the Los Angeles County Code, an employee must work through the six-month qualifying period before she is eligible for long-term disability benefits under the county's plan. Because the employee had been discharged prior to the end of the qualifying period, she was not entitled to benefits under the plain language of the county administrative code.

Agneta Dobos began working for the county in December 1984, as a student nurse. Ten months later, she was hired as a staff nurse and was promoted to a full-time permanent

staff nurse on January 1, 1987. Dobos worked at the Women's Hospital at the University of Southern California Medical Center.

On March 25, 1992, Dobos suffered a disabling injury at work. The same day, the county suspended her pending an investigation into allegations of misconduct. Dobos did not return to work for the county any time after that date. Following its investigation, Dobos was terminated effective April 28, 1992.

On October 5, 1992, Dobos filed an application for long-term disability



Education is the ability to listen to almost anything without losing your temper or your self-confidence.

-- Robert Frost, poet

Keep your cool with CPER's best-selling Pocket Guide. It provides a clear explanation of the protections relating to investigations and interrogations, self-incrimination, privacy rights, polygraph exams, searches, personnel files, and administrative appeals. The Guide includes summaries of key court decisions, the text of the act, a glossary of terms, and an index.

This Guide is a must for each and every peace officer and for those involved in internal affairs and discipline.

Pocket Guide to the Public Safety Officers Procedural Bill of Rights Act

By Cecil Marr and Diane Marchant (Updated by Dieter Dammeier) • 12th edition (2007) • \$16
<http://cper.berkeley.edu>

benefits under the county's Long-Term Disability and Survivor Benefit Plan. She alleged that she had become disabled on March 25, 1992.

Voluntary Plan Administrators, the third-party that administers the plan for the county, denied Dobos's application based on insufficient medical evidence to support her disability claim. She appealed that determination, but on November 9, 1993, VPA stood by its decision.

Five days later, Dobos applied for Supplemental Security Income disability benefits through the Social Security Administration. *Ten years later*, on October 30, 2003, after several additional applications and appeals, an administrative law judge found that Dobos was totally disabled and entitled to SSI disability benefits. Among the ALJ's findings was that Dobos had been disabled since at least November 1, 1993.

On February 15, 2005, now approximately 13 years after her employment with the county ended, Dobos filed a second application for long-term disability benefits under the county plan. She alleged that her disability was the direct result of a work-related injury and that her first day of absence from work due to that disability was March 26, 1992.

Because Dobos had not returned to work after her first disability application had been denied, VPA agreed to review her original claim and took into account that she subsequently had been approved for SSI benefits by the Social Security Administration. On July 7, 2005, VPA denied Dobos's second application for long-term disability benefits because she failed to satisfy the plan's eligibility requirements. An employee must complete a six-month qualifying period during which an eligible employee must be to-

tally and continuously disabled because of her employment with the county. In Dobos's case, her employment with the county ended before the expiration of her qualifying period.

Undeterred, Dobos appealed the denial of her second application. Acting on behalf of the county, a hearing officer considered her appeal and, on May 24, 2006, concluded that Dobos was not eligible for long-term disability benefits because she was not employed by the county at the end of the qualifying period.

In an action challenging the administrative decision upholding VPA's denial of her application, Dobos argued that the county code merely required that she be employed by the county when she first became disabled, not for the full six-month qualifying period. Any contrary reading of the code, she argued, would violate public policy because it would allow an em-

ployer to deny the payment of benefits by terminating a disabled employee before her qualifying period ended. The trial court rejected this argument and, once again, Dobos appealed.

As summarized by the trial court, the code requires that, to be eligible for long-term disability benefits, Do-

Dobos was not employed at the end of the qualifying period.

bos had to be an employee when she became totally disabled, had to remain an employee absent from work due to a total disability for a period of six months, and had to be an employee on the first day following the expiration of the qualifying period.

The Court of Appeal carefully reviewed the language of the county code, including the definitions of “qualifying period,” “employee,” and “eligible employee.” Construing these terms in the context of each other, the court concluded that an applicant for long-term disability benefits must not only be an “employee” of the county at the time he or she becomes totally disabled and unable to work, but also must remain an “employee” of the county for the duration of the six-month qualifying period to be eligible for benefits. Dobos argued that the meaning of “eligible employee” is not limited to current county employees

because the term “disability beneficiary” is defined to include a “former employee” who is “eligible to receive disability benefits.” Dobos reasoned that a former employee would never be eligible to receive disability benefits if the definition of “eligible employee” is read only to encompass current employees. The Court of Appeal rejected that logic. A former employee discharged after completing the six-month qualifying period still would be eligible to receive disability benefits, said the court. But, like any other applicant, a former employee would be subject to the eligibility requirement of continuous employment with the county throughout the qualifying period.

The written policy provided to employees to explain the terms of the benefit plan also states that a qualifying period of six months is required before disability benefits may be paid and that “the qualifying period begins with the first day of absence from work by reason of the employee’s total disability.” The court found nothing in the language of the policy inconsistent with the code requirement that an applicant for benefits be employed by the county at the end of the qualifying period. “The policy does not provide that both current and former employees are eligible to apply for long-term disability benefits at any time, nor does it suggest that the qualifying period may be satisfied without regard to an applicant’s employment status.” Consistent with the plain language of the code, the court concluded, an employee does not

include an individual who is no longer employed by the county.

The court responded to Dobos’s argument that, by construing the code to require current employment, the county can discharge employees without preserving their vested disability benefits and would be allowed to unlawfully discharge employees on

An employee does not include an individual who is no longer employed.

disability-related family and medical leave conveyed by state and federal laws. Noting the absence of any contention that Dobos had been terminated because she was on a disability leave or had applied for disability benefits, the court found the argument unavailing even as a possible scenario for other disabled employees.

First, said the court, since an employee who does not complete the qualifying period has not met the eligibility requirements, discharging such an employee does not deprive him or her of the right to any *vested* disability benefits. Nor does the code give the county “free reign to discharge disabled employees in violation of state and federal law.” “To the extent that an employee is discharged because of a disability or in retaliation for taking a protected disability-related leave,

he or she remains free to pursue a legal action against the employer for violation of any number of statutes, including the Family Medical Leave Act, the California Family Rights Act, the Americans with Disabilities Act, and the California Fair Employment and Housing Act.”

The county’s plan simply requires that a disabled person be employed by the county at the end of the qualifying period to be eligible for long-term disability benefits, the court summed up. “It does not in any manner exempt the County from compliance with applicable state and federal laws protecting the rights of disabled employees.” (*Dobos v. Voluntary Plan Administrators* [9-3-08] B199870 [2d Dist.] ___ Cal. App.4th___, 2008 DJDAR 13968.) *

State Employment

Minimum Wage Order Stalled by Controller, Court Maneuvers

THE GOVERNOR attempted to inject some urgency into the budget impasse by announcing on July 31 that most non-exempt state employees would receive only the federal minimum wage until a budget was signed. When State Controller John Chiang refused

If an employee earns overtime, regulations entitle the employee to full pay for non-overtime hours.

on both legal and practical grounds to cut workers' pay, the director of the Department of Personnel Administration asked a court to order Chiang to comply with the executive mandate. But the intervention of several unions in the legal process, and their motion to remove the case from state court to federal court, derailed any chance that the pay cut order would conserve cash. When *CPER* went to press, a hearing was scheduled for October 17.

No Pay for Some

As the early summer fires burned, the economy floundered, and the legislature dithered over the budget. At the end of July, the governor calculated that the state soon would be short of money and unable to respond to unforeseen emergencies if the budget impasse continued much longer. The executive order he issued explained that because borrowing would be exorbitantly costly, he found it necessary to conserve the state's cash reserve. Furthermore, he asserted, a 2003 Supreme Court decision held he was not authorized to pay more than federal law requires if there is no budget by July 1.

The governor ordered the directors of the Department of Finance and Department of Personnel Administration to comply with the court's opinion in *White v. Davis* (2003) 30 Cal.4th 528, 160 CPER 14, effective with August paychecks unless a budget were passed. In *White*, the court ruled that the state Constitution does not allow the state to continue paying its employees after July 1 until a budget is signed, since there is no continuing appropriation for employee pay. But, under the supremacy clause of

the federal Constitution, the state employer must comply with the federal Fair Labor Standards Act, which requires timely payment of wages to most employees.

The governor interpreted *White* to require payment of the federal minimum hourly wage of \$6.55 to non-exempt employees unless they earned overtime during the pay period. If an employee earns overtime, federal regulations entitle the employee to full pay for non-overtime hours and one-and-a-half times the regular rate of pay for overtime hours. Some

Compliance with the minimum wage cap and the overtime rule has proven difficult.

exempt employees also benefit from the FLSA, since the act requires a minimum weekly salary of \$455 to be paid to managers to keep them exempt from overtime pay. Teachers, doctors, and lawyers are exempt as professionals, no matter what their salary. Also, the controller does not pay elected officials, appointees, or their personal and legal staff after July 1 until a budget is adopted.

Compliance with the overtime rule, however, has proven difficult for the state's payroll system. In *White*, former Controller Steve Westly

claimed that it would be impossible to segregate employees who were entitled to full pay with overtime from those who were entitled only to minimum wage and still meet payroll deadlines. If those deadlines were missed, the state would be faced with FLSA penalties, he argued.

For procedural reasons, the *White* court did not resolve how to solve this practical dilemma. But it did advise that the state pay full regular wages and overtime compensation to non-exempt employees “who it reasonably anticipates will work overtime during a given pay period,” and pay any overtime premium due to those it did not anticipate working overtime as soon as “practicable” during the next pay period. The following year, Westly assured employees they would receive their full wages because it would not be feasible to pay some employees full salary while paying others the minimum wage. “We are in the process of replacing our payroll system,” he wrote in a July 2004 letter to legislators, “but that work will not be completed until 2008.”

To implement Governor Schwarzenegger’s July order, DPA Director David Gilb issued a pay letter to Controller Chiang requesting that he issue paychecks of \$1,153 to non-exempt employees and \$2,003 to managerial employees. Doctors, lawyers, and the teachers employed at state correctional institutions should be paid zero, the letter instructed.

To counter the effects of the overtime rule that would guarantee employees full pay, the executive order banned overtime work except in critical services “directly related to the preservation and protection of human life and safety, including...emergency and disaster response activities and the provision of 24-hour medical care.” Agencies were required to report within 24 hours to the governor’s

The executive order banned overtime work except in critical services.

cabinet and the finance department the names of any positions found critical and excepted from the executive order. In its pay letter, DPA spared all non-exempt employees in agencies such as the California Highway Patrol, Department of Parks and Recreation, and Department of Mental Health. The California Department of Corrections and Rehabilitation was notably absent from the list of exceptions.

Obstinacy and Opposition

The controller pounced on the exceptions for critical services in his letter notifying the governor of his refusal to comply with the pay cut aspects of the executive order. “On the one hand, you incorrectly indicate

that there exists no authority to pay employees not working overtime more than the minimum wage and, on the other hand, purport to authorize full pay to certain classes of employees,” he pointed out.

In addition, Chiang reiterated the practical problems his office would face attempting to adjust the payroll during the budget impasse and then reverse the changes later. Payroll problems would linger for months after a budget is enacted, he predicted, “exposing the State to possible treble damages for failing to comply with the FLSA.” In his statement at an August 4 Senate committee hearing, Chiang asserted:

In 2003, my office tried to see if we could reconfigure our system to do such a task, and after 12 months, we stopped without a feasible solution and with the knowledge that recovery for such a sweeping adjustment to minimum wage would take at least 6 months before all employees would see the right amounts in their hard-earned paychecks.

Besides, he testified, delaying full pay for state employees would not delay the need for the state to borrow money through issuance of costly revenue anticipation warrants.

In response, DPA tried to assist the controller with several suggestions to ease the FLSA calculations. It could be done by programming three pay differentials, or by establishing new pay ranges, DPA advised in an August 7 memorandum. One of the suggested techniques is used to suspend pay for

600 elected officials when budgets are overdue, the controller's office admitted in an August 11 reply, but changing the pay of 180,000 employees is "a different scenario." The controller would have to suspend regular pay and issue minimum wage checks with the appropriate deductions. Then, after the budget is adopted, the controller would need to restore regular wages and figure the deductions to take from retroactive pay. Normally, changing any step in the payroll procedure requires a new design, modification of computer programs, testing and quality assurance, and development of new procedures, wrote the controller's chief of personnel and payroll services, Don Scheppmann. DPA had suggested that the controller need not make deductions for retirement or state dis-

ability insurance from the minimum wage paychecks, but the controller wanted legal opinions to support that approach. And what about the 55,000 employees of the California State University that the controller pays, especially the 25,000 teachers? The executive order exempted CSU, but under what rationale?

Chiang refused to cut employee pay. DPA and its director, David Gilb, sued to prevent him from "illegally spend[ing] monies from the state treasury." In the lawsuit, DPA asserts:

The August 11, 2008 letter suggests the Controller has taken virtually no action since 2003 to address the alleged obstacles in implementing salary payment consistent with *White v. Davis*. Assuming the obstacles raised in the August 11, 2008 letter have

some validity (a fact DPA disputes) action is needed by the court to compel the Controller to fulfill his responsibility to comply with...state law, the California Constitution and *White v. Davis*.

Legal Maneuvers

In papers filed in state court, the administration contended that the controller was set to violate the state Constitution. Chiang had no right to refuse to comply with DPA's pay letter, argued DPA, because the Government Code makes a state employee's salary effective and payable once approved by DPA. In *Tirapelle v. Davis* (1994) 20 Cal.App.4th 1317, 103 CPER 31, DPA argued, the Court of Appeal held that the controller must defer to DPA where the department acts within its authority.

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The cure for boredom is curiosity. There is no cure for curiosity.

— Dorothy Parker, writer

Satisfy your curiosity about the statute that covers state employment. This second edition includes recent developments relating to legislative approval of collective bargaining agreements; a discussion of recent Supreme Court cases that recognize limitations necessitated by civil service law; and a section on PERB procedures, including reversals in pre-arbitration deferral law.

This 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.

Pocket Guide to the Ralph C. Dills Act

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

DPA asked for a preliminary injunction, contending that the state would lose hundreds of millions of dollars by waiting until the case was fully ready for hearing. And further, the controller's defiance "undermines the authority vested in DPA to administer employee salary and compensation in accordance with state law," the department fumed. However, the administration did not ask for an immediate temporary restraining order, and the judge set the hearing date on the preliminary injunction for September 12, too late to endanger August paychecks.

Meanwhile, several state employee unions intervened in the case to advocate for full wages for the employees they represent. The Service Employees International Union, Local 1000, argued that the controller "is empowered to exercise his authority independent of the direction of the governor." The union asserted that ordering the controller to cut pay to the federal minimum wage would likely delay even the minimal pay to state employees. This, in turn, would result in underpayment for months after the budget is enacted, resulting in multiple violations of the FLSA. Local 1000 also argued that the automatic exemptions from the pay cut order are arbitrary and capricious, and deny some state employees the right to uniform operation of the law in violation of the equal protection clauses of the state and federal Constitutions.

The California State Law Enforcement Association and the California Correctional Peace Officers As-

sociation contended that the administration's failure to exempt correctional officers and some safety positions from the pay restrictions and the ban on overtime would have unlawful consequences: untimely payment of wages and a violation of correctional officers' substantive due process rights to a safe workplace. It is likely that some safety employees and peace officers would be allowed to work overtime

Local 1000 argued that the automatic exemptions from the pay cut order are arbitrary and capricious, and violate equal protection.

under the critical services exemption. But these workers would not be paid at the end of the month because they are not on the list of automatically exempted employees, predicted the associations. Therefore, they would not receive either full pay or overtime pay until the controller issues another paycheck during the next pay period, a violation of their FLSA rights, the two unions argued.

CCPOA additionally contended that the ban on overtime would lead

to hazardous conditions in the prisons because safe levels of overtime can be maintained only by assigning extra hours to correctional officers. Courts have held that liability arises under the due process clause of the federal Constitution when the state creates a danger to an individual or a situation that makes a person more vulnerable to danger, the union pointed out.

Once granted status as intervenors, the unions removed the case to federal court, an action that caused the September 12 state court hearing date to be vacated. The federal court set its hearing for October 17.

Unions are not the only ones that want to be heard on the issues. State Treasurer Bill Lockyer asked to file an amicus brief while the case was still in state court. He urged the court to deny DPA's petition for an injunction against the continuing payment of full wages. Such an order likely would result in reduced confidence in the state's ability to manage its finances and a downgrading of the state's credit rating. This, in turn, would cause the state to pay more when it borrows money, he contended. He reiterated Chiang's position that the minimum wage order would have no effect on whether the state would be required to use costly revenue anticipation warrants to borrow the funds it needs every fall, since the necessity for RAWs is caused by the failure to enact a budget. He cautioned that an injunction against the controller would place Chiang in a lose-lose situation — either violate the order

and the state Constitution or violate the FLSA timely payment conditions because of the impossibility of quickly reprogramming the computers. Finally, he pointed out the overly broad nature of the departmental exemptions to the pay cut order. The exemptions likely include “hundreds of positions

that have never worked overtime while arbitrarily excluding employees that historically have worked significant overtime.”

Legal maneuvers continued. In September, DPA moved to remand the case back to state court. That motion also was set for hearing on October 17.

In a budget letter, the Department of Finance also permitted exceptions to avoid a significant revenue loss or to achieve significant net cost savings. In rare situations, a worker who performs a “unique and critical function” could remain on the payroll if the governor’s cabinet secretary approved.

Any thought that agencies could hire temporary employees into permanent positions was foreclosed by a hiring freeze designed to clamp down on a workforce that grows at about 1,700 employees every month. The Department of Personnel Administration issued a directive that all job

SEIU Local 1000 Litigates Layoff of Temporary Employees

THE GOVERNOR’S attempt to preserve cash during the long budget impasse has been attacked by a state employees union as an unconstitutional power grab in derogation of the civil service merit principle. Service Employees International Union, Local 1000, charges in a lawsuit that the governor skirted procedures of the State Personnel Board when laying off about 10,000 seasonal, intermittent, and other temporary employees. The union also charges that the state failed to immediately pay earned wages to discharged employees as required by the Labor Code, instead waiting over a week. When the state could not provide a list of laid-off employees to the union three weeks after it was requested, Local 1000 filed an unfair practice charge with the Public Employment Relations Board.

Non-Critical Services Terminated

In his July 31 executive order,

Governor Schwarzenegger cited dwindling cash in the state treasury and the exorbitant cost of borrowing money during the budget impasse to justify his decision to lay off non-permanent employees. His order targeted seasonal, permanent intermittent, and retired part-time employees, in addition to temporary workers and student assistants. Permanent intermittent employees, who are employed as needed to work up to 1,500 hours per year, were not to be separated, but agencies were ordered not to use their services. Retired annuitants are retired workers who can continue to work up to 960 hours annually while receiving retirement benefits.

The order contained exemptions for government services and functions “directly related to the preservation and protection of human life and safety, including but not limited to emergency and disaster response activities and the provision of 24-hour medical care.”

All job offers not accepted by July 31 were on hold.

offers not accepted by July 31 were on hold, as well as any increases in time base for part-time employees. Other than the exempted functions, the only exceptions to the hiring freeze were for intra-departmental transfers.

Some agencies quickly shed employees, while others tried to squeeze them into exempt categories. The Department of Motor Vehicles stopped opening its offices on Saturdays due to “staffing constraints” caused by laying off temporary workers and retired annuitants.

The prison healthcare receiver, however, initially announced exemptions for all employees working in

adult corrections due to the “pervasive interconnectedness between delivering medical services, for which [he is] primarily responsible, and the multifaceted services and functions performed by [California Department of Corrections and Rehabilitation] staff responsible for adult institutions.” He based his exemption on the need “to ensure the preservation and protection of human life and safety...and to preserve the efficacy of multiple federal court orders,” but the governor’s administration disagreed he had any authority beyond the inmate medical system. State legislative leaders sent a letter to the governor demanding an exemption for all correctional officers and questioning why they were not automatically exempt, while fish and game wardens and medical fraud inspectors were.

But, despite lawmakers’ pressure and the receiver’s stance, CDCR laid off about 400 student assistants and retired annuitants, and stopped calling in about 1,300 permanent intermittent employees in the adult operations division. The Senate Public Safety Committee held a hearing in mid-August to question the administration about the layoffs and hear about its effects on the correctional system, but CDCR Secretary Matthew Cate did not appear personally. Union representatives described the rising tension that has resulted from rotating lockdowns caused by minimal correctional officer staffing, cancelled education and vocational classes due to laid-off substitute

teachers, and lack of access to recreation and libraries. Guard supervisors have been assigned to oversee several units, employee representatives told the senators.

A total of 10,133 employees were laid off, according to DPA. However, records obtained from the state controller’s office indicate a difference of only 6,400 part-time and intermittent employees from the July payroll to the August payroll. The number of

*Wage costs paid by
the controller fell
about \$31 million.*

active full-time employees increased by 265, a much slower pace than the average increase of 1,190 per month since February, when the governor issued an order to cut spending by 1.5 percent through measures such as hiring freezes. The number of active employees dropped from 246,240 to 240,157 in the one-month period, according to the controller’s website.

The hiring freeze and layoff did have some effect on the payroll. Wage costs paid by the controller fell about \$31 million dollars for the month to \$1.595 billion. The latter figure includes the salaries paid to California State University employees.

‘Layoff by Executive Fiat’

Local 1000 challenged the layoff order, pointing to provisions in state law that require layoff plans to be reviewed by the SPB and to follow procedures established by DPA. The union charges that the executive order circumvented these procedures, thereby disregarding the legislative branch of state government in violation of the state Constitution. It also contends that the order denied permanent intermittent employees civil service rights to appeal to the SPB.

The governor and DPA have filed a motion to dismiss the lawsuit for failure to allege any illegal state conduct. The governor’s job is to enforce the law, they pointed out in their brief. The governor is within his constitutional authority to direct departments under his executive control, such as DPA. The order did not call for the layoff of any permanent employees, they continued. DPA’s instructions to departments clarified that permanent intermittent employees were not to be separated, although departments were not to use their services during the budget impasse. The brief cited state court and SPB decisions which hold that a reduction in hours of an intermittent employee does not constitute a layoff. The seasonal and temporary employees, retired annuitants, and student assistants have no civil service status, the administration asserts, so SPB review was not circumvented.

The governor also argues that Local 1000 President Yvonne Walker

has no standing to represent the laid off employees, and the union cannot file a lawsuit on behalf of retired annuitants, whom it does not represent. The union should have filed a grievance under the layoff provisions of its memoranda of understanding with the

The SPB has declined to take a position in the lawsuit.

state, the administration contends, a claim that ignores the statutory bases for the union's claims.

The SPB has declined to take a position in the lawsuit. Board counsel Dorothy Egel told *CPER* that the SPB will do whatever the court rules should be done. The hearing on the state's motion will take place on October 31.

Pay Delayed

Local 1000 also filed suit against the state for untimely payment of earnings. The Labor Code requires an employer to immediately pay employees it terminates. But, despite the week-long warning before the executive order was issued, hundreds of employees did not receive their final paychecks upon separation, the union charges. As a result, the state owes the employees their regular wages for each day they

remained unpaid, which for some employees was more than a week. The Labor Code also authorizes payment of the union's attorney's fees and costs of litigation, Local 1000 contends.

In its motion to dismiss this case, the state argues that there was no budget, and therefore no appropriation to pay the wages of laid off employees under *White v. Davis* (2003) 30 Cal.4th 528, 160 CPER 14. If the court finds the state employer was required to pay the wages immediately, the state should not be charged penalties because it acted in good faith and did not violate the law willfully, it argues. The state also asserts that no immediate pay was due to intermittent employees, since they were not separated from employment. Both this motion and the constitutional challenge to the executive order will be heard on the same date.

Still, Local 1000 kept filing legal complaints. In order to represent the employees, the union asked DPA for a listing of laid-off workers. After an initial delay of 13 days, DPA provided an incomplete list of about 250 employees, Local 1000 charges. It contained only 25 DMV workers, for example, although DMV employs hundreds of temporary employees and retired annuitants. The union contends that, despite being notified the list was incomplete, Deputy Director of Labor Relations Julie Chapman failed to respond to telephone messages left by Local 1000's chief counsel, Paul Har-

ris. On August 28, the union filed an unfair practice charge over the failure to provide information.

DPA has not stopped all expenditures for affected employees, however. Foreseeing that permanent intermittent employees whose services were

The state agreed that it would continue health plan contributions for permanent intermittent employees.

not used in August normally would not be entitled to an employer contribution to health benefits in September, the state agreed with various unions — except the California Correctional Peace Officers Association — that it would continue health plan contributions for permanent intermittent employees in the affected bargaining units. Once the budget is signed and the employees return to work, past

employee contributions will be deducted from employee paychecks.

DPA Challenges Retirement Retroactivity Arbitration

Award on Public Policy Grounds

AFTER FOUR years, it looked like unit members represented by the California Statewide Law Enforcement Associa-

The union's initial demand for arbitration was resisted by DPA.

tion finally would have recent pension enhancements applied retroactively to service prior to July 2004. But the Department of Personnel Administration has gone to court to challenge the arbitration award, which found the parties agreed to retroactive application in 2002, even though the written agreement did not say so. DPA is relying on the holding of *Department of Personnel Administration v. California Correctional Peace Officers Assn.* (2007) 152 Cal.App.4th 1193, 185 CPER 50, a case in which it won the argument that an award is against public policy and must be vacated if it requires state expenditures based on an oral agreement that was not disclosed to the legislature.

Change of Position

The retirement retroactivity case grew out of negotiations between DPA and the union, which wanted the service of some of its bargaining unit members recognized as safety service in the Public Employees Retirement System. At the time in 2002, the state already had agreed to enhance the retirement benefit formulas it applied to highway patrol officers represented by California Association of Highway Patrolmen, and firefighters represented by CDF Firefighters. CSLEA, then known as the California Union of Safety Employees (CAUSE), represents investigators, inspectors, and other employees who help to enforce state laws and regulations. Some, such as Department of Justice special agents, are sworn peace officers entitled to lucrative peace officer pension provisions. Others are entitled to safety retirement benefits, and the remainder are miscellaneous members of PERS. Safety retirement benefits are calculated based on 2.5 percent of a member's final compensation, rather than the 2 percent factor used to figure miscellaneous pensions.

DPA agreed to move most of the miscellaneous classifications to the safety category effective July 1, 2004. The written agreement, reached when Gray Davis was governor in 2002, did

not indicate whether the new benefit formula would apply to prior service in positions that had been newly denominated as safety classifications. But a memo issued by DPA in October 2002 stated that the formula would apply to such service prior to July 1, 2004.

By 2004, however, Arnold Schwarzenegger had become governor, and DPA had a new director. On July 15,

Prior retirement enhancements for employees in other bargaining units had been applied retroactively.

2004, DPA notified the union that it would not grant credit for safety retirement purposes to service that was in the miscellaneous category at the time it was earned. The union's initial demand for arbitration was resisted by DPA. CSLEA finally obtained a court order sending the grievance to arbitration in March 2007. (See story in CPER No. 184, pp. 64-65.)

Parties Intended Retroactivity

Arbitrator Bonnie Bogue's award was issued in late-July 2008. It was undisputed that the parties had not discussed whether the new formula would



A little learning is a dangerous thing, but a lot of ignorance is just as bad.

— Bob Edwards, NPR radio host

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

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

Pocket Guide to Workplace Rights of Public Employees

By Bonnie Bogue, Carol Vendrillo and Liz Joffe • 2nd edition (2005) • \$12

<http://cper.berkeley.edu>

be applied retroactively to prior service in one of the new safety classifications, but the arbitrator found that the negotiators had assumed that prior service would be credited under the safety formula. Prior retirement enhancements for employees in other bargaining units had been applied retroactively. Even DPA negotiators testified that they had assumed retroactivity to prior service. The only witness who had a contrary understanding, a CalPERS analyst, was not at the bargaining table. Although state law requires DPA to notify CalPERS how prior service is to be credited when a classification is transferred to the safety category, the analyst had no formal notice from DPA about the retroactivity issue. The arbitrator therefore found the analyst's

understanding irrelevant.

The union's director of governmental services testified that the parties at the table had discussed rebates for Social Security taxes which had been paid for prior miscellaneous service. Negotiators had touched on whether they would be able to obtain a refund of those taxes, an issue that would not have arisen unless the parties had contemplated conversion of prior miscellaneous service to safety service.

The arbitrator also found that the parties' conduct after the agreement was signed indicated they believed the retirement enhancement would be applied retroactively. Although the DPA director of retirement policy first requested from CalPERS a cost-

ing of the benefit that assumed it was prospective, he then requested a new costing based on a retrospective application of the new formula. He testified he would not have made a request for retroactive costs unless asked to do so by his managers. CalPERS informed him in early June that the cost of providing the benefits retroactively would not exceed the \$17.1 million cost of applying the enhanced benefit prospectively. DPA issued its cost analysis based on the assumption that "the reclassification would be done on a retrospective basis."

In October, the director of retirement policy provided to the union a question-and-answer memo that stated the pension enhancement would apply to previous service in the classifications

being moved to the safety retirement category. He discussed the contents of the memo with DPA's chief negotiator and chief of labor relations before giving it to the union. In October, the same memo was provided to CalPERS, which responded with questions that sought to delineate which classifications of prior service would be credited toward a safety retirement.

Based on this evidence the arbitrator found that the parties had a mutual intent to apply the new formula to the safety members' prior service in classifications that are now safety classes. The question remained whether the March 2002 agreement was enforceable through the grievance procedure.

Addendum Enforceable in Arbitration

First, DPA argued that the safety retirement agreement was not enforceable because it had not been incorporated into the memorandum of understanding that contained the arbitration agreement. But the arbitrator noted that the zipper clause of the MOU, which generally waived the parties' rights to negotiate during the term of the agreement, provided that any mid-term agreements would be put into writing and become an addendum to the agreement. The arbitrator concluded that the retirement agreement was an addendum to the contract.

She then considered the argument that retroactivity was not an express

term of the agreement and therefore could not be enforced under the arbitration procedure, which provides only for arbitration of grievances involving the "interpretation, application, or enforcement of the express terms" of the agreement. Despite the earlier court ruling sending the dispute to arbitra-

*'The Arbitrator's
authority...does
not extend to
making public policy
determinations about
legislative enactments.'*

tion even though retroactivity was not an express term of the agreement, the parties had stipulated that the arbitrator should revisit the issue.

The safety retirement agreement is an express term that is ambiguous on the issue of retroactivity, the arbitrator pointed out. The parties' language defining a grievance and the scope of arbitration cannot be read to bar the union from arbitrating a dispute that arises from ambiguous language, she concluded. While the agreement prevents the arbitrator from adding to or modifying an agreement, it does not prohibit the arbitrator from determining the parties' mutual understanding by using established contract

interpretation criteria, she held. Still, DPA raised more arguments against enforceability of the addendum.

Public Policy and the Legislature

Because the new benefit required appropriation of funds and the new safety classifications did not meet the statutory definition of safety service, legislative approval was required. The 2002 implementing legislation, S.B. 183 (Burton, D-San Francisco), did not speak to the issue of retroactivity.

The arbitrator addressed two contentions that enforcement of the addendum would be against public policy. If the state was contending that retroactivity of the benefit would be against public policy because the legislature had never approved retroactivity, the argument was incorrect, she said. Legislation in 1998 provided that DPA could agree in collective bargaining to move classifications to the safety category as long as the classifications met statutory criteria. The legislature already set public policy when it enacted the following language, "State safety service,' with respect to a member who becomes a state safety member pursuant to [the section allowing DPA agreements], shall also include service rendered in an employment in which persons have since become state safety members, as determined by the Department of Personnel Administration pursuant to that section." She interpreted this language as authorizing DPA to agree to include

past service as safety service.

The state also raised another public policy argument, though. It contended that the legislature was not informed of the retrospective aspect of S.B. 183. Evidence showed that costing data supplied during the legislative process quoted a \$17.1 million estimate, and stated the price assumed prospective application. However, a May 21 Department of Finance Bill Analysis cautioned, "to the extent prior State miscellaneous service is transferred to State safety service, the cost of this bill would increase significantly."

Arbitrator Bogue found this question was outside her jurisdiction, which the contract limited to interpreting and enforcing the terms of the collective bargaining agreement. "The Arbitrator's authority...does not extend to making public policy determinations about legislative enactments such as whether they were based on adequate or complete information," she advised.

DPA's final argument was that the agreement could not supersede state law. Therefore, argued DPA, the issue of retroactivity had to be determined by interpreting the implementing legislation, S.B. 183, not the agreement. The legislation cannot be interpreted as calling for retroactivity, the state argued further, because the actuarial analyses available to the legislature provided costing based only on prospective safety service credit. DPA noted that its own analysis based on

retroactive safety service credit was not supplied until the bill was on the governor's desk. But, the arbitrator reminded the parties, the Department of Finance analysis already had noted the possible retrospective nature of the bill in May, well before the legislature approved it. And, she emphasized, there is nothing in the legislative history to show that lawmakers intended to modify the agreement in any way. "The fact that CalPERS provided actuarial analyses that failed to reflect accurately the agreement DPA had negotiated cannot have the effect of modifying DPA's agreement with the Union," the arbitrator declared.

DPA Challenge

Arbitrator Bogue's award requires

that was never disclosed to lawmakers. DPA also asserts that the award violated

the state's statutory rights.

Peace Officers File Third Severance Petition

UNABLE TO show sufficient proof of support for severance last November or in July, the Peace Officers of California filed another petition in August to sever peace officers from state bargaining unit 7, which is represented by the California Statewide Law Enforcement Association. The petitioners believe that their compensation lags behind the salaries and benefits of other state peace officers, such as highway patrol and correctional of-

DPA to ensure that service credit of bargaining unit members is recalculated to reflect prior service in newly classified safety positions. The state, however, has petitioned in court to have the award vacated on public policy and statutory supersession grounds.

DPA contends in its petition that the unwritten agreement for retroactivity was not disclosed to the legislature, and that the legislature had financial estimates based only on prospective service credit. The department estimated the cost of retroactive safety service credit would be \$39.6 million. DPA asserts that the award violates public policy because it gives effect to an unwritten agreement "between the Union and certain DPA employees"

ficers, because of their inclusion with non-sworn personnel in the same bargaining unit. CSLEA defends its record by pointing to the large salary increases unit 7 peace officers have received over the last three years.

CSLEA represents inspectors, driver's license examiners, highway patrol dispatchers, hospital and park police officers, and other employees responsible for enforcing state law and regulations of state agencies. Peace officers, such as game wardens, special agents, fraud investigators, and fire marshals, comprise about 40 percent

of the 7,000-member unit. The union is an umbrella group of 19 affiliates representing different subgroups of safety employees, each with its own board of directors. Each affiliate has a representative on the CSLEA board.

Two affiliates, the State Parks Peace Officers Association of California and the California Fish and Game Wardens Association, became

Peace Officers of California claims that CSLEA turned down raises offered to unit 7 peace officers.

dissatisfied last year with uncompetitive salaries. The organization they founded, Peace Officers of California, claims that CSLEA turned down raises offered to unit 7 peace officers when the Department of Personnel Administration would not extend the same raises to non-sworn unit members. POC also charges that CSLEA President Alan Barcelona is squandering dues with expense reimbursements, stipends, and salary worth more than \$160,000 annually; a \$60,000 donation to a friend's campaign for county sheriff; and a \$1.5 million renovation to the union's offices. CSLEA has placed the two affiliates into trusteeship.

There is no dispute that departments are having difficulty filling some unit 7 peace officer positions, like fish and game warden and state park police officer. In May 2007, the Legislative Analyst's Office reported an overall 20 percent vacancy rate for peace officer positions in unit 7. Analyzing a proposal to increase funding for the Department of Fish and Game, the LAO suggested that game wardens have been underpaid compared to other law enforcement officers statewide, but it attributed some of the blame for the 14 percent vacancy rate in warden positions to a lengthy hiring process. That was before the most recent increases for unit 7 peace officers in January 2008. The warden academy graduated 28 new wardens in August.

POC contends that CSLEA torpedoed a bill in early 2007 that would have provided funding for a substantial raise for wardens. A letter President Barcelona wrote to two senators who cosponsored the bill indicated that the union would support the bill if amended to provide higher compensation for all safety officers. Barcelona's letter specifically raised the specter that a boost for wardens without increases for state park rangers would cause rangers to transfer to warden positions, creating dangerous understaffing in state parks. The bill soon was gutted and replaced with legislation on another subject. In an appeal to peace officer self-interest, POC claims that its affiliates would have the autonomy

to make their cases to the legislature for increased pay for a subset of peace officers. But CSLEA warned peace officers that the wardens would lobby for themselves at the expense of other peace officers.

CSLEA points out that, in an extended contract negotiated in 2006, it obtained extra raises for peace officers beyond the 3.5 percent increases for non-sworn personnel. Special

Special agents, park rangers, and wardens received a 10 percent boost to their salaries in January 2008.

agents, rangers, and wardens received an extra 6.5 percent recruitment and retention increase in July 2006. Special agents, park rangers, and wardens also received a 10 percent boost to their salaries in January 2008. Other peace officers in the unit saw their pay increase 5 percent plus a cost-of-living increase for inflation. That contract has since expired, and negotiations for a new one were placed on hold during the budget impasse.

POC's first attempt at severance last November failed. But the organization continued to gather signatures. It announced in April that it had secured the services of former DPA director

Marty Morgenstern to represent the peace officer unit in negotiations if the severance is successful. According to POC, Morgenstern believes a peace officer-only organization will achieve a better contract than a mixed unit.

POC has added and dropped a couple of classifications of the proposed bargaining unit with each petition. As *CPER* went to press, the Public Employment Relations Board announced that POC had filed sufficient proof of support for severance. CSLEA has submitted objections that the proposed unit includes some classifications that are not sworn peace officers and excludes others that are. The state employer has not taken a position.

When announcing on its website that POC had submitted sufficient proof of support, CSLEA dismissed the result as “not surprising given that PERB has minimal protections in place to guard against the submission of fraudulent signatures.” The union disclosed that it would soon be asking PERB to adopt a regulation requiring proof of support to include the last four digits of an employee’s Social Security number “as a form of fraud prevention.”

Higher Education

California Supreme Court: No Damages for Whistleblowers if U.C. Acts in Timely Manner

WRITING FOR the majority, California Supreme Court Justice Kennard said Sec. 8547.10(c) of the California Whistleblower Protection Act “means what it says” when it states, “any action for damages shall not be available... unless the injured party has first filed a complaint with the [designated] university officer..., and the university

The California Whistleblower Protection Act ‘means what it says.’

has failed to reach a decision regarding that complaint within the time limits established for that purpose by the regents.” Accordingly, in *Miklosy v. Regents of the University of California*, the court affirmed the lower court ruling that denied damages to two University of California employees who were terminated shortly after they expressed concerns about problems at the Lawrence Livermore National Laboratory.

U.C. employees Leo Miklosy and Luciana Messina were computer

scientists at LLNL when they identified several problems with their project and certain equipment, including the potential collision of million dollar robotic petitioners and inadequate control operator training. The two repeatedly expressed their concerns to management verbally and in writing.

Miklosy was fired in February 2003. As he exited the premises, Miklosy overheard one of his supervisors say, “Messina is next.” Concerned that she, too, would be terminated, Messina submitted a letter of resignation. At her supervisor’s urging, she reconsidered. However, when Messina returned to work the following Monday, she found her computer had been disconnected. Days later, she called her supervisor to request a transfer to a different position in the laboratory. The request was denied, and before the call ended, Messina overheard the supervisor tell another employee that he intended to fire Messina. Four days later, Messina resigned.

In August 2003, the former employees filed complaints with the university under Sec. 8547.10(a) of California’s Whistleblower Protection Act. The laboratory’s personnel manual requires the director to appoint a retaliation complaint officer to inves-

tigate an allegation of whistleblower retaliation and to prepare findings within 90 days. After that, the lab’s director is required to reach a decision within 15 days. The appointed RCO was a laboratory employee who had no involvement in the direct management of Miklosy or Messina’s former department and no personal connection to the dispute. After an investigation, the RCO determined that the laboratory did not retaliate against the former employees for reporting problems in their department. Rather, he concluded that Miklosy was terminated for unsatisfactory performance and that there was never any intention of firing Messina.

U.C. resolved the complaints in a timely manner.

The laboratory director adopted the findings in a timely manner, and neither Miklosy nor Messina exercised their rights to appeal the decision to the president of the university.

The plaintiffs filed a civil suit against the university and each of their three supervisors, seeking compensatory damages, punitive damages, and attorney’s fees. The complaint alleged unlawful retaliation in violation of the Whistleblower Protection Act, wrongful termination of Miklosy in violation of public policy, wrongful constructive discharge of Messina in violation of public policy, and intentional infliction

of emotional distress. The trial court dismissed the plaintiffs' action, and the Court of Appeal affirmed, holding that the plaintiffs had no viable claim under the Whistleblower Protection Act because U.C. resolved the complaints in a timely manner. All common law claims were statutorily barred.

Majority Opinion

Justice Kennard's opinion — with which Justices Baxter, Chin, and Corrigan joined — began with an analysis of the Whistleblower Protection Act and its application to the University of California. She instructed that the act distinguishes between three groups. State employees may bring a damages action for alleged whistleblower retali-

ation after they first seek relief from the State Personnel Board. California State University employees may seek "a remedy" — undefined in the statute — if the state university's administrative remedy fails to proceed to a timely decision *or* does not "satisfactorily address" the employees' complaint within 18 months. Finally, U.C. employees may bring damages actions *only if* the university's administrative remedy fails to result in a timely decision. Justice Kennard explained it was not the court's place to compare the provision relating to U.C. employees with those relating to state and CSU employees. Rather, the court was called on only to examine Sec. 8547.10(c).

Citing *People v. Hudson* (2006)

38 Cal.4th 1001, Justice Kennard explained that if the statutory language is unambiguous, the legislature is presumed to have meant what it said, and the plain meaning controls. The majority interpreted the language in the statute to state that if the university completes its own internal dispute-resolution process in a timely manner, the alternative remedy of a damages action in state court is unavailable. This interpretation, Justice Kennard explained, is the only one that fits comfortably with the plain meaning of the section. She also noted the court's prior interpretation, while not determinative, in *Campbell v. Regents of the University of California* (2005) 35 Cal.4th 311, 327, 171 CPER 57,

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It is better to know some of the questions than all of the answers.

— James Thurber, writer

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

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Pocket Guide to the Higher Education Employer-Employee Relations Act

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in which the court expressed the same opinion.

Justice Kennard also commented on the unique constitutional status of the University of California as a public trust with full powers of organization and government. In fact, she explained, the grant of constitutional power given to the university includes that of quasi-judicial powers. According to Justice Kennard, U.C. functions in some ways like an independent sovereign. Thus, she continued, “Given the University’s unique constitutional status, it is not surprising that the Legislature would take a deferential approach when authorizing damages actions against the University.” She admitted, however, that the system has its drawbacks:

A damages action in state court may afford complainants a more favorable forum because the factfinder in state court is not a University employee, and because other procedural protections apply, such as evidentiary rules, testimony under penalty of perjury, and cross-examination of witnesses.

But Justice Kennard declined to determine whether, as a matter of policy, it was appropriate to grant these procedural protections to U.C. whistleblowers, and noted that these plaintiffs did not assert due process violations.

The plaintiffs urged the court to consider the legislative history of the act. However, the majority found no reason to consider the history because it found no ambiguities in the statutory language. Nonetheless, it did so

because the legislative history supported its conclusion. Many changes had been made to the act over time, including the addition of damages remedies for certain plaintiffs. However, Justice Kennard looked to the *lack* of change in the section regarding the University of California. Had the legislature intended something other than the plain meaning of the statute, it had ample opportunity to make its

Kennard looked to the lack of change in the statutory language.

intentions known. But the language has gone unchanged, and demonstrates that the legislature’s failure to alter the section is not necessarily a matter of inadvertence or oversight.

The plaintiffs contended that the availability of a civil remedy including compensatory damages, punitive damages, and attorney’s fees would deter whistleblower retaliation. The majority agreed, but it reiterated that the statutory text does not impose such damages, and they cannot be awarded. And while the plaintiffs urged the court to consider the absurd consequences in the literal meaning of the statute, the majority concluded that a rational basis for the distinction between U.C. and other state employees exists in the university’s unique status as a self-governing institution.

Common Law Claims

The plaintiffs also asserted common law claims of wrongful termination in violation of public policy. This cause of action was established in *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, in which the California Supreme Court held that when an employer’s discharge of an employee violates fundamental principles of public policy, the employee may file a tort action and recover damages traditionally available in such actions. However, 12 years later in *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1095, 93 CPER 42, the court clarified that a *Tameny* cause of action must be “carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions.”

The plaintiffs contended that their *Tameny* claims were rooted in the Whistleblower Protection Act itself, which states “that state employees should be free to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution.” However, Justice Kennard agreed with U.C.’s assertion that a *Tameny* action is unavailable against a public entity such as the university.

The majority explained that the Government Claims Act grants immunity to public entities except when specifically provided for by the state or federal constitution. To support its reasoning, the court looked to an earlier Court of Appeal decision which observed that Sec. 8547.10 provides the *only* statutory authorization for a civil

damage against U.C. based on whistleblower retaliation. The majority noted that in *Palmer v. Regents of University of California* (2003) 107 Cal.App.4th 899, 160 CPER 54, the plaintiff had no whistleblower claim and only brought a *Tameny* cause of action. Accordingly, the Court of Appeal affirmed the lower court's dismissal because a judicially created tort — not authorized by statute — cannot be asserted against the University of California.

The majority rejected the plaintiffs' *Tameny* claims against the individual supervisors because a *Tameny* claim for wrongful discharge in violation of public policy only can be asserted against an employer. It explained that an individual cannot commit the tort of wrongful discharge in violation of public policy because she is only the agent by which the employer commits that tort. Because breach of the employment relationship is an indispensable element of the tort, the action lies only against the employer, with whom the plaintiff had an employment relationship.

The plaintiffs' reliance on the Court of Appeal's decision in *Walrath v. Sprinkel* (2002) 99 Cal.App.4th 1237, 155 CPER 58, in which the court held that a supervisory employee can be held personally liable under the FEHA for retaliation, also was rejected. First, Justice Kennard explained that the court rejected that conclusion in *Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1173-1174, 189 CPER 89. Further, the *Walrath* case was distinguishable because it

rested on specific language in the FEHA referring to a person's liability that does not exist in the Whistleblower Protection Act.

The majority also rejected the plaintiffs' emotional distress claims. It explained that because the alleged misconduct occurred at work, in the normal course of the employer-employee relationship, the exclusive remedy for any injury that may have resulted lies in workers' compensation.

*Justice Werdegär
stated that the
literal reading of
Sec. 8547.10 bordered
on the 'absurd.'*

Werdegär Concurrence

Justice Werdegär wrote a concurring opinion joined by Chief Justice George and Justice Moreno. She agreed with the majority that the unambiguous interpretation of Sec. 8547.10(c) prevents a whistleblower from bringing a damages action against U.C. when the university has made a timely adverse decision that its own actions did not constitute retaliation for a protected disclosure. But Justice Werdegär did not find the result "reasonable in light of the unique constitutional status of the University of California." Rather, she believed the

literal reading of the statute will "act powerfully to defeat the purpose of the Whistle Blower Protection Act" with respect to U.C. employees.

Justice Werdegär reasoned that to ensure whistleblowers' confidence that they are protected against retaliation, they must have access to a fair and impartial decisionmaking process beyond their own management. She explained:

If the same government organization that has tried to silence the reporting employee also sits in final judgment of the employee's retaliation claim, the law's protection against retaliation is illusory.

According to Justice Werdegär, this decision eliminates meaningful independent review for U.C. employees. Thus, she continued, any potential U.C. whistleblower will be unable to act "without fear of retribution," which is the stated purpose of the act.

Justice Werdegär said that the literal reading of Sec. 8547.10 adopted by the court bordered on the "absurd." Instead, she cited the principle that language of a statute should not be given its literal meaning if doing so would result in absurd consequences that the legislature did not intend. However, she declined to apply the principle's use here because, she explained, when the statutory language is clear and unambiguous, to determine that its interpretation is absurd suggests that it resulted from a drafting error. Despite a thorough analysis of

the legislative history behind the act, she could not be sure that a drafting error created the current language in Sec. 8547.10.

Justice Werdegar commented that the correct interpretation of the statute's unambiguous language is contrary to the overall purposes of the act. She emphasized that "the Legislature *should* — logically — have amended

section 8547.10" when it amended the act's other sections. She urged the legislature "to revisit this statute" and, if it intended only to create a requirement that complainants exhaust their internal remedies, "to amend the statute in a manner that makes that intent clear." (*Miklosy v. Regents of the University of California* [2008] 41 Cal.4th 876.)

which it determined that the legislature made a conscious and affirmative decision when it excluded University of California employees from its sweeping amendments to the act. To support its conclusion, the majority conducted a thorough analysis of the legislative history leading up to the section's present language.

The majority observed that in its earliest form, Gov. Code Sec. 8547.10 existed as Gov. Code Sec. 10550, with language identical to Sec. 8547.10. Section 10550 was an adaptation of Sec. 10548, which related to all state employees. These early statutes included requirements that employees file an initial complaint, either with the

State Senator Yee Introduces Whistleblower Bill in Response to *Miklosy*

IN *Miklosy v. U.C. Regents*, the California Supreme Court announced that Sec. 8547.10(c) of the Whistleblower Protection Act "means what it says." Thus, a University of California employee must convince her own employer that she was retaliated against for protected whistleblower activity. But even if the university finds that its own actions violated the act, she can seek monetary damages in civil court *only* if U.C. "has failed to reach a decision" regarding the complaint within the time limits that the regents have established. (See story in this issue of *CPER*, pp. 42-46.)

Calling the current arrangement "a classic case of the fox guarding the hen house," Senator Leland Yee (D-San Francisco) wasted no time introducing an amended S.B. 1199 — previously a bill relating to juvenile prisoners sentenced to life without parole — in an effort to correct the statute. S.B. 1199 proposes to add

two key words to Gov. Code Sec. 8547.10(c). If the bill is signed into law, the statute will read, "...and the university has *reached, or* failed to reach a decision...." Under the amended law, an employee will be permitted to bring a legal claim for damages against the university regardless of whether U.C. determines that it violated the act or when it issues its decision.

Background

Senator Yee explained that the section's current language is the result of "an oversight made by the Legislature when the Act was amended in 2001" to provide legal standing for state-employed whistleblowers, including those at the California State University, to seek damages in civil court. The section relating to U.C. employees was left unchanged.

Senator Yee's admission that the lack of change was an "oversight" contradicts the majority's opinion in *Miklosy*, in

Yee explained the section's current language as the result of 'an oversight.'

State Personnel Board or, in the case of a U.C. employee, with the university, and that the board or university fail to deliver a decision before the employee was authorized to bring an action for damages. The Legislative Counsel's Digest called the board's failure to reach a decision "a condition precedent to filing a civil action for damages" and explained that the provisions relating to U.C. employees would be similar to the provisions administered by the State Personnel Board, except



I can't understand why people are frightened of new ideas.
I'm frightened of the old ones.

— John Cage, composer

Get a handle on old *and* new ideas! It takes time and experience to understand the nuances of labor relations, but here's a start.

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that they would be administered by the regents. The majority found this an indication that the legislature intended that a damages action against U.C. would be available only if the university failed to reach a timely decision and that the university should have autonomy when administering the provisions of the statute.

Then, in 2001, the legislature amended Sec. 8547.8(c) to allow state employees to file a damages action if the State Personnel Board “*has issued, or failed to issue, findings.*” The majority explained that this “arguably” made the provision into a mere exhaustion requirement. Still, the section relating to U.C. employees remained the same. While the Legislative Counsel’s

Digest explained that “the bill would specify that its provisions shall apply to the California State University and the University of California,” the bill itself was silent as to whether the section relating to U.C. employees also should be amended. The majority refused to see this as a mistake. Rather, it considered an explanation that, when the bill to amend the Whistleblower Protection Act was first introduced, it included several new sections concerning the dissemination of information about the act. The majority explained that *this* is the section to which the Legislative Counsel’s Digest is referring when it said that the bill would specify that the provisions shall apply to U.C.

Finally, to support its conclusion that the legislature’s failure to amend the section relating to U.C. employees was not an oversight, the majority pointed to two instances where the legislature was made aware of the restrictive language, and nevertheless declined to make changes. The first was in 1994, when lawmakers were considering a bill to add a section to the act pertaining to CSU employees. An organization expressed concern over statutory “loopholes” and proposed an amendment to authorize a damages action for U.C. employees when the internal complaint process yielded an unsatisfactory resolution. The proposals were summarized in the legislative committee’s analysis, which indicated to the majority that they

were given consideration. However, the language in Sec. 8547.10(c) was left unchanged. In 2006, another bill was introduced that would have amended the section in virtually the same way that Sec. 8547.8 was amended in 2001. That bill remains inactive.

Current Bill

Perhaps Senator Yee took his cue from the concurring opinion in *Miklosy v. U.C. Regents*. There, Justice Wer-

to alter the existing requirements of judicial exhaustion following any decision reached by the University on an employee's administrative complaint." The university also pointed out that the bill could have an adverse fiscal effect on the University in the form of increased costs for litigating the additional whistleblower retaliation claims and for potential damage awards.

Senator Yee's office told *CPER* that the Assembly failed to pass the bill through committee and on to the Assembly floor for the necessary hearings. As a result, the bill will have to be reintroduced in December when the legislature reconvenes. Senator Yee's office said that it intends to reintroduce the bill at that time. If passed quickly, the bill could be signed in to law as early as May or June 2009.

The majority refused to see the failure to amend as a mistake.

degar urged the legislature to revisit the statute and, as she suspected, if it intended to create only a requirement that complainants *exhaust* their internal remedies, "to amend the statute in a manner that makes that intent clear."

The bill has garnered wide support from unions such as AFSCME and citizen groups like Californians Aware. Even the University of California offered only "soft" criticism of the bill. In a letter to Senator Yee, the university expressed its desire to clarify the statute to ensure that employees must exhaust their administrative and judicial remedies before suing for civil damages. U.C. provided its own language, found in an additional provision at the end of the section, that states, "Nothing in this section is intended

U.C. Postdocs Form Union, Face University Opposition

POSTDOCTORAL researchers at the University of California have formed the state's first, and the nation's second, postdoc union. Postdoctoral researchers at the University of California, who work up to five years in a faculty supervisor's lab after receiving a Ph.D. or equivalent degree, make up approximately 10 percent of all postdocs in the country. On August 19, the Public Employment Relations Board informed the Postdoctoral Researchers Organize/UAW (PRO/UAW) that it had submitted valid signatures from a majority of the 5,000 eligible postdocs in support of its petition to become the exclusive representative of the bargaining unit. The UAW is already the exclusive representative of academic student employees — including teaching assistants, readers, and tutors — at U.C. and California State University.

A Bumpy Organizing Drive

The announcement was the culmination of an organizing drive that lasted more than 10 years, including a very public unsuccessful attempt to have the union certified in 2006.

U.C. postdocs make up approximately 10 percent of all postdocs in the country.

At the time, there were widespread rumors that organizers had collected signatures without fully explaining the implications of joining a union. There also was concern over whether the UAW could effectively represent academic employees. The UAW submitted to PERB what it said were

signatures from a majority of unit members. However, after several postdocs asked to have their signatures revoked, and it appeared that rejection was a possibility, the UAW withdrew its petition. The union explained that 500 to 600 of the submitted signatures were from people who were no longer postdocs — due in part to the university's sudden enforcement of the five-year-term-limit rule, which, consequently, termed many postdocs out of their positions. As a result, the union fell 100 signatures short of the majority. The petition was withdrawn before it got to the signature counting stage of the process.

Matthew “Oki” O’Conner told *CPER* that PERB would not release any information other than that the union received at least 50-percent-plus-one of the unit’s support. However, he said that all indications point to having demonstrated very strong support. While it is uncertain whether every card was counted, O’Conner said the union turned in 4,000 cards out of a 5,000-member unit. He told *CPER* that the success was due mostly to effective campaigning, a redesigned website, and a strong base of support after years of organizing.

U.C.’s Objection

Once PERB notified PRO/UAW that it had submitted a majority of signatures, the union requested recognition from the university as the exclusive representative of the proposed bargaining unit. The university challenged the appropriateness of the unit.

PERB told *CPER* that an informal conference is scheduled for October 27, when the two sides will meet in an effort to clarify the issues and attempt to reach a settlement. If that meeting is unfruitful, there will be a formal representation hearing.

U.C. spokesperson Paul Schwartz told *CPER* that the only outstanding issue is “whether a particular title with approximately 300 postdoctoral scholars should or should not be included

The university challenged the appropriateness of the unit.

in the bargaining unit.” He did not elaborate on which title was in dispute or whether it had been included in the union’s proposed unit.

The union’s proposed bargaining unit included six titles: Postdoctoral Scholars-Employee, Postdoctoral Scholars-Fellow, Postgraduate Researcher-FY, Postgraduate Researcher-AY State Funds, Postgraduate Researcher-AY Extramural Funds, and Visiting _____-Postdoc. Since 2003, the university has grouped all postdocs into one of three categories: Postdoctoral Scholar-Employee; Postdoctoral Scholar-Fellow; and Postdoctoral Scholar-Paid Direct. A postdoc is included in the “Employee” category if the agency funding the salary requires or permits the postdoc to be an employee of

U.C. or if university funds support the position. A postdoc falls under the “Fellow” title when the position is funded by an outside agency but is paid through a university account. A “Paid Direct” postdoc has been awarded a fellowship or traineeship by an outside agency that pays the postdoc directly. O’Connor told *CPER* that Paid Direct postdocs create an interesting situation for collective bargaining because their salaries are paid by various individual organizations and, in some cases, even their own country. In anticipation of the university’s objection, the union excluded these postdocs from their proposed unit. However, the title’s predecessor, Postgraduate Researcher-AY Extramural Funds, was included.

With the number of postdocs in the Fellow and Scholar titles estimated to be in the thousands, it is unlikely that Schwartz was referring to either of these categories.

It is possible, however, that the title in dispute is the Postdoctoral Scholars-Paid Direct, which O’Connor estimated to include about 600 people.

If the unit is certified as the union proposed, current postdocs who are paid directly by an outside agency and are still under the old job classification title would be members of the collective bargaining unit for the remainder of their term. However, postdocs under the new title, Postdoctoral Scholar-Paid Direct, who also work at U.C. and are paid directly by an outside agency, would not be members. O’Connor said that while he did not have any hard numbers to go by, he

thought that if there are any postdocs under the old title, the number would be very low.

Union Moving Forward

O’Conner told *CPER* that the union believes the unit is appropriate. He also said that there are ongoing talks with the university to resolve the issue and that the university’s objection to the unit should not be a huge hurdle to gaining exclusive representation.

*The next step
will be to elect
a bargaining team.*

Meanwhile, PRO/UAW is moving forward as planned. The next step will be to elect a bargaining team and send surveys to the membership to determine what issues to bring to the negotiating table. O’Conner said the core issues — wages, benefits, and working conditions — will be part of the talks. Beyond that, he said, the union will listen to its members and, through a democratic process, determine those issues most important to postdocs at U.C.

Discrimination

Congress Amends ADA to Expand Protections for Disabled

LEGISLATION TO expand the definition of disability and make it easier for employees to prove discrimination sailed through Congress on September 17, 2008. Representative Steny H. Hoyer (D-MD) introduced H.R. 3195 last year. Senator Tom Harkin (D-IA), sponsored the Senate version, S. 3406. It passed the Senate unanimously and, when sent back to the House, was

The bill is described as ‘an act to restore the intent and protections’ of the ADA.

enacted unanimously by voice vote. President Bush had not signed the bill as of CPER's press time, but is expected to do so. If he does, the new law will go into effect on January 1, 2009.

The bill is described as “an act to restore the intent and protections of the Americans with Disabilities Act of 1990.” It makes clear that the legislation was enacted to overrule decisions by the United States Supreme Court that set strict standards to determine who is disabled. The bill states, in part,

“while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled.” It mentions specifically *Sutton v. United Air Lines, Inc.* (1999) 527 U.S. 471, 137 CPER 21, and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* (2002) 534 U.S. 184, as having “narrowed the broad scope of protection intended to be afforded by the ADA.” It explains that, as a result of these cases, “lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities.”

One of the purposes of the legislation, according to the bill, is to reject the requirement enunciated in *Sutton* that determination of whether “an impairment substantially limits a major life activity” is made “with reference to the ameliorative effects of mitigating measures.” In order to accomplish this purpose, the bill specifies that the determination shall be made *without* considering the effect of mitigating measures, including medication, medical supplies, equipment, appliances, low-vision devices,

prosthetics, hearing aids, mobility devices, or oxygen therapy equipment. Assistive technology, reasonable accommodations, and learned behavioral or adaptive neurological modifications also may not be considered. However, ordinary eyeglasses and contact lenses can be considered.

The act also specifies that “an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability,” and “an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”

“Major life activities” would now

Determination shall be made without considering the effect of mitigating measures.

include a broader range of activities than some courts have allowed, such as caring for oneself, performing manual tasks, standing, lifting, bending, learning, reading, concentrating, thinking, communicating, and working. Major bodily functions are also encompassed in the definition, including “the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”

The bill would also expand the protections extended to persons who are “regarded as” having an impairment. That standard is met “if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” This definition does not include “transitory or minor” impairments, which are those with an actual or expected duration of six months or less.

The definition of disability is to be construed “in favor of broad coverage

of individuals under this Act, to the maximum extent permitted by the terms of this Act.”

The legislation is heralded as “one of the most important pieces of civil rights legislation of our time,” to quote Representative Jim Langevin (D-RI), who uses a wheelchair. “The Supreme Court decisions have led to a supreme absurdity, a Catch-22 situation. The more successful a person is at coping with a disability, the more likely it is the court will find that they are no longer disabled and therefore no longer covered under the ADA,” explained Senator Harkin. *

Johnson also alleged that the hospital refused to consider a residency candidate because he was African-American and that a certain nurse consistently refused to provide him with necessary equipment. He also alleged that the same nurse repeatedly asked him to remove trash from the operating room, requests which she thought were “funny.” Johnson contended these remarks were racially motivated because they reflected the nurse’s opinion that he should perform the duties of a maintenance man because he is African-American. Johnson also alleged the hospital was aware of these incidents and made no effort to address them.

Under the terms of Johnson’s contract with the hospital, he was required to maintain his membership and privileges with the Medical Staff. Failure to do so was cause for termination. Johnson’s privileges were revoked in February 2002 for failure to pay dues, and the hospital terminated him soon after. His application for reinstatement was denied, and he was forced to reapply as a new applicant and submit to a hearing before the credentials committee. At the hearing, Johnson was confronted with a number of co-worker complaints about his behavior. The committee voted to uphold the denial of his membership.

Johnson filed a lawsuit. The district court dismissed all of his claims, and Johnson appealed. The Ninth Circuit initially upheld the lower court’s decision, but subsequently granted Johnson’s motion for reconsideration.

Ninth Circuit Reverses Itself: Reinstates Race/Sexual Orientation Discrimination Case

THE NINTH CIRCUIT COURT of Appeals reversed a portion of its decision in *Johnson v. Riverside Health Care Systems* (9th Cir. 2008) 189 CPER 93, and reinstated some of the plaintiff’s allegations it had dismissed. In its new decision, the court found that the plaintiff had alleged sufficient facts to state the elements of a hostile work environment claim because of race in violation of 42 USC Sec. 1981, but again upheld the lower court’s dismissal of allegations of racial and sexual orientation discrimination in violation of California’s Unruh Civil Rights Act and the Fair Employment and Housing Act.

Christopher Johnson, who is African-American and bisexual, worked as a physician at the Riverside Community Hospital. Johnson alleged that during the course of his employment, he was harassed about his sexual orientation and because of his race. In one incident, a colleague, Dr. Vlasak, became irate after learning that Johnson had performed surgery on one of Vlasak’s patients. Johnson had discovered that the patient had sustained a skull fracture, a fact Vlasak missed because he failed to review the patient’s CT scan. According to Johnson, Vlasak charged into the room where Johnson was standing and screamed, “You fucking nigger — why did you do that to me?”



If opportunity doesn't knock, build a door.

— Milton Berle, comedian

Disabled California employees need not build a door. Those 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.

CPER's Pocket Guide 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

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Court of Appeals Decision

In its first decision, the court concluded that Johnson had failed to show that the conduct he complained of was sufficiently severe or pervasive to alter the conditions of his employment and create an abusive work environment. It noted that, under Sec. 1981, only the race discrimination allegations could be considered because that section does not prohibit discrimination on the basis of sexual orientation. It found only two allegations qualified: claims concerning Vlasak's conduct and the hospital's refusal to hire the African-American residency candidate. It concluded that, although Vlasak's conduct was clear evidence of race discrimination, it was not sufficient stand-

ing alone, and the hospital's refusal to hire another African-American, while relevant, did not directly impact Johnson. "Thus, Johnson points to just two incidents of discriminatory conduct over the course of his twenty-eight month tenure at Riverside, and only one in which he was the victim," concluded the court. It made only a passing reference to the allegations regarding the nurse's conduct.

However, in its second decision, unlike in the first, the court recited the allegations regarding the nurse in its summary of the facts and relied on them, along with Vlasak's conduct and the hospital's refusal to hire the African-American residency candidate, in ruling in favor of Johnson on the

Sec. 1981 claim. "We have previously held that a coworker's use of a 'code word or phrase' can, under certain circumstances, contribute to a hostile work environment," noted the court. "While we are not obligated to accept every conclusory allegation as true," it continued, "we believe the inference that racial animus motivated the nurse's frequent requests that Johnson perform the tasks of a maintenance man is a reasonable one that we must construe in his favor at the motion to dismiss stage."

The court determined that the complaint alleged enough facts to state a claim for relief "that is plausible on its face," commenting that "our notice pleading requirements do not require more." Therefore, it reversed the dis-

trict court's ruling as to the Sec. 1981 claim and sent it back to the lower court for further proceedings. (*Johnson*

v. Riverside Health Care System [9th Cir. 2008] 534 F.3d 1116.) *

Court's Interpretation of CFRA's Request Requirement Favors Employees

THE SECOND District Court of Appeal, by a vote of two to one, has determined that an employee's submission of medical excuse forms to his employer is sufficient to constitute a request for leave under California's Family Rights Act. In *Avila v. Continental Airlines, Inc.*, the court took a pragmatic approach to allow for leave under the act.

The trial court correctly dismissed the disability discrimination claim.

Henry Avila worked for a division of Continental Airlines. Its attendance policy provided that an employee would be terminated if he or she had seven or more "recordable" absences in any 12-month period. Absences due to pre-arranged short-term disability and family medical leave were not counted as "recordable" absences. The policy provided that each day of missed work counted as one recordable absence, unless the employee submitted a doctor's note stating that the absence was for medical reasons. Under those circum-

stances, only one absence is recorded even if the employee is absent for a number of days.

Avila was terminated under this policy. Included in the seven recordable absences were four days when Avila was hospitalized for acute pancreatitis. When he returned to work after his hospitalization, Avila gave the airlines preprinted forms from Kaiser indicating that he had been hospitalized for four days and unable to work for an additional day. The forms did not reveal the nature of Avila's illness.

Avila filed a lawsuit alleging that Continental's actions violated California's Fair Employment and Housing Act, the CFRA, and public policy. When the trial court dismissed the case, Avila appealed.

Court of Appeal Decision

The court found that the trial court correctly dismissed Avila's disability discrimination claim because he did not prove that Continental knew of his disability when it terminated him, since the Kaiser form did not specify the nature of his illness. And, while Avila told some coworkers why he had been hospitalized, there was no evidence that the managers who

made the termination decision knew about those statements. Further, said the court, the fact that Avila produced medical records *after* he was terminated was irrelevant.

However, the Court of Appeal concluded that Avila's evidence *was* sufficient to state a claim under the CFRA. "In general, CFRA makes it an unlawful employment practice for an employer of 50 or more persons to refuse to grant an employee's request to take up to 12 workweeks in any 12-month period for family care and

The CFRA places the burden on the employer to ask for more information if necessary.

medical leave," explained the court. The CFRA provides that an employee is entitled to leave "because of an employee's own serious health condition that makes the employee unable to perform the functions of the position of that employee." A "serious health condition" is defined as "an illness, injury, impairment, or physical or mental condition that involves...inpatient care in a hospital," the court noted.

The sole issue before the court was whether a reasonable trier of fact could conclude that Avila requested the medical leave within the meaning

of the act. The court brushed aside Continental's claim that Avila had not produced sufficient evidence that he had submitted the Kaiser papers to the airlines. The court found that Avila testified "unequivocally" that he gave the forms to the manager on duty. The court concluded that "a reasonable trier of fact could interpret that testimony to relate not to *whether* plaintiff submitted the Kaiser forms to Continental, but specifically to *whom*" he gave the forms.

The court also rejected the employer's argument that submission of the forms did not constitute a request for leave. While the CFRA does not define what constitutes a "request," the Fair Employment and Housing Commission's regulation interpreting

the act does, noted the court. It states that "an employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs CFRA-qualifying leave, and the anticipated timing and duration of the leave." The regulation goes on to say that, "the employee need not expressly assert rights under CFRA or FMLA, or even mention CFRA or FMLA, to meet the notice requirement; however, the employee must state the reason the leave is needed, such as, for example, the expected birth of a child or for medical treatment." The regulation places the burden on the employer to ask the employee for more information if necessary to determine whether CFRA leave is being sought. In addition, the regulation explains that the

employee does not need to specify that he or she is requesting CFRA leave. It states that, "Under all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as CFRA or CFRA/FMLA qualifying, based on information provided by the employee...and to give notice of the designation to the employee."

The court determined that a reasonable trier of fact could conclude that Avila provided sufficient notice that he needed CFRA-qualifying leave. "In a case involving a medical emergency, notice on a hospital's preprinted form that an employee was hospitalized and unable to work may be sufficient to inform an employer that the employee might have suffered a serious medical condition under CFRA, and the timing

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Facts do not cease to exist because they are ignored.

— Aldous Huxley, writer

Examine the facts and then 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 arbitration deferral standards, restoration of the doctrine of equitable tolling, and the addition of three 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.

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and duration of the necessary leave,” said the court.

But, argued Continental, even if the Kaiser forms constituted a request, it was not liable because there was no evidence that the individuals who made the decision to terminate Avila personally were aware of his status. Therefore, it argued, the termination could not have been “because of” Avila’s exercise of his rights under the CFRA. Continental’s analysis is “not correct,” said the court. “The ‘because of’ language in section 12945.2, subdivision (l), requires only proof of a causal connection between the employee’s protected status or conduct and the adverse employment action taken by the employer,” it explained. The supervisors discharged Avila “because of” his absences. “The facts are sufficient to demonstrate a causal link between” Avila’s leave and his discharge, said the court.

The court criticized the position advocated by Continental, calling it “inconsistent with the anti-discrimination provisions of CFRA.” Interpreting the act in that way “would encourage managers to remain ignorant of both the law and the facts relating to CFRA leave.” In addition, Continental’s proposed rule would require proof that a manager subjectively knew an employee’s leave was legally protected and would, “in effect, require a plaintiff to negate an employer’s good faith as part of the employee’s prima facie case.” There is no authority to support such a principle, said the court.

Justice Sandy R. Kriegler concurred with the majority’s decision upholding the dismissal of the FEHA claim, but dissented from the reversal of the dismissal of the CFRA and wrongful termination claims, concluding that Avila never requested a leave.

The court reinstated Avila’s claim for wrongful termination in addition to the CFRA claim and sent the case back to the trial court for further proceedings. (*Avila v. Continental Airlines, Inc.* [2008] 165 Cal.App.4th 1237.) *

Limitations Period Begins to Run When Employee Learns of Actual Injury

THE TIME FOR filing a complaint alleging employment discrimination in violation of a federal civil rights statute begins to run when the employee knows or has reason to know of the injury that is the basis of the action, not when he or she learns that the action may be illegal, according to the Ninth Circuit Court of Appeals. Although *Lukovsky v. City and County of San Francisco* involved a claim under 42 USC Secs. 1981, 1983, and 1985. The court’s ruling is equally applicable to other anti-discrimination statutes.

The six plaintiffs named in the case applied for the position of permanent mechanic with the San Francisco Municipal Transportation Agency at various times starting in 1998 and ending in 2000. None was hired. Two filed a lawsuit in January 2005, and the other four filed in March 2006. The plaintiffs alleged that the employer gave preferential treatment to Asian and Filipino applicants who did not meet the minimum qualifications for the job. They also alleged that the

employer modified the requirements for the position in late 2000 to make it easier to hire Asian and Filipino applicants and that it failed to provide sufficient information about the position to non-Asian and non-Filipino candidates. They contended that, by taking these actions, the employer violated 42 USC Secs. 1981, 1983, and 1985.

The district court dismissed both lawsuits, holding they were filed after the statute of limitations had run. The plaintiffs appealed.

Court of Appeals Decision

The Ninth Circuit agreed with the district court’s reasoning. Where, as here, the federal statute does not have its own statute of limitations, federal courts borrow the state’s statute of limitations for the same type of injury, it instructed. In a case such as this, California’s limitations period is one year. However, it explained, “although California law determines the *length* of the limitations period, federal law

determines when a civil rights claim *accrues*,” and “under federal law, a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action.”

The plaintiffs argued that their claims did not accrue until they knew both that they were not hired *and* that unqualified Asians and Filipinos had been hired. They contended they did not know about the hiring of Asians and Filipinos until less than a year before filing their lawsuits. “In

Other circuits have concluded that ‘the claim accrues upon awareness of the actual injury.’

other words,” said the court, “plaintiffs contend that knowledge of ‘injury’ includes both the actual injury (failure to hire) and the legal wrong (racial discrimination).”

The court identified the central issue to be “what do we mean by ‘injury,’ that is, what must the plaintiffs ‘discover’ — that there has been an adverse action, or that the employer acted with discriminatory intent in performing that act?” It noted that, while this issue has not been specifically addressed in the Ninth Circuit, it has been decided in the Third, Fifth, Sixth, Seventh, Eighth, and Tenth

Circuits, all of which have concluded that “the claim accrues upon awareness of the actual injury, i.e., the adverse employment action, and not when the plaintiff suspects a legal wrong.”

The court also found the position taken by its sister courts consistent with *Delaware State College v. Ricks* (1980) 449 U.S. 170, in which the Supreme Court focused on when the plaintiff in a Title VII and Sec. 1981 suit became aware of the adverse employment decision. “*Ricks* concluded the statute of limitations under both commenced when the adverse decision was communicated to Ricks, even though the consequences of the action were not fully felt at that time,” explained the court.

Turning to analogous cases in its own circuit, the court pointed to *Davis v. United States* (9th Cir. 1981) 642 F.2d 328, involving the Federal Tort Claims Act, where the court determined that the statute of limitations began to run when the plaintiff knew he had been injured, not when he first had reason to suspect governmental negligence.

The court was not persuaded by the plaintiffs’ reliance on language in two other Ninth Circuit cases, because those cases did not address the issue presented in this case. “These stray remarks in cases that did not actually confront the issue before us do not compel us to disagree with our sister circuits that a claim accrues under federal law when the plaintiff knows or has reason to know of the actual injury,” it said.

Two doctrines that sometimes operate to extend a statute of limitations were not applicable here, concluded the court. The parties agreed that equitable tolling, which would extend the time for filing if a reasonable plaintiff would not have known of the existence of a claim within the filing period, did not apply.

However, the plaintiffs argued that the city and county should be equitably estopped from relying on the statute of limitations as a defense because it made misrepresentations about the application process which hid that it was hiring unqualified Asian and Filipino applicants.

The court was not persuaded. “The primary problem with plaintiffs’ argument is that their alleged basis for equitable estoppel is the same as their cause of action,” said the court. The plaintiffs could not point to any fraudulent concealment or action separate from the wrongdoing that was the basis of their claim to prevent them from filing a timely complaint. (*Lukovsky v. City and County of San Francisco* [9th Cir. 2008] 535 F.3d. 1044.) *

Public Sector Arbitration

One-Year Limitations Period on FEHA Claim Not Unconscionable Arbitration Provision

IN A PRIVATE sector case with public sector application, the Second District Court of Appeal ruled that a mandatory arbitration agreement that includes a one-year statute of limitations provision did not unreasonably restrict the employee's ability to vindicate his rights under the Fair Employment and Housing Act. Reversing the trial court, the Court of Appeal declined to vacate the arbitrator's award which found that the employee had failed to timely submit his FEHA claim to arbitration.

The lawsuit involved a claim for age discrimination filed by Luis Turcios against his employer, Pearson Dental Supplies. Turcios had been hired by the company in 1999, when he was 59 years old. In 2001, he signed a dispute resolution agreement making arbitration the sole remedy for any claim arising in, or related to, his employment. The DRA provided that such disputes must be submitted to binding arbitration within one year from the date the matter arose or when the employee first became aware of the facts giving rise to the dispute.

Pearson fired Turcios on January 31, 2006. On April 5, 2006, Turcios filed an age discrimination complaint with the Department of Fair Employ-

ment and Housing. DFEH issued a right-to-sue letter on April 14, 2006.

On October 2, 2006, Turcios filed a lawsuit against Pearson, alleging age discrimination, wrongful discharge, and breach of contract. The company asserted 31 affirmative defenses to the complaint but did not mention the dispute resolution agreement. The trial court was made aware of the arbitration agreement on February 20, 2007. Two days later, Pearson formally demanded that the case be submitted to binding arbitration. It filed a petition to compel arbitration and provided the court with the DRA but did not mention the one-year limitations period. Turcios opposed the motion, arguing that Pearson had waived its right to arbitration by participating in the litigation. Turcios made no reference to the one-year statute of limitations period, nor did he explain to the court why he had not first submitted his claim to arbitration.

The trial court granted Pearson's petition to compel arbitration under the terms and conditions set forth in the DRA.

On July 24, 2007, during the arbitration proceeding, Pearson asserted that Turcios did not timely submit his claims to binding arbitration. Pear-

son argued before the arbitrator that the statute of limitations defense was properly brought before the arbitrator and that issues involving timeliness can be resolved only in binding arbitration. In response, Turcios charged that his right to arbitrate was tolled during the pendency of the civil action, that the one-year limitations period was substantively unconscionable, and that Pearson's request for arbitration was untimely.

Turcios charged that his right to arbitrate was tolled during the civil action.

The arbitrator sided with Pearson, finding that Turcios had failed to submit his claims within the one-year period required by the DRA and thereby waived his right to proceed in arbitration against his employer.

Pearson filed a petition with the court to confirm the arbitrator's award. In response, Turcios argued that the DRA's one-year limitations period violated his unwaivable FEHA rights because the FEHA allows for a two-year statute of limitations.

The trial court denied Pearson's motion to confirm the arbitration award and concluded that the arbitrator had ruled in excess of his jurisdiction. The court reasoned that Pearson could not deny Turcios the arbitral forum because the company success-

fully had compelled arbitration in the first place. By doing so, the court said, Pearson waived the contractual time limit and “must accept the validity of the arbitration forum for a hearing on the merits.”

On appeal, the court focused first on whether the arbitrator had exceeded his powers by rendering an award in favor of Pearson. “For good or ill,” said the Court of Appeal, “the scope of judicial review of arbitration awards is extremely narrow. Courts may not review the merits of the controversy, the sufficiency of the evidence supporting the award, or the validity of the arbitrator’s reasoning.”

In general, the court continued, citing *DPA v. CCPOA* (2007) 152 Cal.App.4th 1193, 185 CPER 50, an arbitrator’s award is not reviewable for errors of fact or law, whether or not

the error appears on the face of the award or causes substantial injustice to the parties.

Despite these principles, Turcios argued that the trial court must vacate an arbitrator’s award when it violates a party’s statutory rights or a well-defined public policy. In his case, he asserted that the arbitrator’s application of the one-year limitations period contravened public policy because it shortened the FEHA limitations period. The Court of Appeal disagreed.

Armendariz v. Foundation Health Psychcare Services (2000) 24 Cal.4th 831, 144 CPER 69, established that an arbitration agreement cannot serve as a vehicle for the waiver of statutory rights created by the FEHA or as a means of effectively curtailing those rights. *Armendariz* instructed that the minimum procedural requirements

for arbitration of FEHA claims must include a neutral arbitrator, adequate discovery, a written decision sufficient to permit limited judicial review, and imposition of arbitration costs on the employer, not the employee.

The court in *Armendariz* did not discuss what would constitute an unlawful time restriction on an employee’s FEHA claim. However, the appellate court in *Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, concluded that an arbitration agreement which required an employee to notify the employer of all claims within six months of the date the claim arose was substantively unconscionable. The shortened limitations period in that arbitration agreement was “insufficient to protect its employees’ right to vindicate their statutory rights,” the court said in *Martinez*.

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In the present case, the Court of Appeal read *Martinez* narrowly, finding, “It did not hold that an arbitral limitation period that is shorter than the FEHA’s is per se unenforceable.” In *Martinez*, the court noted, the arbitration agreement severely truncated the limitations period, reducing it from one year to six months. And, the question arose in the pre-arbitration context; it involved determining whether to order arbitration in the first place. Here, in contrast, the issue arose after a

The court found that the one-year limitations period was more than adequate.

court-ordered arbitration, and Turcios never claimed the one-year limitations period was unconscionable.

Relying on the factual record, the court found that the one-year limitations period was more than adequate for Turcios to vindicate his FEHA rights had he timely proceeded to arbitration. After he was fired on January 31, 2006, he filed his administrative complaint with DFEH on April 4, 2006, and received a right-to-sue letter nine days later, on April 14. Therefore, the court calculated, only two-and-a-half months elapsed from Turcios’s firing to issuance of the right-to-sue letter. Having agreed not to submit

employment disputes to administrative review or civil litigation, reasoned the court, it was not unreasonable for the parties also to eliminate the one-year period during which the plaintiff would otherwise have been required to exhaust his administrative remedies before the DFEH. Based on this reasoning, the court concluded that the contractual requirement to commence arbitration within a year after the dispute arises is comparable to the one-year period within which a plaintiff must file a lawsuit for statutory discrimination after obtaining a right-to-sue letter from the DFEH.

The court also pointed out that the entire time frame in the case — from firing to lawsuit — took only eight months. Therefore, said the court, “it cannot be said that the one-year arbitral limitation period provided insufficient time for [Turcios] to vindicate his FEHA rights in an arbitral forum.”

In an unpublished portion of the decision, the court noted that Turcios never argued that the one-year time limitation was unconscionable when he opposed Pearson’s motion to compel arbitration in the trial court. And, said the court, because Turcios failed to raise unconscionability in a timely manner when he had the opportunity to do so, he forfeited his claim that the court, not the arbitrator, should rule on that question.

Finally, the court entertained Turcios’ assertion that Pearson was estopped from asserting the one-year statute of limitations period once the

matter had been referred to arbitration. Turcios stressed that Pearson did not raise the issue of arbitration during litigation until *after the one-year limitation period had expired*. And, when it sought to compel arbitration, it advised the trial court that there was an enforceable arbitration agreement, and that Turcios would not be prejudiced by granting its petition to compel arbitration.

Concluding that Turcios raised these same facts in opposing Pearson’s

Turcios failed to raise unconscionability in a timely manner.

summary judgment motion before the arbitrator, the court again referred to case law that prohibits the trial court from reviewing the arbitrator’s factual or legal conclusions. Moreover, the court added, even if substantive review of the arbitrator’s decision were permissible, the evidence does not support the estoppel claim because Turcios was on notice that Pearson believed his claim was barred by the one-year statute of limitations before it petitioned the court to compel arbitration. Therefore, Turcios could have asserted that the one-year limitations period was unconscionable when he opposed the petition to compel arbitration. (*Pearson Dental Supplies v. Superior Court of Los Angeles; Luis Turcios, RPI* [2008] 166 Cal.App.4th 71.) *

Arbitration Log

- **Contract Interpretation**
- **Training**

State of California, Dept. of Corrections and Rehabilitation, and California Correctional Peace Officers Assn. (5-21-07; 11 pp.). *Representatives*: Edmund K. Brehl (labor relations counsel) for the state; Fred Wasilewski (hearing representative) for the union. *Arbitrator*: Bonnie G. Bogue.

Issue: Did the department violate Sec. 7.05.G of the collective bargaining agreement when it stopped providing “side-handle” baton training to correctional officers after such batons were replaced by another type of baton?

Association’s position: (1) Section 7.05.G requires the department to provide correctional officers with four hours of annual training in the use and certification of side-handle batons. Since early 2005, in violation of the contract, no such training has been provided.

(2) In March 2005, the department proposed as its “last and best final offer” the issuance of a new type of “expandable” baton. Since then, expandable batons have been issued to all correctional officers instead of side-handle batons. This has no bearing on the contractual requirement to provide side-handle baton training.

(3) During negotiations, the department did not give notice it intended to change the application of Sec. 7.05.G.

Employer’s position: (1) The department properly exercised its managerial discretion when it elected to issue expandable batons.

(2) Principles of contract law provide that a party will not be required to perform an idle act when conditions that existed when a contract was formed no longer exist. Having the department provide side-handle baton training when such batons are no longer used would be an illogical and unreasonable interpretation of the contract.

Arbitrator’s holding: Grievance denied.

Arbitrator’s reasoning: (1) A contract provision does not have to be implemented when the reason for the provision no longer exists. An axiom in the interpretation of labor agreements is to avoid an interpretation that yields a harsh or nonsensical result. The union’s requested remedy — side-handle baton training in every institution — would yield an unreasonable result because side-handle batons are no longer used, and training officers to use such batons

would be a waste of department resources.

(2) When the CBA was negotiated, the parties were not aware that side-handle batons would be phased out. Had they known, they likely would have negotiated conditional language that required side-handle baton training only if such batons were in use.

(3) This award cannot be cited as precedent to declare other parts of the contract meaningless merely by claiming changed circumstances. Each case depends on its own facts, contract language, and bargaining history.

(4) The department acted within its reserved managerial right to change safety equipment and introduce the new baton. The effect of this action was to render a piece of safety equipment redundant and training on that equipment without purpose.

(5) The state did not violate contract Sec. 7.05.G. If side-handle batons are again put in service by the department, then the association, at that time, can act to enforce the contractual training requirement.

(Binding Grievance Arbitration)

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- **Contract Interpretation**
- **Vacancy Posting**

Hayward Education Assn., CTA/NEA, and Hayward Unified School Dist. (1-14-08; 18 pp.). *Representatives:* Roy A. Combs and Joshua A. Stevens (Fagen Friedman & Fulfroft) for the district; Samuel DeHaven (chapter services consultant) for the association. *Arbitrator:* William E. Riker.

Issue: Did the district violate the collective bargaining agreement by failing to post vacant adult-school contract positions, or portions of the contract position[s], and fill them according to the contract?

Association's position: (1) In 2006, two adult school teachers retired from their contract positions. Both were subsequently reemployed to teach half of their prior courseload on a temporary contract basis. In the past, contract employees were reemployed as hourly employees after they retired, never as contract employees, because such re-employment violates the collective bargaining agreement.

(2) The district is required to post notice of a position vacated by a retiree and fill it with a properly credentialed individual. Instead, the district posted part of the two retiring teachers' positions that had been broken up. The district violated the contract by failing to post either of the two vacated positions.

(3) The contract requires that bargaining unit members be interviewed for a posted position before outside applicants. The district interviewed one outside applicant before the grievant.

(4) Article 14 of the contract requires the district to measure all inter-

viewed applicants based on experience, district and site seniority, and evaluations of past performance. The district did not follow these criteria because the applicant hired over the grievant had less work experience and seniority.

(5) The grievant is entitled to a full-time contract position, effective 2006-07, with backpay.

District's position: (1) The association's grievance is based on the assumption that there was a vacancy under the contractual definition in Article 14. But, because there were temporary substitute employees available to fill the vacancy sought by the grievant, there was no such contractually defined vacancy available, and thus no contract violation occurred.

(2) In the past, when a contract teacher retired and then was reemployed on a part-time basis, neither the portion of the position retained nor the part given up was posted. Though not required to do so, the district posted part of the two retiring teachers' positions as a single position.

(3) Even if the district violated the contract by failing to post the positions, it followed proper procedure in filling the position it did post. The hiring panel found the successful candidate to be the most acceptable person for the position. The principal and the retired incumbent, who was one of the interviewers, deny that they treated the grievant unfairly.

Arbitrator's holding: Grievance sustained.

Arbitrator's reasoning: (1) The district gave proper notice that the two retiring teachers would be given an opportunity to return. There were no improper ne-

gotiations with the two employees.

(2) The district has a past practice of reemploying retiring teachers in part-time positions. The definition of "vacancy" under Article 14 allowed the two retirees to be given first consideration to teach on a reduced schedule.

(3) Regardless of management prerogative, once the decision is made by the district to post a position, the district must adhere to Article 14. The district's argument that since there was no vacancy, there could be no violation of Article 14, is rejected. A position was posted, and this subsequent posting and interview process can be reviewed by an arbitrator.

(4) The district did not violate the contract by scheduling an outside candidate to be interviewed before the grievant. The scheduling order of the persons being interviewed is not material.

(5) The principal and the interview panel violated the contract by failing to specifically consider the hiring criteria enumerated in Article 14. The interviewer's testimony reveals that while the hiring decision was not biased, the contract criteria were not applied. The grievant is to be made whole for any difference in income lost as a result of the failure to select her for the position.

(Binding Grievance Arbitration)

- **Contract Interpretation**
- **Overtime**

City of Santa Rosa and Santa Rosa Police Officers Assn. (3-10-08; 14 pp.) *Representatives:* Cynthia O'Neill, for the city; Alison Berry Wilkinson, for the association. *Arbitrator:* Paul D. Staudohar (CSMCS Case No. ARB-06-0595).

Relevant Contract Provision: Article 40, Overtime; Sec. 40.1 — If the employee works either a 4/10 or 5/8 schedule, and is required by the City to work more than forty (40) hours per week, employees shall be compensated for such overtime hours at the rate of 1.5 times the regular rate of pay. Sec. 40.2 — If the employee works a three (3) day — twelve and one half (12.5) hour schedule, they shall be compensated at the overtime rate for all hours worked in excess of thirty seven and one half (37.5) hours in a work week. During the “payback week” which occurs once every twenty eight (28) day cycle, they shall be compensated at the overtime rate for all hours in excess of forty seven and one half (47.5) hours. Sec. 40.3 — An employee may elect overtime pay as CTO for those overtime hours that are under the FLSA weekly overtime requirement. Sec. 40.4 — The overtime rate shall be as provided by the FLSA.

Issue: Did the city violate Article 40 by using the city overtime rate — which includes base pay, educational incentive pay, and motorcycle pay — for hours over the daily schedule, and using the FLSA regular rate formula only for hours over the FLSA 171-hour threshold? If so, what is the remedy?

Association’s position: (1) Under the FLSA, non-exempt employees receive overtime at one-and-one-half times the employee’s regular rate of pay for each hour worked beyond the maximum period. “Regular rate” is defined as “all remuneration for employment paid to, or on behalf of the employee.” Examples of compensation that must be considered in computing the regular rate of pay for overtime include shift differentials, educational incentives, longevity premiums, hazardous-duty pay, and special assignment pay.

(2) The memorandum of understanding includes several specialty pay provisions that provide an additional percentage of base salary per month and that must be included in the FLSA overtime rate. Examples of specialty pay include completion of the POST program, riding motorcycles, and fluency in Spanish. While the plain language of the MOU requires that all specialty pay be included in the overtime rate for all purposes, the city has not included specialty pay in computing the MOU overtime rate.

(3) Since 1985, the collective bargaining agreement has stated that the “overtime rate shall be as provided by the FLSA.” Although the agreement

requires payment of overtime on a more generous basis than the FLSA, the city is contractually obligated to pay the FLSA overtime rate, which is higher than the MOU overtime rate.

(4) According to two unit members who were at the bargaining table in 1985, the intent of the overtime language was to ensure that all specialty pay received on a regular basis was included in the overtime pay. In 1985, there were only two categories of specialty pay — educational incentives and motorcycle pay. Because these categories were covered in the MOU’s overtime rate, the city was in compliance. The city fell out of compliance when specialty pay was extended to other categories in 1996 and 1999, and it did not include this in overtime calculations.

(5) The city unduly relies on a letter from the association’s counsel in which he inquired whether the city intended to have a two-tier approach to overtime — one rate for MOU overtime and the other for FLSA overtime. The city never formally responded, and it continued its practice of having only one overtime rate that included FLSA-mandated premium pay for educational incentives and motorcycle pay.

(6) The association did not waive its rights under the MOU. In a 2005 meeting, the city sought to explain how it calculated overtime, but did not explain why it does not calculate all overtime hours, FLSA and MOU, at the regular rate required by the MOU. The issue carried over into negotiations but was not resolved.

(7) The appropriate remedy is backpay for association members whose

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overtime was improperly calculated from August 2005 to the present.

City's position: (1) The association did not prove that the city violated the MOU. There are inherent ambiguities in Article 40. However, this is because the city generously pays overtime for any combination of work and paid leave that pushes an employee over his or her work schedule.

(2) The association's assertion that "regular hourly rate of pay" in Sec. 40.1 and "overtime rate" in Sec. 40.4 both refer to the FLSA rate is incorrect. It requires the reader to ignore the parties' use of the word "hourly" in Sec. 40.1. Had the parties intended MOU overtime and FLSA overtime to be paid at the same rate, they would have used the phrase "regular rate" consistently throughout the agreement.

(3) Association officers and labor representatives agreed to a two-tier system of overtime compensation where daily MOU overtime and FLSA overtime are paid at different rates. Unspoken beliefs of association witnesses do not establish a violation.

(4) Despite the association attorney's letter requesting confirmation of the two-tier approach to overtime rates in February 1986, he acknowledged during 1999 negotiations that the two-tier formula was "within the letter of the law."

(5) The association's expressed and documented agreement with the two-tier formula proves that the parties never intended to pay MOU overtime at the FLSA rate. Each time the association raised the issue of MOU overtime during negotiations, it abandoned the effort and signed a successor agreement.

(6) For 27 years, the daily MOU overtime rate has included only base pay, educational incentive pay, and motorcycle pay. As the parties added other specialty pay provisions, the city made it clear, and the association understood, that these would be excluded from the MOU overtime rate. The association's filing of the instant grievance seven months after the parties settled on the current MOU demonstrates that the parties reached agreement on all issues. The association's claim that the dispute has been ongoing is disingenuous. Failure to achieve a provision through negotiation should not be resuscitated through arbitration.

(7) A firmly established past practice exists because the language in Article 40 has been included and consistently interpreted for 27 years. The practice is unequivocal, clearly enunciated and acted upon, and readily ascertainable as a fixed and established practice. It is binding on both parties.

Arbitrator's decision: The city did not violate Article 40 of the MOU in its calculation of overtime to the police officers.

Arbitrator's reasoning: (1) Under the FLSA, all forms of regularly received compensation are part of the employee's rate of pay for purposes of calculating overtime. Thus, if an employee regularly receives a shift differential in addition to base pay, that additional pay is factored into the overtime calculation for FLSA purposes.

(2) Here, the city calculates its own overtime rate, called MOU overtime, that is equal to an employee's base hourly rate plus educational incentive

pay and motorcycle pay — the only two categories of specialty pay included in the MOU overtime rate. While an employee may regularly receive extra pay for being on a SWAT team or for fluency in Spanish, this does not impact the MOU overtime calculation. The MOU overtime is generous to employees because it is paid on a daily basis and includes paid leave when an employee does not actually work. FLSA overtime is based on hours worked in a week and does not include time not actually worked.

(3) Testimony that a member of the 1985 negotiating team intended the language in the contract to include all incentive pays in determining the overtime rate is not convincing. At that time, there were only two types of specialty pay, educational incentive and motorcycle pay. Both were counted in calculating MOU overtime and FLSA overtime. As more specialty pays were added, they were excluded from the calculation of overtime pay, and the association never filed a grievance challenging that calculation. Bargaining notes from the 1999 negotiations reveal an agreement on the way the city calculated FLSA pay and the association's long-time counsel's agreement with the city's position that the formula was legitimate.

(4) When the issue of including specialty pays in addition to the two already included arose during negotiations, the city would not yield on its position. In fact, a quid pro quo existed between the parties whereby the city approved additional specialty pays but only if excluded from the MOU overtime rate.

(5) During the 2005 negotiations, the association questioned whether the

city's method of calculating overtime was in compliance with the FLSA and whether the FLSA overtime calculation was included in a list of issues proposed for possible interest arbitration. The parties reached an agreement before arbitration was necessary. However, seven months later, the association filed a grievance on the issue of FLSA overtime calculation.

(6) Article 40 is ambiguous, and it is contradicted by practice, as overtime is paid on a daily rather than weekly basis, and paid leave qualifies as "work." Section 40.0's statement that "the overtime rate shall be as provided by the FLSA" could mean, as the association urges, that the MOU rate must include all specialty pay because it is part of an employee's regular compensation. However, the language could also refer simply to the FLSA rate of time-and-one-half and signal the city's intention to comply with the act.

(7) Because the contract language is unclear, it is appropriate to examine the lengthy past practice of using the two-tier formula for calculating overtime. Despite its opposition to the method, the association did little to formally challenge it.

(8) Sustaining the grievance would give the association a benefit it did not obtain at the bargaining table. Negotiation is the appropriate way to achieve clarification or modification of Article 40.

(Binding Grievance Arbitration)

• **Discipline**
• **Just Cause**

Service Employees International Union, Loc. No. 1021, and Superior Court of California, County of Sonoma (6-23-08; 13 pp.). *Representatives:* Suzanne Price (Wiley Price & Radulovich) for the employer; Vincent Harrington (Weinberg, Roger & Rosenfeld) for the union. *Arbitrator:* C. Allen Pool.

Issue: Was the grievant's three-day suspension and subsequent termination warranted?

Court's position: (1) The grievant exceeded the scope of her authority as a courtroom clerk when she continued a trial date, contacted the jury commissioner to cancel a jury panel, and scheduled a trial in the judge's courtroom. The three-day suspension issued to the grievant in July 2007 was warranted.

(2) The grievant heightened the tension in the courtroom when she told an uncooperative litigant that the bailiff had a gun.

(3) The two acts of misconduct were similar in nature and part of a pattern of poor judgment.

(4) Termination was warranted in light of the grievant's receipt of the prior three-day suspension, a letter of reprimand, and a counseling memo.

Union's position: (1) The grievant may have exercised an error in judgment, but did not engage in intentional misconduct deserving of a three-day suspension.

(2) The evidence does not establish what occurred in the courtroom and, thus, does not establish grounds for discharge.

(3) The employer did not follow the progressive disciplinary procedures set out in the court's personnel plan.

Arbitrator's holding: Grievances sustained.

Arbitrator's reasoning: (1) The personnel plan provides for discipline "for cause," and that discipline will follow a progressive discipline procedure that includes one or more warnings and/or suspension before termination is imposed.

(2) The evidence does not support the allegation that the grievant performed judicial duties outside her authority and without authorization from the judge. The grievant was instructed to call the judge if the parties reached a settlement, and she followed these instructions. In her eagerness to assist, she volunteered to contact the jury commissioner and call the trailing case. When instructed by the judge to reverse the actions she had taken, she complied.

(3) Imposition of the three-day suspension is at odds with progressive discipline. She had no prior suspensions, and the letter of reprimand arose from an incident not similar to the events that formed the basis of the suspension.

(4) There is not sufficient proof that the grievant engaged in misconduct in the small claims courtroom. The litigant ignored the bailiff's instructions, and the litigant's behavior caused the grievant to feel threatened.

(5) Although the bailiff felt that the grievant's use of the word "gun" caused the litigant to become defensive, other witnesses testified that members of the court staff have been heard to refer to the bailiff as the "man with the gun."

(6) The court failed to interview a third witness to the incident and thus compromised the integrity of the investigation. The court lacked just cause to terminate the grievant.

(Binding Grievance Arbitration)

- **Class Size**
- **Contract Interpretation**
- **Teacher Workday**

Vallejo Education Assn., CTA/NEA, and Vallejo City Unified School Dist. (7-5-08; 14 pp.) *Representatives:* Rebecca Flanigan, (CTA Napa-Solano Regional Uniserv) for the association; Reynaldo Santa Cruz (Asst. Supt. of Human Resources) and Bruce Sarchet (Littler Mendelson) for the district. *Arbitrator:* Katherine J. Thomson (AAA Case No. 74-39000049 08).

Issue: Did the district violate the collective bargaining agreement by requiring the grievants to teach and perform other teaching-related responsibilities in language arts for students who were not on their homeroom rosters? If so, what is the appropriate remedy?

Association's position: (1) The district violated the contractual class-size maximum of 32 elementary school students when it required the grievants to teach language arts to students who were not on their homeroom roster, since the teachers were responsible for teaching, correcting papers, assigning grades, and holding discussions with parents, if necessary, for more than 32 students. Adding students to a teacher's classroom each day violates the class-size maximum, even if an equal number of students leave at the same time to be taught language arts in another classroom.

(2) The parties did not intend that elementary teachers teach more than 32 students. The language of the contract is intended to place some limits on the number of students assigned to a teacher to create the best learning environment for the students and limit the workload of the teachers.

(3) The district violated the spirit of the contract when it required students to change teachers, thereby mirroring what takes place at the secondary level, where there are student contact limits. Drafters of the contract recognized the differences between elementary school classes and secondary school classes. Because students change teachers in secondary schools, the contract sets maximum student contacts as well as maximum class sizes in the secondary schools. It also provides for 500 minutes of preparation time every 10 student days for the secondary school teachers, who may teach the same subject all day. In elementary school, the teacher must prepare lessons in five subjects every day, but has only 1,800 minutes a year of preparation time.

(4) The association had no notice that elementary students would be changing classes, or it would have clarified the provisions relating to student contacts. The district should not be able to gain in arbitration what it did not obtain in bargaining. The implied contact limit in elementary school is the same as the class-size maximum — 32 students.

(5) The district violated the contract when it failed to pay the grievants for the additional students they were assigned to teach. One grievant should have been

paid for each of the 25 students over the maximum, and the other should have been paid for each of the 13 students over the maximum.

(6) The district also violated the contract by failing to pay the grievants for the extra hours they worked. The agreement provides that the length of the duty day cannot be more than 30 minutes longer than the student day. The grievants regularly performed two hours more work because of the additional language arts students. The teachers did not volunteer to do the extra work. This work, including parent contacts, was part of their professional duties. Logically, the work had to be done after the duty day and should be compensated. The contract requires teachers to be paid hourly for work requested by the site manager.

(7) The district had other options for implementing a language arts intervention program. At another elementary school, teacher leaders instruct students in the intervention program. Classroom teachers are not assigned extra students.

District's position: (1) As a program improvement school, the elementary school was required to implement an intervention program for students who are at least two years below grade level in English-language arts. These students are grouped and taught language arts separately.

(2) Because an equal number of students left the classroom when different students entered for language arts, the grievants did not teach more than 32 students at one time. They took attendance for only 32 students, not the additional students that came into class

for language arts. Each was responsible for completing only 32 report cards and holding only 32 parent conferences.

(3) The agreement contains no maximum number of student contacts for elementary school teachers. If the parties had intended to address student contact maximums in the contract, they knew how. The association is asking the arbitrator to add student contact language to the contract, which she cannot do.

(4) The association's request that the arbitrator set the number of student contacts at 32 students per day is in sharp contrast with the methodology the parties adopted for secondary schools, where student contact maximums are four to five times greater than class size maximums. Secondary teachers are responsible for attendance, grades, and parent contacts for all students in each class they teach. The one-to-one relationship of student contacts and class size that the association advocates is not supported by the rationale that motivated the parties to limit student contacts in the secondary schools.

(5) Purported bargaining history that indicated the 32-student maximum was negotiated when the parties knew there were no students coming in and going out is without foundation and is contradicted by a teacher's testimony that he had worked as a team teacher while at the district, when students were "in and out" of his classes. Because no class exceeded 32 students, the district has no obligation to pay the grievants for overages.

(6) As they were not required to stay at school more than 6.5 hours, the grievants' duty day was not extended.

The contract contemplates that teachers actually work more than the duty day when it states, "Preparation time excluding scheduled preparation time... for elementary unit members shall be scheduled at the professional discretion of the unit member."

(7) The parties' contract provides that past practice is not enforceable. Even if past practice were considered, a past practice is not established unless it is unequivocal, clearly defined and acted upon over a reasonable period of time, and mutually accepted by the parties. The association's evidence on past practice concerning the language arts program in 2006-07 goes back only one year and is not readily ascertainable.

Arbitrator's holding: Grievance denied.

Arbitrator's reasoning: (1) The evidence is that the term "class size" has meant the number of students in a classroom at one time. There is no indication that the term has a different meaning in elementary school than in secondary school. The contract does not contain a prohibition on assignment of additional students for some subjects or a penalty, as long as the class size does not exceed 32.

(2) The lack of a contractual student contact maximum for elementary school indicates the parties did not anticipate that elementary teachers would teach other than the 32 students assigned to their homeroom rosters. There is no evidence that the parties intended to measure an elementary teacher's workload by student contacts. For this reason, the association's argument that 32 is the

student-contact maximum, as well as the class-size maximum, fails.

(3) The arbitral principle that a party should not be able to gain in arbitration what it could not obtain in bargaining applies to provisions that were proposed by the party but not accepted. There is no evidence that the district unsuccessfully proposed in arbitration that elementary teachers be assigned different students for different subjects.

(4) There is no dispute that the grievants performed some extra work because of the assignment of different students to their language arts classes, but there was no evidence that the teachers were required to be onsite longer than the 30 minutes beyond the student day allowed by the contract. Therefore, the duty day was not lengthened.

(5) Although the off-duty time necessary to prepare for classes, correct papers, and assign grades was longer, the parties have not pointed to any contractual limit on preparation time. As the association has not shown that the extra work performed by the grievants was the kind for which the parties intended extra compensation, no pay was due.

(Binding Grievance Arbitration)

Resources

Supervisors as Teachers, Not Taskmasters

What does the word “bureaucracy” bring to mind? Images of endless lines, piles of paperwork, and frustrating battles over rules and red tape. But some bureaucracies are clearly more efficient and responsive than others. Why? In *Teaching, Tasks, and Trust*, political scientists John Brehm and Scott Gates argue that the answer depends on the roles that middle managers play in teaching and supporting front-line employees who make the bureaucracy work.

The authors use a range of modeling and statistical methods to analyze employees in federal agencies, police departments, and social service centers. They find that employees who feel they have received adequate training from their supervisors have a clearer understanding of the agency’s mission, which leads to improved efficiency within their departments. Quality training translates to trust — employees who feel supported and well-trained are more likely to trust their supervisors than those who are constantly monitored and engulfed in a strict hierarchy. Managers who “stand up” for employees — to the media, government, and other agency officials — are particularly effective in cultivating the workers’ trust. And trust, the authors find, motivates superior job performance and commitment to the agency’s mission. Employees who trust their supervisors work harder, put in longer hours, and are less likely to break rules. The authors also demonstrate that once supervisors gain trust, they enjoy greater latitude in influencing how employees allocate their work time.

Brehm and Gates explain how executive roles are interrelated — training and protection for employees gives rise to trust, which provides supervisors with the leverage to stimulate improved performance. This new model — that frames supervisors as teachers and protectors instead of taskmasters — has widespread implications for training a new generation of leaders and creating more efficient organizations.

Teaching, Tasks, and Trust: Functions of the Public Executive, by John Brehm and Scott Gates (2008) 176 pp. Russell Sage Foundation, <http://www.russellsage.org/>. Hardcover, \$27.50.

Coming Soon: Online Collective Bargaining Database

The Labor Project for Working Families has received a grant from the Alfred P. Sloan Foundation to build an online database of work and family collective bargaining clauses. This unique resource, to be launched in 2009, will provide a searchable format for union contract provisions on various work and family issues including family leave, childcare, elder care, flexible work options, parent-teacher conferences, adoption, and bereavement.

LPWF will partner with Microsearch Corp. (a technology consulting firm that specializes in web-based information access solutions for unions) to create a secure password-protected database that will enable storage, research, and retrieval of model contract language. The database will include fact sheets, information on essential elements of good/effective contract clauses, and an overlay of state policies that might impact a union’s bargaining.

The online database will be structured to give union negotiators the ability to choose from multiple collective bargaining agreements as they move through different negotiation cycles. For example, a union representative who is negotiating on “childcare” for the first time can search for language indexed with a “beginner” tag and pull up model language suited to an initial bargaining proposal. Other union negotiators will be able to search language relevant to an intermediate or advanced negotiation process. The database also will allow unions to submit model and negotiated contract provisions on work and family issues.

Labor Project’s Online Database of Work & Family Contract Provisions. For more information about this project or to submit contract language, contact Vibhuti Mehra at the LPWF: Email: vibhuti@working-families.org; phone: (510) 643-6813.

Labor Federation Goes Digital

U.C. Berkeley’s Labor and Employment Library is digitizing 100 years of California labor history. The library at the Institute for Research on Labor and Employment has created a digital repository of the publications of the

California Labor Federation, AFL-CIO. The collection includes proceedings and papers dating back to 1901, from the records of the American Federation of Labor and Congress of Industrial Organizations. While the project is not yet completed, the repository is ready for use through the U.C. Berkeley Library website, and also in the California Digital Library's Calisphere and Online Archive of California (OAC).

California Labor Federation Proceedings: Digitization. Documents may be viewed online at the The University of California, Berkeley Library, http://www.irle.berkeley.edu/library/digital_collections/calfed/ or through The Online Archive of California: <http://content.cdlib.org/search?style=oacimg&sort=title&relation=ark:/13030/kt0489q6r6>. For more information, contact IRLE Librarian Terry Huwe, thuwe@library.berkeley.edu/.

Law in Plain English

This textbook, now in its fourth edition, offers a concise introduction to the American legal system for those without a legal background. The book's coverage is cross-disciplinary, informed by the literature of law, business administration, and the social sciences, especially public administration and policy. Its goal is to give non-lawyers in these areas a lucid overview of the workings of the American legal system as it may affect individuals and organizations in their interactions with each other. It offers clear explanations of how to brief a case and how statutes and regulations are codified in the United States.

The Dynamics of Law (4th edition), by Michael S. Hamilton and George W. Spiro (2008) 232 pp. M.E. Sharpe, <http://www.mesharpe.com/index.htm/>. Hardcover, \$89.95; softcover, \$44.95.

Gender Equality for Blue-Collar Women

Women have made a lot of progress in the workplace since Title VII of the Civil Rights Act of 1964 prohibited gender-based discrimination. But discrimination is still widely practiced in many ways, denying women access and

opportunity, particularly in blue-collar occupations that long have been dominated by men.

Jeanie Ahearn Greene brings the experiences of blue-collar women to life through interviews and analysis that expose the challenges they face on a daily basis. A police officer, a local union president, and others describe the negative situations they encounter in every facet of their work lives — from the hiring process to socializing with coworkers to relationships with supervisors — and discuss their coping mechanisms.

The author explores the social, political, and economic implications of enduring gender discrimination, and concludes with a series of recommendations that challenge all concerned to change the status quo.

Blue-Collar Women at Work with Men: Negotiating the Hostile Environment, by Jeanie Ahearn Greene (2008) 209 pp. Union Communication Services, Inc., <http://www.unionist.com/>. Hardcover, \$59.95.

Telling It Like It Is

Straight-talk at work! Grumblings in offices everywhere suggest that there is not much that we crave more, but do not get often enough. *Beyond Bullsh*t* reveals the dynamics of bullsh*t and why it has become the corporate etiquette of choice. It also explains how telling it straight contributes to personal well-being and business success.

After decades of research and consulting, Samuel A. Culbert is convinced that straight-talk at work *is* possible. But it requires more than luck and willing people. Straight-talk is the product of thoughtful, caring relationships built on trust and a commitment to look out for one another's success. Culbert describes this brand of truthfulness as "a caring, other-sensitive, candor-on-demand, loyalty-producing, intimacy-escalating, give-and-take relationship, leading to enhanced personal and organizational productivity." From an organizational perspective, says the author, there is no greater contribution to operational effectiveness and success than conversations in which people with conflicting viewpoints discuss their differences forthrightly.

Beyond Bullsh*t: Straight-Talk at Work, by Samuel A. Culbert (2008) 168 pp. Stanford University Press, <http://www.sup.org/>. Hardcover, \$24.95.

The Positive Effects of Minimum-Wage Increases

As various states consider minimum wage boosts, and with Democratic presidential nominee Barack Obama proposing that the minimum wage be raised and indexed to adjust for cost-of-living increases, researchers at the University of California, Berkeley's Institute for Research on Labor and Employment (IRLE) have found that such increases do benefit the lowest-paid workers and do not have negative effects on their employment.

"Minimum Wage Effects Across State Borders: Estimates Using Contiguous Counties," by campus labor economist Arindrajit Dube, T. William Lester, and IRLE Director Michael Reich, compared all neighboring U.S. counties across state borders with different minimum-wage levels between 1990 and 2006. The exhaustive study carefully controlled for local economic conditions, an important advance over previous studies. It also controlled for county size, population, and geographic region. The study found no adverse employment effects in counties with a higher minimum wage.

The researchers posit that their findings may be due to the fact that a higher minimum wage attracts more workers and reduces a firm's vacancy rate; in addition, they say, decreased turnover increases productivity and reduces the cost of expanding employment. "It appears that minimum-wage increases are not job killers — they are job-vacancy killers," says Reich.

Minimum Wage Effects Across State Borders: Estimates Using Contiguous Counties. For the full text of this study, as well as other minimum-wage research, consult the website of the Institute for Research on Labor and Employment, <http://www.iir.berkeley.edu/research/minimumwage.html/>.

American Time Use Survey

Economists have long been interested in how people spend their time. Until recently, however, studies of this nature lacked high-quality data. In 2003, after years of study and preparation, the United States Bureau of Labor Statistics initiated the annual American Time Use Survey. Respondents report how they spend their time (in 15 minute intervals), and with whom and where they spend it. These detailed data afford economists the opportunity to gain a better understanding of everyday life.

Contributors to this book reveal findings with numerous implications for the U.S. labor market. The authors examine topics such as child care, housework, household production and consumption, and shift work. For example, in "Day, Evening and Night Workers: A Comparison of What They Do in Their Nonwork Houses and With Whom They Interact," the author examines work timing across the 24-hour day and how the timing impacts our ability to interact with family and friends. She also looks at whether the timing of work affects individuals' health and welfare, and therefore whether a particular work schedule imposes a certain cost on workers.

How Do We Spend Our Time: Evidence From the American Time Use Survey, edited by Jean Kimmel (2008) 188 pp. W. E. Upjohn, <http://www.upjohninst.org/>. Hardcover, \$40; softcover, \$15.

Funding Formulas for California Schools

Education advocates and budget junkies can go online to read the Public Policy Institute's analysis of a funding formula proposal by the Governor's Committee on Education Excellence. In this paper, researchers examine the committee's proposal for a finance system that would consolidate a large number of current K-12 revenue programs into just two: a base program serving the needs of all students, and a targeted program providing supplemental funds for disadvantaged students. This new approach would call for two fundamental changes in current policy. First, the state would have to transfer its revenue authority to local school districts. And, second, the state would have to

allocate a larger share of K-12 revenues to districts with high proportions of disadvantaged students. The full text is available online at no charge.

Funding Formulas for California Schools II: An Analysis of a Proposal by the Governor's Committee on Education Excellence, by Ray Reinhard, Heather Rose, Ria Sengupta, and Jon Sonstelie (July 2008) 50 pp. Public Policy Institute of California, <http://www.ppic.org/main/home.asp/>.

Public Employment Relations Board

Orders & Decisions

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

Dills Act Cases

Unfair Practice Rulings

Charge dismissed for failure to state prima facie case: CDCR.

(*Swan v. State of California [Dept. of Corrections & Rehabilitation]*, No. 1961-S, 7-17-08; 11 pp. dec. By Member Dowdin Calvillo, with Chair Neuwald and Member Wesley.)

Holding: The charging party's unfair practice charge was timely filed but was dismissed because it failed to demonstrate that CDCR discriminated against him or interfered with any rights granted to the charging party under the Dills Act.

Summary: The charging party, a correctional officer, brought an unfair practice charge against the California Department of Corrections & Rehabilitation, alleging violations of his rights under the Dills Act.

The board agent issued a dismissal letter, finding the charging party failed to state a prima facie case. The B.A. found that while the charging party attempted to plead the charge as an interference and/or discrimination case, the basis of the charge was that CDCR violated a provision of its negotiated agreement with the union that represents the charging party. Specifically, the charging party's contention was that he was denied an assignment despite meeting all eli-

gibility requirements for preferred post positions under the procedure laid out in the collective bargaining agreement.

The B.A. explained that PERB does not have jurisdiction over disputes arising out of a bargaining agreement unless a charge based on violation of the agreement also would constitute an independent unfair practice charge. According to the B.A., the charging party attempted to frame his complaint as interference and/or discrimination. However, the charge failed to allege sufficient facts or legal authority for the interference violation to constitute an independent unfair practice charge.

The B.A. also rejected the charging party's claim of discrimination. The agent found circular reasoning in the charging party's claim that he was denied an assignment because he bid on the assignment. The charge also lacked sufficient factual and legal support to constitute an independent unfair practice charge. Accordingly, the board agent dismissed the charge.

The charging party appealed the board agent's decision. On appeal, CDCR argued that the charge was untimely because it was filed more than six months after the charging party knew or should have known that he would not receive the assignment that he had requested. The board determined that there was no way for the charging party

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

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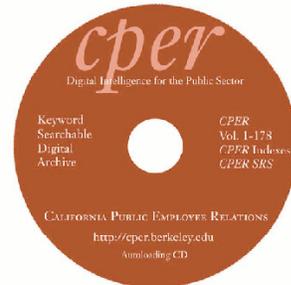
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to know that he would not receive the assignment until he was told so. Since he was informed of CDCR's decision within six months of the current charge, it was not untimely. Nevertheless, the board agreed with the board agent with respect to the charging party's failure to state a prima facie case for violations of the Dills Act. Consequently, PERB affirmed the board agent's dismissal of the charge.

EERA Cases

Unfair Practice Rulings

Failure to follow established procedure provides prima facie case of retaliation: Oakland USD.

(*Gregory v. Oakland Unified School Dist.*, No. 1965, 6-26-08; 8 pp. dec. By Member Wesley, with Chair Neuwald and Member Rystrom.)

Holding: The board agent's dismissal was reversed and the case remanded to the general counsel because the charging party's unfair practice charge was timely filed and she asserted facts sufficient to establish a prima facie case of retaliation under EERA.

Summary: The charging party was a paraprofessional with the Oakland USD and a member of a bargaining unit represented by AFSCME. Due to various circumstances, and under the advice of her union, the charging party requested and received several transfers to different schools within the district. Eventually, she was assigned to assist children with special needs at Brookfield Elementary School. The charging party believed she lacked the necessary medical background to effectively assist the children. Attempts to contact the district regarding a new assignment went unanswered and training was never made available. One month after she was assigned to Brookfield, the charging party was informed that she was not a suitable candidate for the position due to her lack of medical experience.

While the charging party continued to seek alternative assignments from the district, she was told that she had been absent from work without cause. When the charging party refused to complete the necessary leave forms, she was

told that a meeting would be scheduled with the district's human resources department. Days later, the charging party discovered that she had not been paid for several days during the period in which she awaited medical training.

When the charging party received a letter offering COBRA health benefits following her separation from the district, she immediately contacted AFSCME. One week later, she received a letter claiming that she had abandoned her position, that this was cause for termination, and that she had the right to a hearing. The charging party requested a hearing and that her benefits not be terminated. The benefits were revoked days later. While the district asserted that a second, identical letter was sent, the charging party denied ever receiving it.

Six months later, AFSCME informed the charging party that a meeting with the district was scheduled for August 17, 2007. The district contended there had been a previous meeting scheduled in February 2007.

The charging party filed her charge on August 15, 2007, alleging the district terminated her employment because of her protected activity. The board agent dismissed the charge, finding it was untimely filed. The charging party appealed the B.A.'s determination and argued that she stated a prima facie case for retaliation under EERA.

The board examined the timeliness issue, noting that the effective date of termination triggers the running of the six-month statute of limitations. Because the charging party filed her charge on August 15, 2007, any unfair practice charges that occurred on or after February 15, 2007, were timely filed. The board determined that it was "clear" that the charging party's official termination came after February 15. While the district alleged that it sent identical letters to the charging party dated January 16, 2007, and February 16, 2007, both letters stated that dismissal proceedings "will be initiated" if the charging party did not contact the district's human resources department. The district claimed that a meeting had been scheduled for February. However, it could not specify the actual date, produce correspondence informing the charging party, or document that a meeting ever took place. Because the charging party requested that

a hearing be held before her termination would become effective, and there was no evidence of a meeting, she could not have been officially terminated until some time after February 15, 2007. Accordingly, the board found the charge to be timely filed.

Examining the merits of the unfair practice charge, the board observed that the charging party engaged in protected activity when she sought assistance from AFSCME regarding a transfer. Further, the board explained, the district's knowledge of the activity is evident in a letter from the charging party to the district, informing it of her contact with AFSCME and request for a transfer.

The board also found a nexus between the protected activity and the adverse action taken against the charging party. First, PERB noted the adverse action's temporal proximity to the protected activity. Further, the board found "numerous and obvious" departures from the district's established procedures. These included the district's two identical letters a month apart offering the charging party the opportunity for a hearing — the second of which the charging party denied receiving. Additionally, while the district insisted that it scheduled a February meeting, it was unable to pinpoint the exact date, provide documentation that it informed the charging party of the meeting, or prove that the meeting ever took place. All agreed that even if a meeting had taken place, the charging party had not been present. Finally, the charging party never received a final notice of termination — even after she met with the district in August. Thus, the board determined, the failure to follow established procedure, coupled with the temporal proximity of the protected activity to the adverse employment action, was sufficient to state a prima facie case of discrimination in violation of EERA.

Accordingly, PERB reversed the board agent's dismissal and remanded the case to the general counsel's office for proceedings consistent with the decision.

Charge dismissed for failure to show actual impact on work hours: Beverly Hills USD.

(Beverly Hills Education Assn. v. Beverly Hills Unified School Dist., No. 1969, 7-8-08; 13 pp. dec. By Member Dowdin Calvillo, with Chair Neuwald and Member Wesley.)

Holding: The charge was dismissed because the charging party failed to show that a non-negotiable unilateral change had affected negotiable work hours and that it had demanded to bargain over the issue.

Summary: The district ordered teachers to give parents copies of their child's examinations for review outside the classroom. Previously, test results could be reviewed only in the classroom. The association filed an unfair practice charge alleging this was a unilateral change made without providing the association an opportunity to bargain. The association also alleged that the district retaliated against its vice president after he sent a letter to parents urging them to continue to review exams in the classroom.

The Office of the General Counsel issued a complaint on the retaliation charge, while the board agent dismissed the unilateral change and refusal to bargain allegations. The association appealed the dismissals.

The association conceded that the district had no duty to meet and confer over the decision to require teachers to provide exams to parents on request. However, it argued that the new policy increased teachers' work hours because it forced teachers who released their prior exams to write new ones for subsequent years. The association contended that additional work hours are a negotiable subject. Thus, according to the association, the district was required to bargain over those effects prior to implementing the policy.

Before addressing the association's allegations, PERB rejected the district's argument that it should apply an abuse of discretion standard to the board agent's decision. Citing precedent, it explained that it is well founded that the board applies a de novo standard when reviewing a board agent's dismissal of an unfair practice charge.

Turning to the association's charges, the board cited *Salinas UHSD* (2004) No. 1639, 167 CPER 89, establishing that the charging party has the burden of alleging facts

demonstrating that the policy actually impacts employees' work hours. In *Imperial USD* (1990) No. 825, 86 CPER 66, the board explained that an actual impact on work hours may be shown by an increase in instructional time or a decrease in preparation time that has the effect of lengthening the workday or shortening existing duty-free time. Further, in *Lake Elsinore S.D.* (1987) No. 646, 71X CPER 12, PERB held that there is no unilateral change in work hours when the effect on the teachers' workday is "indirect and speculative."

Based on these principles, the board concluded that the association failed to allege facts demonstrating that the new policy had an actual impact on teachers' work hours. PERB noted that the association did not contend that instructional hours were lengthened. Further, the association relied solely on allegations from one teacher who stated that he worked additional hours outside of the normal workday rewriting examinations that had been released to parents. The board criticized the allegations for failure to establish the length of that teacher's workday before or after the adoption of the new policy, and suggested that several factors could contribute to the teacher's need to work additional hours to create examinations.

The board rejected the association's argument that the district established a presumption that the change had a negotiable effect on work hours since it did not stop teachers from performing their other prep time duties in order to create a new exam. While the board recognized such a presumption in *Moreno Valley USD* (1982) No. 206, 54 CPER 42, 61, this presumption was overruled in *Imperial*. Therefore, the association was required to allege facts demonstrating the new policy had an actual impact on work hours, and it failed to meet the standard because it did not show that the teachers had insufficient time to create new exams.

PERB disagreed with the association's contention that the *Imperial* standard should apply only when a case goes to hearing because the cases discussed in that decision all involved witness testimony. Pointing to language in *Salinas*, which upheld the dismissal of a charge for failure to show

requisite impact on the workday, PERB determined that the *Imperial* standard is the same at both the charge and hearing stages of the process, and *Imperial* is appropriately applied to determine whether a charge states a prima facie case of a unilateral change in work hours.

Finally, the board determined the association's memorandum expressing a demand to bargain over "the impact and effects of requiring tests to be released" failed to provide the district with a valid demand to meet and confer because the association did not indicate the specific negotiable effects of the new policy. Accordingly, PERB found that the district did not violate EERA by failing to meet and confer with the association in response to its demands to bargain over the impact and effects of the test release policy.

HEERA Cases

Unfair Practice Rulings

Failure to rehire was retaliation for grievance filing: CSU.

(*California State Employees Assn. v. California State University*, No. 1970-H, 7-18-08; 8 pp. dec. + 30 pp. ALJ dec. By Member Dowdin Calvillo, with Members Wesley and Rystrom.)

Holding: CSU retaliated against the employee for filing grievances and an unfair practice charge against the university. The employee was awarded reinstatement and back wages.

Summary: Terry Ireland was an equipment technician who was terminated after working for three years in the Department of Mechanical Engineering, in the College of Engineering, at CSU's San Diego campus. Before his termination, Ireland received two performance reports. In the first, he was given all superior marks; in the second, he received mostly outstanding marks with a few good marks.

During Ireland's third year of employment, Karen May-Newman was appointed the new chair of the department. Several months later, Ireland filed a grievance complaining that he was performing supervisory work over a

superior employee, Greg Morris, without being properly compensated. The allegations upset Morris, who told Ireland that he should tear up the grievance. CSU denied the grievance, and Ireland did not pursue it further.

Two months after Ireland filed his grievance, May-Newman informed him that he would not be reappointed to a fourth year — a fourth reappointment would have made Ireland a permanent employee. He was not given a reason for the termination. Ireland's second grievance, alleging his termination was in retaliation for the first grievance, was denied. Soon after, Ireland's vacant position was filled on an emergency basis. The chosen employee was an acquaintance of the department chair and performed the same duties as Ireland. After he was hired, the new employee was given training on new procedures and a new machine in the lab.

May-Newman subsequently revised the job description for Ireland's former position. The chair found the old description confusing and revised it to ensure that the new employee would have the necessary qualifications. The job was posted as a permanent position, and May-Newman directed the search process. Previous selection committees had included two faculty members, both of whom would have been supportive of Ireland. However, May-Newman excluded them and replaced them with three unit members, including Morris. Neither of the other two search committee members was employed in the mechanical engineering department, and one had no direct experience with the principal machines used in the position. The four applicants for the position included Ireland and the employee who replaced him on an emergency basis. Ireland was not among the two candidates granted an interview. Ultimately, the employee who had replaced Ireland was hired for the permanent position, and California State Employees Association filed the instant unfair practice charge on Ireland's behalf, alleging CSU's failure to rehire him was in retaliation for his prior grievances.

The administrative law judge found that Ireland engaged in protected activities when he filed his grievances and that CSU was aware of his activities. Thus, the lone issue was whether there was a nexus between the activities

and the adverse action taken against him. The ALJ turned to circumstantial evidence including temporal proximity together with facts that might demonstrate the employer's unlawful motive. PERB agreed with the majority of the ALJ's findings. However, it noted the absence of an important analytical step evaluating the legitimate business necessity of CSU's actions.

While the ALJ observed that Ireland's termination and the emergency filling of his position were not alleged in the complaint and time-barred, both incidents were decided by Ireland's supervisor — the chair of the department — and thus may serve as background evidence of her motivation not to rehire him.

The ALJ looked to the temporal proximity between Ireland's first grievance and his termination, contradictory reasons for the termination from the department chair, and Ireland's generally excellent performance reviews prior to his termination. From this, she determined that Ireland's supervisor's complaints about his job performance were pretextual and put forth to hide the unlawful, retaliatory motives. The ALJ also determined that CSU's decision to replace Ireland with an emergency employee and then train that employee to perform duties Ireland had experience performing was unlawfully motivated and not a result of Ireland's job performance.

Next, the ALJ found the department chair's decision to issue a new job description and permanently fill the position shortly after Ireland's unfair practice charge suggested unlawful motivation. Further, the ALJ noted the "striking similarities" between the old and new descriptions, and that the employee hired as Ireland's emergency replacement lacked the computer knowledge required in the new job description and acquired this qualification only when CSU provided training.

PERB disagreed with the ALJ's conclusion that there was no legitimate reason for CSU to revise the job description. The board noted that the revision served the legitimate business purpose of ensuring that the job description met the current needs of the department and accurately reflected the position's duties. However, the board agreed

with the ALJ that given the evidence of May-Newman's past retaliation against Ireland for filing grievances, and her knowledge that Ireland would only narrowly meet the modified qualifications, Ireland's protected activities, and not the business necessities of the department, motivated May-Newman to modify the job description. Accordingly, PERB found that CSU failed to establish that it would have revised the job description in the same way had Ireland not engaged in protected activity.

The board rejected the ALJ's determination that CSU departed from established procedures in its composition of the search committee. PERB explained that CSEA failed to demonstrate there was an established procedure. Also, PERB disagreed with the ALJ that there was no legitimate reason to replace faculty members on the search committee with unit members. As the board observed, May-Newman explained that the members were appointed to the search committee because she felt they were best able to evaluate the applicants' skills. However, the evidence showed that one of the technicians appointed to the committee lacked experience as a technician and another was Morris, who had demonstrated animosity toward Ireland. Thus, the board determined that CSU failed to prove that it would have selected the committee members even if Ireland had not engaged in protected activity and, therefore, agreed with the ALJ that the composition of the committee was unlawfully motivated.

While the board agreed with the ALJ that the committee's failure to grant an interview to Ireland was unlawfully motivated, it disagreed that there was no legitimate business purpose to its decision. Rather, the board noted, May-Newman and Morris gave Ireland low rankings because of his weak application and their concern about his ability to perform the job. But, citing May-Newman's past retaliation against Ireland and Morris' animosity toward him, the board could not conclude that May-Newman and Morris would have ranked Ireland as low had he not engaged in protected activity. While the board rejected the ALJ's conclusion that there was no legitimate reason for Ireland's failure to be rehired — the legitimate reason was that he

was not selected by the search committee — it determined that the ranking process itself was tainted. Thus the record failed to establish that Ireland would not have been one of the two top applicant's even if retaliatory motive had played no part in the hearing process.

Finally, PERB rejected the ALJ's conclusion that an adverse inference should be drawn against CSU based on its failure to call one of the selection committee members as a witness. When a party fails to call a witness assumed to be favorable to the party, a rule applied by the National Labor Relations Board permits the ALJ to infer that the witness would have testified adversely to the party. In *Victor Valley CCD* (1986) No. 570 69X CPER 18, the board refused to draw such an inference. It explained that because both parties had the opportunity to call the selection committee member, and neither did, no adverse inference should have been drawn.

Accordingly, PERB concluded that CSU violated HEERA by failing to rehire Ireland in retaliation for protected activities. The board awarded reinstatement and backpay.

Duty of Fair Representation Rulings

Withdrawal of appeal granted: AFSCME, Loc. 3299.

(*Woolfolk v. AFSCME, Loc. 3299*, No. 1966-H, 6-26-08; 2 pp. dec. By Chair Neuwald, with Members Rystrom and Dowdin Calvillo.)

Holding: The withdrawal of the charge was granted in the best interests of the parties and consistent with the purposes of HEERA.

Summary: The charging party filed an unfair practice charge alleging AFSCME, Local 3299, provided him with inadequate representation during disciplinary proceedings. The board agent dismissed the charge. The charging party appealed the decision but ultimately withdrew the appeal.

Upon review of the record, the board determined the withdrawal was in the best interests of the parties and consistent with the purposes of HEERA. Accordingly, the board granted the withdrawal.

MMBA Cases

Unfair Practice Rulings

Knowledge of conduct, not legal significance, begins limitations period: Orange County Fire Authority.

(*Orange County Professional Firefighters Assn., LAFF, Loc. 3621 v. Orange County Fire Authority*, No. 1968-M, 6-30-08; 8 pp. dec. By Member McKeag with Member Wesley; Member Rystrom dissenting.)

Holding: The six-month statute of limitations began when the charging party discovered the conduct leading to the charge, and not when the charging party discovered the legal significance of the conduct. Because the charging party knew or should have known that the bargaining unit had been modified long before six months prior to the instant charge, the filing was untimely and the charge dismissed.

Summary: Prior to 2001, the charging party represented the firefighter and fire management bargaining units of the fire authority. The Orange County Employees Association represented the general employees unit, the supervisory management unit, and the mechanics and service center unit, which included the fire mechanic positions. During contract negotiations in 2001, OCEA and the fire authority reached a five-year agreement that eliminated the mechanics and service center unit and placed all classifications in the general and supervisory units. An appendix to the MOU listed all of the positions in the general and supervisory units, including the fire mechanic classifications. The MOU was posted on the Internet in April 2003.

In April 2006, the charging party submitted a request to remove certain mechanic and technician classifications from the general and supervisory management units and to establish a new unit for those classifications. Two months later, the charging party and the fire authority met to discuss whether fire mechanics should remain part of the general employees bargaining unit or be placed in a separate unit. Unable to resolve the issue, the matter was submitted to the fire authority's board of directors, pursuant to its employee relations resolution. A board of directors meeting was held

on November 16, 2006, to discuss the issue. According to the charging party at that meeting, it first learned that the fire authority and OCEA agreed to eliminate the fire mechanics bargaining unit and place the classifications in the OCEA-represented general employees unit.

On April 6, 2007, the charging party filed an unfair practice charge alleging the fire authority failed to comply with its employee relations resolution, and thereby violated the MMBA, when it placed fire mechanics in the general employees unit represented by OCEA. The charging party appealed the board agent's finding that the charge was untimely filed.

An unfair practice charge must be filed with PERB within six months of the date the charging party first knew or should have known about the offending actions. In *Empire USD* (2004) No. 1650, 168 CPER 92, PERB stated that it is the knowledge of the conduct, and not discovery of the legal significance of the conduct, that triggers the six-month statute of limitations.

The board rejected the charging party's assertion that it first discovered both the facts revealing the unlawful conduct and the legal significance of the conduct at the board of directors meeting in November 2006. Rather, the board determined, what the charging party discovered at that meeting was merely the legal significance of the unit modification about which it knew or should have known. PERB reasoned that since unit modifications are "significant undertakings that require a substantial commitment of time and resources," at a minimum the charging party should have discovered that the prior unit was eliminated and the fire mechanics were transferred during its organizational efforts of 2003. Thus, the board determined the six-month statute of limitations began to run on April 3, 2006, the day the charging party submitted its request for a unit modification. Since this was more than one year before the instant charge was filed, it was properly dismissed as an untimely filing.

Member Rystrom dissented from the majority's decision. She observed that there was no evidence in the record to support a finding that the charging party should have

known prior to the November 2006 board of directors meeting that the fire mechanics had been transferred out of their bargaining unit. Further, Member Rystrom took issue with the board's characterization of the organizing effort itself. The board stated that, in 2003, the charging party sought "restoration of, and placement in, an independent bargaining unit that existed prior to 2001." Member Rystrom explained, however, that the record does not support a finding that the charging party sought "restoration" of any unit. Rather, the charging party's amended complaint and the "uncontroverted evidence before the Board of the prior existence of a fire mechanic's unit are that such existence was discovered on November 16, 2006."

Further, Member Rystrom found no evidence in the record or in applicable law to support a finding that the charging party's organizational efforts would have involved significant undertakings from which it can be concluded that the transfer should have been discovered. Citing *SEIU Local 99 (Gutierrez)* (2007) No. 1899, 185 CPER 100, Member Rystrom explained, "When the Board concludes that the charging party should have known facts which trigger a statute of limitations, such a finding must be based on evidence contained in the record before the Board." Lacking such evidence, a party's factual claims in support of its statute of limitations defense must be determined during the administrative hearing on the complaint.

Accordingly, Member Rystrom would have remanded the case to the general counsel's office with directions that a complaint be issued.

Request for reconsideration denied: Carmichael Recreation & Park Dist.

(*AFSCME, Loc. 146 v. Carmichael Recreation & Park Dist.*, No. 1953a-M, 6-27-08; 2 pp. dec. By Chair Neuwald, with Members McKeag and Rystrom.)

Holding: The union and the employer were the only parties to the initial board decision. Thus, the employee who was the subject of the allegations in the initial charge lacks standing to request reconsideration.

Summary: AFSCME Local 146 filed an unfair practice charge on an employee's behalf alleging the park district interfered with her statutory rights and retaliated against her (*Carmichael Recreation & Park Dist.* [6-27-08] No. 1953-M, 191 CPER 93). The board dismissed the charges.

The employee requested that PERB reconsider its decision. PERB Reg. 32410(a) governs reconsideration requests of board decisions and permits any "party" to a board decision to file a request to reconsider the decision in the event of extraordinary circumstances. However, in *John Swett USD* (1981) No. 188, 52 CPER 66, the board observed that the PERB regulation requires the individual or entity seeking reconsideration to have been a party in the initial charge. Here, like in *John Swett USD*, the association representing the individual was the charging party.

Accordingly, PERB denied the employee's request for reconsideration of the decision to dismiss the initial charge.