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LETTER FROM THE EDITOR

Dear *CPER* Readers:

Regardless of your political persuasion, you have to admit that it's not going to be business as usual in the coming months. Sure, we'll be hearing the same debate about taxes and "big government," about rising health care costs and precarious pension funds. But, this time, the discourse will be taking place on a larger stage and with the volume turned up.

Close to home, the state's economic forecast unfortunately has worsened since the last issue of *CPER*, as budget projections have gone from bad to worse.

What this means for California's public sector is still uncertain, but it is likely that no one will be spared and the impact will be felt at all levels of government.

For state employees, the governor has furloughs and other compensation take-aways in mind. In the public schools, proposed mid-term budget cuts threaten to force school districts to revisit and alter existing staffing and workload commitments mid-course. Higher education institutions almost certainly will be getting a lot less state money than anticipated. At U.C., employees will be making contributions for future pension benefits for the first time in several years. And, at CSU, unions are being called back to the bargaining table to take a second look at compensation levels. Local governments face difficult budget allocation decisions and will be tightening their belts when negotiating future labor agreements with unions.

And, at the risk of really turning up the panic level, all of these budgetary cut-backs are taking place in the midst of national economic stagnation that has found its way to Europe and Asia.

They say that bad news sells newspapers. Maybe that's true. But I'll be optimistic and invite you to follow *CPER*'s coverage as we turn the corner and get through these challenging times.

Sincerely yours,

A handwritten signature in black ink, reading "Carol Vendrillo". The signature is fluid and cursive, with a large loop at the end.

Carol Vendrillo
Editor

Charter Amendments, Ordinances and Impasse Procedures, Oh My! City and County Bargaining Obligations

Alan Hersh

Alan Hersh is the Chief Deputy City Attorney, Labor and Employment Unit, Office of the City Attorney for the City of San Diego. Previously he was the General Counsel for the West Contra Costa Unified School District, in Richmond, California for six years. And prior to that position, he was a staff attorney for the California School Employees Association for six years.

THE MEYERS-MILIAS-BROWN ACT¹ often conflicts with the desires of cities and counties to legislate labor issues under their home rule authority. Local government agencies frequently want to enact charter amendments, ordinances, and regulations such as contracting out of work, restrictions on increases in retirement benefits, layoff rules, not strike provisions, and impasse procedures.² These are the very matters within the scope of union representation under MMBA Sec. 3504.

With the national and state economic crisis, the ability of municipalities to pass charter amendments in these areas becomes critical. What are the bargaining obligations of cities and counties to negotiate with its unions before a charter amendment is placed on the ballot by a board of supervisors or after a ballot measure passes? What options do charter cities and counties have under the MMBA when they reach a stalemate with their labor unions over ballot language or implementing ordinances? This latter question must take into account the separation of powers in many charter cities.

The Public Employment Relations Board recognizes that the governing board of a school district, community college, or state school has the ultimate authority to decide labor relations issues for that entity. But that is not necessarily the case in charter cities. In San Francisco, Los Angeles, and San Diego, the mayor and city attorney are independently elected, and hold power and have mandated duties under their city charters separate and apart from their city council. Those charter-mandated powers and duties often involve control, or interpretation, of the city's charter and laws regarding negotiations and impasse procedures.

Bargaining Obligations to Negotiate Proposed Charter Amendments and Implementing Ordinances

When a California city or county adopts a charter, its provisions have the force and effect of legislative enactments.³ “Under the constitution, the charter of a city is not only the organic law of the city, but it is also a law of the state within the constitutional limitations.”⁴ For this reason, cities and counties at times believe they can skirt the MMBA by ballot initiatives proposed by the agency. Or they may believe they are foreclosed from following the MMBA because of voter-passed charter amendments.

This is erroneous, but understandable. Courts consistently hold that the “will of the voters” is sacrosanct and must be honored.⁵ Cities and counties must jealously guard the sovereign people’s initiative power, “it being one of the most precious rights of our democratic process.”⁶ While the power to adopt an implementing ordinance is within the authority of a city or county, to be valid it must “conform to, be subordinate to, not conflict with and not exceed the charter.”⁷ Despite these dictates, however, charter amendments may not foil the requirements of the Government Code.

The California Supreme Court, in the landmark case of *Seal Beach Police Officers Assn. v. City of Seal Beach*,⁸ held that a city council is required to meet and confer with labor organizations over a proposed charter amendment affecting wages, hours, or other terms and conditions of employment *before* placing the amendment on the ballot. The city had passed charter amendments which mandated that any city employee who participated in a strike would be fired and prohibited the city council from granting amnesty or rehiring any striking public employee. The court held it was improper for the city council to place the charter amendments on the ballot without first providing the unions an opportunity to negotiate.⁹

The holding in *Seal Beach* — that local public agencies must meet and confer over proposed charter amendments the city council wishes to place on the ballot involving

mandatory subjects of bargaining — is not surprising to practitioners. However, equally important was the court’s holding that while the MMBA sets the *procedure* by which an issue is resolved in a city or county, it does not affect the rights of municipalities to legislate the *substance* of public employee labor issues. Courts and PERB are required to “harmonize” charter provisions with the MMBA, whenever possible, and not find them in conflict.¹⁰

We emphasize that there is a clear distinction between the *substance* of a public employee labor issue and the

procedure by which it is resolved.

Thus there is no question that “salaries of local employees of a charter city constitute municipal affairs and are not subject to general laws.” (*Sonoma County Organization of Public Employees v. County of Sonoma*, *supra*, 23 Cal.3d at p. 317.) Nevertheless, the process by which salaries are fixed is obviously a matter of statewide concern and none could, at this late stage, argue that a charter city need not meet and confer concerning its salary structure. *Seal*

Beach Police Officers Association v. City of Seal Beach, 36 Cal.3d at 600, fn.11, emphasis in the original.

Charter amendments may not foil the requirements of the Government Code.

The *Seal Beach* court philosophically divides the functions of cities and counties into two roles — one is to legislate needed measures as the democratic organ of government, the other is as employer. The MMBA’s meet and confer requirement only regulates cities as employers; it does not impinge on a city’s democratic function to legislate measures related to labor relations.¹¹

This distinction between a city’s obligation to use the negotiation process and a city’s right to determine the substance of its goals and achievements has been repeatedly recognized by the courts.¹²

Seal Beach reminded cities and counties that the duty to meet and confer before proceeding with a council-sponsored ballot measure did not mean the agency gave up its right to enact the labor legislation it wanted. The court stated:

No conflict exists between a city council's power to propose charter amendments and section 3503. Although that section encourages binding agreements resulting from the parties' bargaining, the governing body of the agency — *here the city council* — *retains the ultimate power to refuse an agreement and to make its own decision.* (See *Glendale City Employees' Assn., v. City of Glendale* (1975) 15 Cal.3d 328, 334-336.) This power preserves the council's rights under article XI, section 3, subdivision (b) — it may still propose a charter amendment if the meet-and-confer process does not persuade it otherwise. *Id.* at 601, emphasis added.

Therefore, despite the MMBA's bargaining obligation, public agencies retain the ultimate power to refuse to agree on any particular issue.¹³

The mandate of *Seal Beach*, that charter amendments and implementing ordinances and regulations proposed by cities and counties must first be negotiated, and that the courts will strive to harmonize the MMBA with local charters, rather than defeat the agency's legislative power to regulate labor issues, has been enforced repeatedly by California courts. They have addressed charter amendments and implementing ordinances dealing with layoff rules, elimination of bargaining unit positions and transfer of work, the right to join a labor union, no-strike provisions and penalties for violations, and mandatory interest arbitration impasse procedures.¹⁴

While the courts strive to uphold the legislature's right to regulate, the fact is these rulings have significant though never verbalized consequences which bear on that right. The union's right under the MMBA to negotiate the language of proposed ballot measures before they go to the people, or the language of implementing ordinances after voter approval, gives the union a place at the table and requires that its input be taken into account. Other groups representing the public have no such legal right to offer input into fashioning charter amendments or drafting interpretative implementing ordinances.¹⁵

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If a charter provision is truly in direct conflict with the MMBA, the latter trumps the charter because the MMBA is a law of "statewide concern."¹⁶ Stated another way, courts will strike down charter language that exploits the charter process for an improper purpose.¹⁷

In *Seal Beach*, the court emphasized it was not deciding if the MMBA meet-and-confer requirement applied to charter amendments proposed by the voters, as opposed to the city council or county board of supervisors.¹⁸ The charter amendments in that case came by way of the city council. However, it seems clear that a charter amendment

proposal by citizens using the initiative process, as permitted by the California Constitution, Art. XI, Sec. 3, and every city and county charter, *would not* be subject to the MMBA meet and confer requirements. A voter-initiated charter amendment cannot be altered by the city or county. And since a voter-initiated measure does not carry the imprimatur of the city, the MMBA has no application. The obligation to meet and confer under the act is triggered only when there is a proposal by a public agency or

by a union representing those employees, not by a private citizen.¹⁹

However, regardless of the method used to *propose* a charter amendment, if it is approved by the voters, the city must meet and confer with the labor unions before *enacting* legislation needed to implement it.

Leeway in Negotiations Over Ballot Language or Implementing Language

The MMBA provides only a vague framework for cities and counties when constructing their individual labor relations laws.²⁰ It provides no more than "a rather general legislative blessing for collective bargaining at the local governmental level without clear delineation of policy or means for its implementation."²¹ The manner in which cities comply with the procedure required under the MMBA, as well as the substantive labor laws of counties and cities, can

vary enormously. For example, procedures for resolving bargaining impasses can be mandated by a city or county charter and implementing ordinances and rules. No one way is dictated by the MMBA.

While the MMBA constructs central negotiating themes, such as the duty to bargain and the prohibition against unilateral changes, it leaves local municipalities on their own to fashion impasse procedures, and negotiate those with its unions, that will be acceptable to PERB and the courts.

Impasse resolution procedures clearly spelled out in other labor acts such as the Educational Employment Relations Act and the Higher Education Employer-Employee Relations Act do not appear in the MMBA. It does not impose a specific impasse resolution procedure, or any impasse procedure at all, for that matter. The act merely states: "The [meet and confer] process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent."²² If the agency does have an impasse procedure, after it is exhausted, the "public agency" is permitted to implement its last, best, and final offer.²³

The MMBA conveys great discretion to local agencies to create their own impasse procedures.²⁴ Unlike other labor statutes, the MMBA does not pre-empt the field. It does not define, delineate, or provide a guideline for what a city or county impasse procedure should look like. It does not prescribe any factfinding mechanisms, hearings on proposals, or rules about when or how a city or county can impose a last, best, and final offer.²⁵ There is no "one size fits all" rule.

Nor does the MMBA indicate which "agency" has the power to "impose" a last, best, and final offer after exhaustion of negotiations and impasse procedures. It does not distinguish between an independently elected mayor

and city council with regard to what "agency" can impose a last, best, and final offer. The definition of "agency" could conceivably permit the city council or independently elected mayor to wield that power.²⁶

In contrast to the strict confines of agencies covered by EERA and HEERA, agencies covered by the MMBA enjoy broad discretion. This was starkly demonstrated in two PERB cases. The issue was whether the San Francisco charter provision establishing binding interest arbitration was a permissible impasse resolution procedure under the MMBA and EERA. The charter calls for a three-person panel, with the union and management selecting one member each, and those two individuals selecting the

third. If issues are not settled during the hearing process, each party submits a last, best, final offer on each disputed issue, and the panel decides by majority vote, issue by issue, which proposal to impose.

In *Stationary Engineers Loc. 39 v. City and County of San Francisco*,²⁷ the union argued it was impermissible under the MMBA for the city charter to (1) mandate interest arbitration; (2) require the union to pick a panel member; or (3) allow the panel to impose proposals on individual issues. PERB disagreed and held the union did not demonstrate that the charter provision mandating interest arbitration is unreasonable.

In a key footnote, PERB stated that the legislature "*did not intend thereby to preempt the field of public employer-employee relations except where public agencies do not provide reasonable methods of administering employer-employee relations through...uniform and orderly methods of communication between employees and the public agencies by which they are employed.*"²⁸

In contrast, in *International Federation of Professional & Technical Engineers, Loc. 21, AFL-CIO v. San Francisco Unified School Dist.*,²⁹ PERB looked at the same San Francisco charter provision but through the lens of EERA, and came to a very different conclusion. PERB held that the city charter requiring interest arbitration of impasses was in

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conflict with the specific impasse procedures mandated by EERA; i.e., mediation followed by factfinding.³⁰ PERB distinguished the broad discretion of agencies in forming impasse procedures conveyed by the MMBA with the strict constraints of EERA.

In future MMBA cases, PERB and its administrative law judges must take care not to be influenced by those cases decided under other public sector statutes that do not permit public agencies to be creative and fashion their own impasse procedures. Consistent with the MMBA's vague framework, cities and counties are free to enact charter provisions that call for completely different impasse procedures than those with which PERB is familiar.

"[W]hen looking at a disputed rule, the inquiry does not concern whether PERB would find a different rule more reasonable. Rather, the question is whether a disputed rule is consistent with and effectuates the purposes of the express provisions of the MMBA."³¹

Cities With Independently Elected Mayor and City Attorney

As noted above, while PERB knows that it is the governing board of a school district, community college, or state school that ultimately decides labor relations issues for that entity, that is not necessarily the case in charter cities. In many cities such as San Francisco, Los Angeles, and San Diego, the mayor and city attorney are independently elected, and hold power and duties under the city charters separate and apart from the city councils. Those charter-mandated powers and duties often involve control or interpretation of the city's labor issues. Independently elected mayors, whose authority stems from city charters, may have considerable power to decide and direct the labor relations of the city.

The city attorney often is an elected position under the city charter. This is very different from provisions governing city attorneys in general law cities. For instance, the San Diego City Charter, Sec. 40, provides: "The City Attorney shall be the chief legal adviser of, and the attorney for, the

City and all Departments and offices thereof in matters relating to their official powers and duties...." In contrast, city attorneys in general law cities are "subordinate" officials, who "shall perform...legal services required from time to time by the legislative body."³²

PERB gives great weight to the interpretation of a charter or labor relations ordinance offered by the public agency's attorney. "The contemporaneous construction of a statute by those charged with its enforcement and interpretation, although not necessarily controlling, 'is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous

or unauthorized."³³ Likewise, it is important for PERB to recognize and give proper weight to the charter-mandated duties of elected mayors and city attorneys, whose labor relations responsibilities are part and parcel of the charter provisions of their cities.

This is an important consideration when deciding whether a city impasse procedure satisfies the requirements of the MMBA.

Questions That PERB, Cities, and Counties Will Face

As demonstrated above, the MMBA offers local governments only a vague framework. It conveys cities and counties broad discretion to create their own negotiation and impasse resolution procedures, and charter provisions can cast different labor relations roles to various participants in its governmental structure.

Within these parameters, PERB may have to decide who has the authority to negotiate and make bargaining decisions on behalf of a city. By what measure or standard does PERB determine whether a city's impasse procedure, if it has one, comports with the MMBA?³⁴ Who has the power to declare impasse in a charter city with an independently elected council and mayor? Does the city council or the mayor have the authority to impose a city's last, best, and final offer?

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Can PERB insist on a process equivalent to factfinding as exists in EERA and HEERA? Is it permissible for a city or county to have an impasse procedure where the panel is authorized to do more than pick between management or union proposals?

Conclusion

Cities and counties must get used to the idea that, except with limited exceptions, city councils and county boards that sponsor charter ballot initiatives must bargain over those initiatives before placing them before the people. The same is true of implementing ordinances and regulations after successful passage of charter amendments. However, this does not mean that cities and counties can not legislate or carry through on their intent in these areas. Given the recent economic crisis, this must be clearly understood. The courts have repeatedly reminded municipalities that they need not compromise or change ballot language if it would deter their intention, so long as they participate in good faith in the bargaining process.

The determination to place ballot measures before the public may depend on the manner in which cities and counties create and implement impasse procedures under the MMBA. Given the MMBA's vague wording, cities and counties should recognize they can vary the way of mandating impasse procedures. Neither cities, counties, nor PERB should not fall into the trap of assuming one size fits all or that municipalities must create a system that mirrors what EERA or HERRA require. The MMBA permits diverse impasse mechanisms.

Finally, PERB must take into account the distinct labor roles and powers of independently elected city councils, mayors, and city attorneys in determining if an impasse procedure conforms with the MMBA's vague impasse language. *

contract negotiated by county supervisors that would increase the retirement benefits of any public employee would have to be approved by the ballot. On November 7, 2006, City of San Diego voters approved a similar measure known as Proposition B, codified in the San Diego City Charter as Article IX, Secs. 143.1 (b), (c), and (d). At the same election, City of San Diego voters also approved a ballot measure (Proposition C), granting the city the power to outsource or contract out city work following a competitive process of city departments competing with outside contractors, codified in the San Diego City Charter as Article VII, Sec. 117(c). For other examples, see fn. 14.

3 Cal. Const., Art. XI, Sec. 3.

4 *Hubbard v. City of San Diego* (1976) 55 Cal.App.3d 380, 385.

5 *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 219-220.

6 *Id.* at 248.

7 5 McQuillin Mun. Corp. Sec. 15.17 (3d ed 2006).

8 (1984) 36 Cal.3d 591.

9 *Id.* at 594-595.

10 *Id.* at 598-601. The Supreme Court emphasized the need to harmonize the state constitutional provisions that guarantee the city council's right to bring charter amendments to the electorate (Article XI, Sec. 3, subd. [b]) with the MMBA, where the amendment addresses terms and conditions of public employment. *Id.* at 597-602.

11 *Id.* at 599. While emphasizing the distinction between a public agency as legislature and employer, the U.S. Supreme Court recently has taken a different view. The California Supreme Court views the dichotomy as restricting municipal action of employers without first negotiating. The U.S. Supreme Court views the same dichotomy as granting agencies *greater* power to take unilateral action as an employer while relegating to a lesser status their role as sovereign. *Engquist v. Oregon Department of Agriculture* (2008) 128 S.Ct. 2146, 2151; 170 L.Ed. 2d 975, 983-984 (a "class of one" theory alleging government action was arbitrary, vindictive and malicious is not permissible in public employment). The court stated: "We have long held the view that there is a crucial difference, with respect to constitutional analysis, between the government exercising "the power to regulate or license, as lawmaker," and the government acting "as proprietor, to manage [its] internal operation." Thus, "the government as employer indeed has far broader powers than does the government as sovereign." "The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer."

12 As recently as in *Dimon v. County of Los Angeles* (2008)

1 Gov. Code Secs. 3500-3511.

2 On November 4, 2008, Orange County voters approved County Charter Measure J, requiring that any future labor

166 Cal.App. 4th 1276, 1289-1290 (filed September 16, 2008), a California court reiterated the *Seal Beach* conclusion that the MMBA is a procedural state law which requires agencies to meet and confer before proposing charter amendments.

13 *Building Material & Construction Teamsters Union, Loc. 216* (1986) 41 Cal.3d 651, 665, citing *Glendale City Employees Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 334-336; *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 630.

14 *City and County of San Francisco v. International Union Operating Engineers, Loc. 39* (2007) 151 Cal.App.4th 938; *International Federation of Professional & Technical Engineers, Loc. 21, AFL-CIO v. San Francisco Unified School Dist.* (2008) PERB Dec. No. 1948 (binding interest arbitration of all labor disputes); *Los Angeles County Civil Service Commission v. Superior Court* (1978) 23 Cal.3d 55 (county charter only required public hearing by civil service commission, not negotiations, on layoffs. The charter provisions did not conflict, but instead could “coexist,” with the MMBA requirement to negotiate layoff procedures beyond the charter mandated hearing. *Id.* at 553); *Building Material & Construction Teamsters Union, Loc. 216 v. Farrell, supra*, 41 Cal.3d 651 (elimination of bargaining unit positions and transfer of positions to non-unit employees); *Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276 (charter and regulations stated firefighters could not join union); *International Brotherhood of Electrical Workers, Loc. Union 1245 v. City of Gridley* (1983) 34 Cal.3d 191 (city council resolutions revoked union recognition for engaging in strike activity and provided for summary dismissal of striking employees).

15 *Glendale City Employees Assn., Inc. v. City of Glendale, supra*, 15 Cal.3d 328 (an MOU negotiated between union and public employer under MMBA is enforceable and binds the discretion of city council. *Id.* at 337-338, reaffirmed in *Santa Clara County Counsel Attorneys Assn. v. Woodside* (1994) 7 Cal.4th 525 at 623-624).

16 *Professional Fire Fighters, Inc. v. City of Los Angeles, supra*, 60 Cal.2d 276, 294-295 (charter and implementing regulations prohibiting fire fighters from joining a union were invalid).

17 *Widders v. Furchtenicht* (filed Oct. 20, 2008) 2008 Cal. App.Lexis 1614, Second Appellate District (city attorney need not fulfill charter duty to prepare ballot language for proposals when they are unconstitutional on their face, citing *American Federation of Labor v. Eu* [1984] 36 Cal.3d at 695).

18 *Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d at 599, fn. 8.

19 Gov. Code Secs. 3501, 3505.

20 *International Brotherhood of Electrical Workers v. City of Gridley, supra*, 34 Cal.3d 191, 197.

21 Grodin, “Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts” (1972) 23 Hastings L.J. 719,761.

22 Gov. Code Sec. 3505.

23 Gov. Code Sec. 3505.4.

24 *Stationary Engineers Loc. 39 v. City and County of San Francisco* (2007) PERB Dec. No. 1890-M.

25 *Id.* at 8.

26 The act includes in the definition of “public agency” every governmental subdivision, public and quasi-public corporation, every public agency, public service corporation and every town, city, and county. Gov. Code Sec. 3501(c).

27 (2007) PERB Dec. No. 1890-M.

28 *Los Angeles County Firefighters Loc. 1014 v. City of Monrovia* (1972) 24 Cal.App.3d 289, 295. *Stationary Engineers Loc. 39 v. City and County of San Francisco, supra*, p. 7, fn. 9. Emphasis added by PERB. *Stationary Engineers Loc. 39 v. City and County of San Francisco* (2007) PERB Dec. No. 1890-M, did not deal with the issue of how the charter language was enacted. There was no union charge that the city had committed an unfair practice by unilaterally implementing a charter provision delineating its impasse procedures without negotiating with the union.

29 (2008) PERB Dec. No. 1948 (petition of appeal by union granted, pending before First District Court of Appeal).

30 Gov. Code Sec. 3548-3548.8). *Id.* at 21.

31 *Teamsters Loc. 542 v. County of Imperial* (2007) PERB Dec. No. 1916-M at 16, citing *International Brotherhood of Electrical Workers v. City of Gridley, supra*, 34 Cal.3d 191 and *Huntington Beach Police Officers Assn. v. City of Huntington Beach* (1976) 58 Cal. App.3d 492. Agency regulations are presumed to be reasonable in the absence of proof to the contrary (*San Bernardino County Sheriff's etc. Assn. v. Board of Supervisors* [1992] 7 Cal.App.4th 602, 613 [8 Cal.Rptr.2d 658], citing *Organization of Deputy Sheriffs v. County of San Mateo* (1975) 48 Cal.App.3d 331, 338).

32 Gov. Code Secs. 36505, 41803.

33 *Meyer v. Board of Trustees of the San Dieguito Union High School Dist.* (1961) 195 Cal.App.2d 420, 431-432, citing from *Coca-Cola Co. v. State Board of Equalization*, 25 Cal.2d 918, 921.

34 Because the MMBA does not require agencies to enact impasse procedures, cities and counties may conclude that the impasse standard PERB sets as a floor is too strict or not amenable to management of the agency. They might opt not to provide impasse at all, or if it already exists, propose to eliminate it.

NEW!

On January 1, 2008, California firefighters gained many of the same rights as peace officers, and more.

Now, firefighters have a new resource.

Pocket Guide to the Firefighters Bill of Rights Act

By J. Scott Teidemann
1st edition (2008) \$16

Firefighters have a resource comparable to CPER's bestselling *Pocket Guide to the Public Safety Officers Procedural Bill of Rights Act*, known statewide as the definitive guide to peace officers' rights and protections. The new guide is a *must* for individual firefighters and for all those involved in internal affairs and discipline.

The FBOR guide provides:

- an overview of the requirements of the Act;
- the text of the Act as well as pertinent provisions of the Administrative Procedure Act applicable to appeals;
- a catalog of major court decisions likely to be important in deciding issues under the Act; a table of cases, and a glossary of terms.

The FBOR is largely modeled on the PSOPRA, which has protected peace officers for over 30 years. Thus, there is an existing body of case law and practical experience that may be called on when implementing the new law. This booklet cites cases decided under the PSOPBRA that are likely to influence how the courts interpret the FBOR. There are some significant differences between the two laws that warrant careful attention. Those differences are highlighted.

To view the FBOR Guide's Table of Contents or to order this and other CPER publications, go to

<http://cper.berkeley.edu>

A Riddle Wrapped in a Mystery: State Wage and Hour Provisions

Miles Locker

Miles E. Locker, former chief counsel for the Division of Labor Standards Enforcement, now maintains a private practice handling primarily appellate cases and serving as a consultant and expert witness in wage and hour litigation. He worked at the DLSE from 1990 to 2006, and played a major role in the development of the Division's enforcement policies and legal interpretations, particularly during the Davis Administration.

THE ATTEMPT to determine the extent to which various wage and hour provisions of the California Labor Code and the Industrial Welfare Commission orders cover public employees brings to mind Winston Churchill's comment about a riddle, wrapped in a mystery, inside an enigma. The search for a key takes us on such a journey. It begins with statutes that more often than not neither expressly include nor exclude public sector employees, moves on to special rules of statutory construction that typically favor non-coverage (more so for some public entities, less so for others), and then takes one to an evolving case law that has both confused and clarified the issues which have been debated by attorneys practicing in this field.¹

The Analytic Framework

Some Labor Code provisions expressly apply to specified categories of public employers,² while other statutes expressly exclude some or all types of public employers from coverage.³ Far more typically, California wage and hour statutes are silent as to whether they are applicable to public employers, and legislative history often fails to shed any light on intent. The general rule of statutory construction, favoring the broad application of remedial statutes in order to effectuate their purpose,⁴ is almost never invoked in analyzing this issue. Instead, an almost opposite rule of construction is followed, under which the "general terms of a statute will not be construed as including government if the statute would operate to trench on sovereign rights, injuriously affect the capacity to perform state functions, or establish a right of action against the state."⁵

Under this special rule of construction, there is a presumption of non-applicability, such that "general language in a statute is not sufficient, of itself, to

indicate an intention to make it applicable to government.”⁶ Conversely, though, “[w]here no impairment of sovereign powers would result [from application of the statute], the reason underlying this rule of construction ceases to exist and the Legislature may properly be held to have intended that the statute apply to governmental bodies even though it used general statutory language only.”⁷

The presumption of non-applicability may be defeated when a statute expressly excludes only certain specified categories of public employees or employers from coverage. Under the doctrine of statutory construction, *expressio unius est exclusio alterius*, “where exceptions to a general rule are specified by statute, other exceptions are not to be presumed unless a contrary legislative intent can be discerned.”⁸ For example, look at Labor Code Sec. 230.3, which prohibits employers from discriminating against an employee for taking time off to perform emergency duty as a volunteer firefighter, and which expressly does not apply to “any public safety agency” if the employer determines the employee’s absence would hinder public safety. Here, the California Attorney General concluded the section must therefore apply to other public employers that were not listed in this statutory exclusion.⁹

Likewise, the presumption of non-applicability can be surmounted when a statute, situated within a discrete chapter or article of the Labor Code, expressly excludes public employers or employees from coverage of some, but not all, of the sections contained within that chapter or article of the Labor Code. The express exclusion of public employers from some sections of a unified statutory scheme implies that the legislature intended coverage as to those sections from which such employers were not expressly excluded.¹⁰ This flows from the established rule that courts “do not construe statutes in isolation, but rather read every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.”¹¹

Analysis of this issue is necessarily complicated by the different treatment accorded to different types of

governmental entities. Constitutional provisions setting out the authority of counties and charter cities, and the University of California, have been interpreted in a way that often will operate to exempt those governmental bodies from state wage and hour laws which apply to other public employers, including the state itself.

Charter cities, charter counties, and general law counties have constitutionally granted authority to provide for the compensation of their employees.¹² In itself, however, the power to set compensation should not immunize these governmental entities from substantive state laws that

set minimum labor standards. But under the California Constitution, charter cities enjoy autonomous rule over “municipal affairs,” and as to such matters, city charter provisions “shall supersede all laws inconsistent therewith.”¹³ A charter city’s autonomy gives way, however, to matters that are “of statewide concern,” rather than merely “municipal affairs.”¹⁴ State law controls over issues of statewide concern, regardless of the provisions of any city charter.¹⁵

There is no bright-line test for determining whether an activity or law constitutes a “municipal affair” or a “matter of statewide concern,” nor, for that matter, a precise definition of those terms.¹⁶ Seeking to “bring a measure of certainty to the process,” the California Supreme Court articulated a two-part test. First, it is necessary to determine whether there is an “actual conflict” between the state law and the charter city measure. Absent any conflict, there is no need to proceed further. Where there is an actual conflict, the court must then determine whether the subject of the state statute is truly one of statewide concern; if it is not, then the conflicting city charter measure is a “municipal affair” and “beyond the reach of legislative enactment.” But if the court determines that “the subject of the statute is one of statewide concern and that the statute is reasonably related to its resolution,” then the city charter measure ceases to be a “municipal affair” and gives way to the state law.¹⁷

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Under the express provisions of the Constitution, charter counties seem to have a more limited degree of autonomy than that enjoyed by charter cities.¹⁸ As for general law counties, there is no express constitutional exemption from state law. What the Constitution does not expressly provide nonetheless has been established by judicial interpretation, with the California Supreme Court concluding that “[a]lthough the language” of the Constitution that empowers the governing board of each county to provide for the appointment, compensation, and tenure of county employees “does not expressly limit the power of the Legislature, it does so by necessary implication. An express grant of authority to the county necessarily implies the Legislature does not have that authority.”¹⁹

In analyzing the interplay between state wage regulation and contrary enactments by a charter city or charter county, the case law teaches that “the wages paid to employees of charter cities as well as charter counties is a matter of local rather than statewide concern.”²⁰ That served as one of the grounds on which the Supreme Court struck down a state law that nullified any agreement by a local agency to pay a cost-of-living increase in excess of that granted to state employees.²¹ Nonetheless, it is not at all evident, and decidedly unlikely, that the Supreme Court would follow this categorical approach or reach the same result if faced with the conflict between a state law establishing a generally applicable minimum wage and a local enactment undercutting that minimum.

The University of California also enjoys broad autonomy under the California Constitution.²² A line of cases makes clear that the university has “general immunity from legislative regulation,” and that “the power of the Regents to operate, control and administer the University is virtually exclusive.”²³ While the university is “not completely free from legislative regulation,” exceptions to “general immunity” are limited to the areas expressly reserved to the legislature under Article IX, Sec. 9(a), of the Constitution, and to three additional areas. These are (1) the power to

appropriate funds; (2) general police power regulations generally applicable to persons and corporations (such as workers compensation laws) that may be made applicable to the university; and (3) legislation regulating public agency activity not generally applicable to the public, that may be made applicable to the university “when the legislation regulates matters of statewide concern not involving internal university affairs.”²⁴ These exceptions have been interpreted extremely narrowly, so as to preclude the application of state prevailing wage requirements on public works projects,²⁵ state overtime law,²⁶ and state law requiring reimbursement for the cost of purchasing, cleaning, and maintaining

required work uniforms.²⁷ In contrast, language in one case suggests that state minimum wage requirements fall within the state’s general police power authority, and therefore apply to the university.²⁸

Statutes Governing the Timing of Final Wage Payments

Labor Code Sec. 201 requires the payment of all earned and unpaid wages immediately upon discharge.²⁹ Labor Code Sec. 202 pertains to workers not employed for a specified period pursuant to a written contract, and requires that they be paid all earned and unpaid wages no later than 72 hours after voluntarily quitting, unless the employee provided 72 hours notice of intent to quit, in which case the employee must be paid at the time of leaving. Labor Code Sec. 203 provides for the imposition of so-called “waiting time penalties” against an employer that “willfully fails to pay without abatement or reduction” any wages owed to an employee under Secs. 201 or 202, with the penalty set at the employee’s per diem wage rate multiplied by the number of calendar days (not to exceed 30 days) that payment was made after the wages became due.³⁰ These time-of-payment requirements, along with various other minimum labor standards, cannot be waived by contract.³¹

Labor Code Sec. 206(a) provides that in any dispute over wages, “the employer shall pay, without condition and

Charter counties seem to have a more limited degree of autonomy than that enjoyed by charter cities.

within the time set by [Secs. 201 and 202], all wages, or parts thereof, conceded by him to be due, leaving the employee all remedies...as to any balance claimed.” Labor Code Sec. 206.5 prohibits employers from requiring the execution of any release of any claim for wages unless payment of the wages has been made, and makes any release executed in violation of this prohibition null and void.

Prior to 2001, Labor Code Sec. 220 provided that Secs. 200 to 211, and 215 to 219, did not apply to the payment of wages of employees “directly employed by the State or any county, incorporated city or town or other municipal corporation.” The statute then was amended, making these sections of the Labor Code applicable to workers directly employed by the state by deleting that category of public employees from the exemption. The exemption now applies only to “employees directly employed by any county, incorporated city or town, or other municipal corporation,” and the statute goes on to declare that “[a]ll other employments are subject to these provisions.”³² State employees are now unquestionably covered by the statutes governing the timing of the final payment of wages.³³

But what about public workers who are not directly employed by the employers expressly enumerated in the exemption — i.e., employees of special districts and U.C.? An appellate department of a superior court concluded, some 38 years ago, that the term “municipal corporation,” as used in Labor Code Sec. 220, includes special districts that are organized as public corporations or quasi-municipal corporations, so that the employees of such special districts are not covered by Labor Code Secs. 200-211 and 215-219.³⁴ Although opinions published by a superior court’s appellate department do not constitute binding precedent,³⁵ this opinion has been followed, albeit without any independent analysis, by at least one appellate court.³⁶

As for employees of U.C., it seems incontrovertible that they fall within Sec. 220(b)’s category of “all other employments,” so that they are expressly covered by Labor

Code Secs. 200-211 and 215-219. The question then becomes whether the statutory provisions governing the payment of final wages constitute general police power regulations, or implicate matters of statewide concern not involving internal university affairs. If these statutes come within either of these two categories, controlling case law dictates that these statutes would apply to U.C. employees. Eighty years ago, these final wage payment laws were upheld as an exercise of the state’s police power, “general and uniform in its operation and valid.”³⁷ The Supreme

Court has repeatedly characterized these laws as the cornerstone of the state’s fundamental public policy in favor of prompt wage payment.³⁸ U.C.’s “formidable autonomy”³⁹ notwithstanding, if and when this question is addressed by a court, the Labor Code’s final wage payment statutes most likely would be found to apply to the university.

State Minimum Wage Requirements

The Industrial Welfare Commission is empowered, under the state constitution,⁴⁰ and by statute,⁴¹ to adopt wage orders that are quasi-legislative in nature, “prescribing the minimum wages, maximum hours, and the standard conditions of employment for employees in this state.”⁴² The employer’s obligation to pay employees no less than the state minimum wage is set out in each of the IWC’s industrywide and occupational wage orders, and in a separate minimum wage order.⁴³ Minimum wage requirements are similar in all of the industrywide and occupational wage orders: “Every employer shall pay to each employee wages not less than...\$8.00 per hour for all hours worked, effective January 1, 2008.”⁴⁴ “Hours worked” includes not just time the employee is required to work but all time the employee is suffered or permitted to work and all time the employee is subject to the employer’s control.⁴⁵

Under state law, hourly employees are entitled to payment of no less than the minimum wage for each hour, or part of each hour, worked. In contrast to federal law, the

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employer's obligation to pay no less than the minimum wage for all hours worked is not satisfied simply by looking back at the end of the workweek or pay period, and dividing the total compensation by the total hours, to determine whether the employee's average hourly earnings did not fall below the minimum wage. That method of determining minimum wage compliance under federal law is insufficient under state law, where an hourly employee must be paid no less than the minimum wage for each and every segment of time worked.⁴⁶ The consequence of this is significant — under California law, there can be no unpaid time for any activity that comes within the definition of "hours worked."

Payment of wages below the IWC-established minimum wage is unlawful,⁴⁷ and any agreement to work for less than the minimum wage is void.⁴⁸ In any action to recover unpaid minimum wages, the employee is entitled to recover interest on the unpaid wages, liquidated damages in an amount equal to the unpaid wages and interest, and attorney's fees.⁴⁹

Under the pre-2001 IWC orders, every wage order (except for Order 14, governing employees in agricultural occupations) contained a provision exempting "employees directly employed by the State or any county, incorporated city or town or other municipal corporation" from the wage order in its entirety.⁵⁰ In proceedings leading up to the adoption of the 2001 wage orders, the IWC decided to replace this total exemption with a more limited, partial exemption, so as to make certain portions of the wage orders applicable to these public employees. All of the industrywide and occupational wage orders that contained the exemption were amended, so that since January 1, 2001, these public employees have been expressly covered by each such order's minimum wage requirements.⁵¹

The separate minimum wage order, MW-2007, contains no exemption for public employees. Consequently, state minimum wage requirements now apply to all state, county, city, and special district employees. Any such public employers that maintain pay practices under which hourly

employees are not compensated for any time spent in connection with an activity that falls under the definition of "hours worked" will be found to be in violation of the state minimum wage requirements.⁵²

Although the applicability of the state minimum wage to U.C. is open to some doubt, as there is no case law directly on point, the Supreme Court's characterization of the minimum wage as a "general regulation pursuant to the police power applicable to private individuals and corporations,"⁵³ strongly suggests that it would find these minimum wage provisions applicable to the university.

Under California law, there can be no unpaid time for any activity that comes within the definition of 'hours worked.'

State Overtime Requirements

With the enactment of A.B. 60 in 1999, substantive state overtime requirements, which previously were founded solely on the IWC orders, became statutorily based. The centerpiece of A.B. 60, Labor Code Sec. 510, restored daily overtime, requiring payment of overtime compensation not just for work in excess of 40 hours in a workweek, but also for work in excess of 8 hours in a workday, with payment

at one-and-a-half times the employee's regular rate for hours worked in excess of 8 but not more than 12 hours in a workday, and at twice the employee's regular rate for all hours worked in excess of 12 in a workday. A.B. 60 nullified the 1998 wage orders that had eliminated daily overtime,⁵⁴ and mandated the IWC to adopt new wage hours consistent with the provisions of A.B. 60.⁵⁵ Under A.B. 60 and the post-A.B. 60 wage orders, state overtime law is far more protective than federal law, which provides for overtime compensation exceeding 40 hours in a workweek, but no daily overtime.⁵⁶

These state overtime requirements are almost entirely not applicable to public employees. A.B. 60 expressly stated that except for certain specified provisions (none of which related to the applicability of the IWC orders to public employees), "nothing in this section requires the commission to alter any exemption from provisions

regulating hours of work that was contained in any valid wage order that was in effect in 1997,” and that “[e]xcept as otherwise provided [in A.B. 60], the commission may review, retain, or eliminate any exemption from provisions regulating hours of work that was contained in any valid wage order in effect in 1997.”⁵⁷

All of the wage orders that were in effect in 1997 (except for Order 14, governing agricultural employees) exempted “employees directly employed by the State or any county, incorporated city or town or other municipal corporation” from the wage order in its entirety, so these employees were not covered by provisions in the wage orders regulating overtime and hours of work. Each of the post-A.B. 60 industrywide and occupational wage orders (again, except for Order 14) expressly exempt these categories of public employees from the wage order’s overtime provisions.⁵⁸

Although U.C. employees were never expressly included within the terms of this exemption, the only case to address this issue held that “regardless of whether [a university employee is] directly employed by the state within the meaning of the [IWC] regulation,” the university is exempt from state overtime requirements by virtue of its constitutional status.⁵⁹

Some question exists as to whether public employees who are exempt from IWC overtime requirements may nonetheless be covered by the overtime requirements of Labor Code Sec. 510. The statute is silent as to whether it applies to public employees, and there is no indication that the legislature intended it to apply to public employees. Also, construing Sec. 510 in such a manner would create an inconsistency with the statutory provision allowing the IWC to maintain its pre-existing exemptions from overtime requirements. Indeed, by authorizing, but not requiring, the IWC to eliminate any such exemptions, the legislature left little doubt that the determination of whether public employees would be covered by overtime was to be left solely to the IWC. One would therefore have thought that a court facing the issue of whether a public employer is required to pay overtime compensation under

Sec. 510 would simply have concluded that this statute does not apply to public employees. But when recently faced with this question, in *Curcini v. County of Alameda*,⁶⁰ the court approached the issue in another way, focusing on the fact that the defendant was a charter county. It held that overtime compensation matters are of local rather than statewide concern, and thus are “within the County’s exclusive constitutional purview.” The implications of this decision are troubling, in that it deprives the legislature and the IWC of the authority to extend overtime protections to employees of charter counties, should the legislature or IWC choose to do so in the future.

State Meal and Rest Period Requirements

Meal period requirements are founded on Labor Code Sec. 512 and the meal period provisions in all of the IWC wage orders. Section 512 prohibits an employer from employing someone for a work period of more than five hours per day without providing that employee with a meal period of not less than 30 minutes, and requires a second meal period for employees with work periods of more than 10 hours in a day. The statute permits the parties to waive the first meal period if the employee does not work over 6 hours in the day, and to waive the second meal period

if the first one was not waived and the employee does not work more than 12 hours in the day.

The IWC orders specify that on-duty meal periods are permitted only when the nature of the work prevents an employee from being relieved of all duty and the parties have entered into a written agreement to an on-the-job paid meal period.⁶¹ In all other circumstances, the employee must be relieved of all duty for the entire meal period, and (except for health care workers under IWC Orders 4 or 5) free to leave the employer’s premises during this off-duty meal period.⁶² The IWC orders also require employers to permit employees to take paid 10-minute rest periods, with the number of rest periods based on the

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total daily hours worked, with 1 rest period per 4 hours or major fraction thereof, except that no rest period need be authorized for an employee who works less than 3.5 hours. There is no “nature of the work” exception from these rest period requirements.⁶³ An employer that fails to provide an employee with a required meal or rest period in accordance with the provisions of the applicable IWC order must pay the employee one additional hour of pay for each day that the meal or rest period is not provided.⁶⁴

With very few exceptions, state meal and rest break requirements are not applicable to public employees. Every IWC industrywide and occupational order (except for Wage Order 9, which applies to employees in the “transportation industry,”⁶⁵ and Order 14, covering agricultural occupations) expressly exempts “employees directly employed by the State, or any political subdivision thereof, including any city, county or special district” from the order’s meal and rest period requirements. The remedy of the extra hour pay under Labor Code Sec. 226.7 is tied to violations of the meal or rest period provisions of an IWC order, and thus, is not available to public employees excluded from these wage order provisions. And although U.C. employees are not expressly excluded from any of the wage order requirements, there seems little likelihood of distinguishing compensation under Sec. 227.3 from overtime compensation⁶⁶ so as to overcome the holding that these employees are not covered by the wage orders’ overtime provisions.⁶⁷

There has been some debate among wage and hour practitioners as to whether public employees are covered by Labor Code Sec. 512, which serves as an independent source of the right to a meal period. *Curcini v. County of Alameda* settled that question in the negative as to employees of charter counties, on the ground that the statute, along with Labor Code Sec. 226.7, address “matters of compensation within the County’s exclusive constitutional purview,” and that “such compensation matters are of local rather than statewide concern.”⁶⁸

As to whether Sec. 512 applies to those categories of public employees whose employers do not enjoy “autonomy” over “matters of compensation,” i.e., persons who are employed by the state, general law cities, or special districts, it is noteworthy that the statute is silent as to whether it applies to public employees, and there is no indication that the legislature that enacted Sec. 512 intended it to apply to public employees. Under the special rules of construction for determining whether a statute applies to public employers, it seems likely that a court presented with this issue would conclude that the legislature intended to permit the IWC to determine whether or not to extend meal period protections to public employees, and that Sec. 512 does not serve as an independent source of meal period rights for public employees.⁶⁹

State Laws Prohibiting Employer Imposed Wage Deductions

Labor Code Sec. 221 makes it “unlawful for an employer to collect or receive any part of wages theretofore paid by said employer to said employee.” Section 222 makes it “unlawful, in case of any collective bargaining agreement...to withhold from said employee any part of the wage agreed upon.” Section 223 provides that “where any statute or contract requires an employer to

maintain the designated wage scale, it shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or by contract.”

The only exceptions to these statutes are set out at Labor Code Sec. 224, which provides that these statutes “shall in no way make it unlawful for an employer to withhold or divert any portion of an employee’s wages where the employer is required or empowered to do so by state or federal law or when a deduction is expressly authorized in writing by the employee to cover insurance premiums, hospital or medical dues, or other deductions not amounting to a rebate or deduction from the standard wage arrived at by collective bargaining or pursuant to a wage agreement

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or statute, or when a deduction to cover health or welfare or pension plan contributions is expressly authorized by a collective bargaining or wage agreement.”

In an opinion letter, the labor commissioner concluded that these statutes apply to all California public employers.⁷⁰ There is no authority that has held otherwise. This means that a public employer cannot impose an involuntary wage deduction to recover a prior overpayment absent some other law expressly empowering the employer to do so. Even when there is a memorandum of understanding between a public employer and an employee organization purporting to allow the employer to deduct wages from the employee’s final paycheck to recoup amounts owed to the employer (for anything other than health or welfare or pension plan contributions), Labor Code Secs. 221-224 make the deductions unlawful unless the employee has executed a written agreement expressly authorizing the deductions.⁷¹

Twenty years ago, *California State Employees Assn. v. State of California*⁷² relied on the wage garnishment and attachment statutes in holding that the state acted unlawfully by imposing wage deductions to recoup prior alleged overpayments.⁷³ One year later, Government Code Sec. 19838 was enacted, which expressly empowers the state to recoup overpaid wages through payroll deductions, with deductions from any paycheck (except a final check) capped at 25 percent of the employee’s net disposable earnings. Insofar as this statute meets the “empowered to” exception set out in Labor Code Sec. 224, such wage deductions imposed against state employees would not run afoul of Secs. 221-223; however, any deductions that reduce net pay below the federal minimum wage would certainly run afoul of the FLSA.⁷⁴

This leaves us with every other public employer that cannot point to a specific statute empowering it to impose similar wage deductions. As to all such public employers, involuntary wage deductions to recoup prior overpayments remain unlawful as a consequence of Labor Code Secs. 221-223 and the court’s holding in *CSEA*.

Reimbursement of Uniform Costs and Other Necessary Business Expenses

Labor Code Sec. 2802 requires “[a]n employer [to] indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer.” A related provision, Sec. 2804, expressly prohibits waiver of the rights afforded by Sec. 2802. Common business expenses that must be reimbursed under Sec. 2802 include the cost of purchasing and maintaining required uniforms,⁷⁵ and mileage costs associated with the use of a personal automobile for business travel. *Gattuso v. Harte-Hanks Shoppers, Inc.*,⁷⁶ addresses the

methods by which an employer may comply with its obligation to reimburse employees for mileage and other expenses incurred in the discharge of their duties. Whatever method is used, if the expenses were necessary and incurred in the course and scope of employment, “the existence of an agreement concerning a... reimbursement rate would not relieve the employer of the statutory obligation to provide complete reimbursement,

nor would it preclude an employee from challenging the sufficiency of a reimbursement payment that was calculated using the agreed...rate.”⁷⁷

Two published decisions deal with the applicability of Sec. 2802 as to public employees. Both cases decided the issue unfavorably for the employees, but for quite different reasons. *Los Angeles Police Protective League v. City of Los Angeles*⁷⁸ arose when four police officers and their unions filed an action under Sec. 2802 for indemnification of expenses incurred in the successful defense of criminal charges brought against the officers for actions taken within the scope of their employment. Without discussion, the court assumed that Sec. 2802 applies to public employees, but reasoned that it could not be reconciled with Gov. Code Sec. 995.8, which specifies that public entities are not required to provide for the defense of criminal actions brought against their employees. The court held that this

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deductions to recoup
prior overpayments
remains unlawful.*

provision in the Tort Claims Act prevailed over Labor Code Sec. 2802 because it was enacted more recently and is more specific.⁷⁹ The implication flowing from this decision was that absent clear conflict with another statute as to a particular item of reimbursement, Sec. 2802 would serve as a source of substantive rights for public employees.

In contrast, *In re Work Uniform Cases*⁸⁰ was decided on much farther reaching grounds, holding that Sec. 2802 has almost no applicability to employees of counties, charter cities, and U.C.; and that while it is applicable to persons employed directly by the state, it conflicts with, and gives way to, Gov. Code Sec. 19850.1, a more specific statute concerning expenses associated with state employee's required uniforms.⁸¹ Ruling that payments for uniforms constitute compensation,⁸² and that such payments are not a matter of statewide concern,⁸³ the court held that "the constitutional powers granted to [counties and charter cities] to manage their own affairs and set the compensation of their own employees," and "the unique constitutional status of the Regents [under which] it is not subject to general laws relating to employee compensation," relieves these entities from the obligation under Sec. 2802 to pay for work-related uniform costs.⁸⁴ Under the court's sweeping analysis, it is difficult to conceive of more than a few of the very many types of employee-incurred business expenses reimbursable under Sec. 2802 that would be construed as "a matter of statewide concern" or deemed not to constitute "compensation" so as to overcome this constitutional immunity for counties, charter cities, and the regents.⁸⁵

The court's analysis would suggest that general law cities and special districts, like the state itself, are subject to the requirements of Sec. 2802, absent a conflict with a more specific statute concerning the type of expense at issue. Another significant aspect of this decision was its discussion of *Grier v. Alameda-Contra Costa Transit Dist.*,⁸⁶ which held that Labor Code Sec. 2928, which limits the extent to which wages can be deducted for tardiness, was applicable

to the defendant transit district as it did not result in an infringement on sovereign governmental powers. The *Work Uniform* court noted that "*Grier* dealt with the impermissible withholding of wages actually earned by employees....It concerns the manner of payment, not the determination of an item of compensation."⁸⁷ This small part of the decision ought to give some solace to public employee-side practitioners faced with the task of establishing the applicability of laws that, unlike Sec. 2802, merely prohibit deductions from wages already earned.

Prohibition of Forfeiture of Accrued Vacation Pay

Labor Code Sec. 227.3, the statute that prohibits the forfeiture of accrued vacation pay, falls into the category of laws that do not fix compensation but merely prohibit deductions from wages already earned. In relevant part, Sec. 227.3 states that unless a collective bargaining agreement provides for something different, "whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate," and that "an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination."

In *Suastez v. Plastic Dress-Up Co.*,⁸⁸ the California Supreme Court held that vacation pay "vests," within the meaning of Sec. 227.3, as it is earned. The court explained: "The right to a paid vacation, when offered in an employer's policy or contract of employment, constitutes deferred wages for services rendered....[A] proportionate right to a paid vacation 'vests' as the labor is rendered. Once vested, the right is protected from forfeiture by Sec. 227.3."⁸⁹ Thus, any accrued and unused paid vacation time must be paid out to the employee upon separation from employment, along with any other earned and unpaid wages.⁹⁰ So-called "use it or lose it" policies are prohibited by Sec. 227.3,

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and unpaid wages.*

although employers may establish a reasonable cap under which no further vacation time is accrued once an employee reaches a pre-specified limit, with accrual resuming once the employee takes sufficient paid vacation time to fall below the cap.⁹¹

Section 227.3 does not itself state whether it does or does not apply to public employees. There is no decision directly on point, though there is at least one case that assumed the statute would apply to public employees,⁹² and another case that provides a one-sentence assertion unsupported by any analysis that public employers “are not governed by that section of the Labor Code.”⁹³ There are several reasons why applicability should be found. First, Sec. 227.3 is not part of the list of statutes enumerated in Sec. 220 that expressly do not apply to public employers. Next, Sec. 227.3 cannot be construed as a statute “fixing compensation” as the right to vacation pay is not founded on that statute, but arises solely from the employer policy or the contract of employment. The statute merely prohibits the forfeiture of already earned vacation wages and controls the timing of the payment of those wages upon separation of employment. As such, it does not implicate the constitutional authority of counties, charter cities, and the regents to determine employee compensation.

Thus, it seems unlikely that Sec. 227.3 would be held inapplicable to any category of public employer in California. The only limitation on applicability would be where there is a conflicting, more specific statute concerning the accrual and forfeiture of vacation pay for a particular category of public employees. For example, in *Seymour v. Christiansen*,⁹⁴ the court held that Sec. 227.3, and cases that have interpreted it, including *Suastez*, “have no application to the case of a classified public school employee, whose right to payment for accumulated vacation is governed by the Education Code.”⁹⁵

Conclusion

While it is beyond question that public employees do not enjoy the full range of Labor Code protections available to private employees, the Labor Code and IWC orders nonetheless provide public employees with some very significant rights. Attorneys representing public

employees should be vigilant in asserting these rights, just as counsel for public employers must caution their clients to comply with all applicable obligations or face the expensive consequences. *

1 This article owes much to my participation in a panel discussion on this topic earlier this year at a State Bar Labor and Employment Section conference. In particular, I want to thank my co-panelists, Kate Hallward, Carol L. Koenig, and Emily Prescott, for their valuable insights and their sometimes diverging but always well reasoned opinions that provided me with a far better understanding of the complexities of these issues.

2 For example, Labor Code Sec. 233, which requires any employer that provides sick leave to permit its employees to use a specified amount of that leave to attend to the illness of family members, expressly defines “employer” to include the state, political subdivisions of the state, and municipalities. (Labor Code Sec. 233[b][2].)

3 For example, Labor Code Sec. 220(b) provides, “Sections 200 to 211, inclusive, and Sections 215 to 219, inclusive, do not apply to the payment of wages of employees directly employed by any county, incorporated city, or town or other municipal corporation. All other employments are subject to these provisions.”

4 See *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103, 184 CPER 85, citing several other cases for the proposition that “statutes governing employment are to be construed broadly in favor of protecting employees.”

5 *Nutter v. City of Santa Monica* (1946) 74 Cal.App.2d 292, 300.

6 *Ibid.*

7 *Hoyt v. Board of Civil Service Commrs.* (1942) 21 Cal.2d 399, 402.

8 *Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 436-437, citing *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 116.

9 (1995) 78 Ops.Cal.Atty.Gen. 116.

10 *Ibid.* The Attorney General noted that Labor Code Sec. 220, which then made Secs. 200-211 and 215-219 inapplicable to all public employees, was “part of the same legislative scheme (Secs. 200-243) as section 230.3,” and “that the Legislature could easily have excluded public employees from the requirements of the latter statute if it had so intended.”

11 *Smith v. Superior Court (L’Oreal USA, Inc.)* (2006) 39 Cal.4th 77, 83.

12 Cal. Const., Art. XI, Sec. 5, subd. (b), gives charter cities “plenary authority” to provide in their charters for the compensation of their employees. Article XI, Sec. 4, subd. (f), states that county charters “shall provide for...the prescribing and regulating by [governing] bodies of the...compensation” of county employees. Article XI, Sec. 1, subd. (b), states that “the governing body” of any county, including any general law county, “shall provide for the...compensation...of employees.”

13 Cal. Const., Art. XI, Sec. 5, subd. (a). See *In re Work Uniform Cases* (2005) 133 Cal.App.4th 328, 335.

14 “As to matters which are of statewide concern, however, home rule charter cities remain subject to and controlled by applicable general state laws regardless of the provisions of their charters, if it is the intent and purpose of such general laws to occupy the field to the exclusion of municipal regulation.” *Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 61-62. In *Bishop*, a narrowly divided court rejected the plaintiff’s contention that city employees who worked as electricians maintaining, repairing, and constructing city electrical facilities and equipment were covered by the prevailing wage law. The court held the public works prevailing wage requirement (Labor Code Secs. 1770 et seq.) is applicable only to contracts with private employers, and does not apply to work carried out by a public agency with its own workers. After *Bishop*, the statute was amended to expressly exclude public employees from its coverage. (Labor Code Sec. 1771; *Division of Labor Standards Enforcement v. Ericsson Information Systems, Inc.* [1990] 221 Cal.App.3d 114, 124 fn. 16.)

15 *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 17.

16 *Id.*, at 16. (“[T]he task of determining whether a given activity is a ‘municipal affair’ or one of statewide concern is an ad hoc inquiry,” and the “constitutional concept of municipal affairs is not a fixed or static quantity,” so that “the question must be answered in light of the facts and circumstances surrounding each case....No exact definition of the term ‘municipal affairs’ can be formulated and the courts have made no attempt to do so, but instead have indicated that judicial interpretation is necessary to give it meaning in each controverted case.”)

17 *Id.*, at 16-18.

18 Cal. Const., Art. XI, Sec. 4(g), provides, “Whenever any county has...adopted a charter...the general laws adopted by the legislature in pursuance of Sec. 1(b) of the article shall, as to such county, be superseded by said charter as to matters for which, under this section, it is competent to make provisions in such charter, and for which such provisions are made therein....” Under the Constitution’s express terms, the only state laws that are superseded are those adopted “in pursuance of Sec. 1(b)” of

Art. XI. Sec. 1(b) addresses the compensation of members of a county’s governing body, not a county’s employees. Compensation of county employees is instead addressed at Sec. 4(f) of Art. XI.

19 *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 285, 160 CPER 19 (statute requiring counties and other local agencies to submit to binding arbitration of economic issues in negotiations with law enforcement and firefighter unions held unconstitutional). In his concurrence, Chief Justice George rejected this aspect of the decision, noting that “the issue is not nearly as simple or clear-cut as the majority suggests,” noting that the substantive anti-discrimination provisions of the Fair Employment and Housing Act (Gov. Code Secs. 12900, et seq.) take precedence over contrary rules established by local governmental entities. *Id.*, at 297-298. The Chief Justice observed; “If the state properly may impinge upon a county’s power to *appoint* or *dismiss* employees in order to serve the statewide concern of protecting employees from discrimination, it is not immediately apparent why the state...may not similarly impinge upon a county’s authority to have the last word on employee compensation.” *Id.*, at 299.

20 *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 317.

21 *Id.*, at 314-318.

22 Cal. Const., Art. IX, Sec. 9(a), grants the Regents of the University of California “full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of the university and such competitive bidding procedures as may be made applicable to the university for the letting of construction contracts, sales of real property, and purchasing of materials, goods and services.”

23 *San Francisco Labor Council v. Regents of the University of California* (1980) 26 Cal.3d 785, 788-789.

24 *Id.*, at 789.

25 *Regents of the University of California v. Aubry* (1996) 42 Cal.App.4th 579 (holding that construction of off-campus housing for students, faculty, and staff on university-owned land was not a matter of statewide concern and involved internal university affairs vital to its core educational function).

26 *Kim v. Regents of the University of California* (2000) 80 Cal.App.4th 160, 167, 142 CPER 34 (holding that state overtime requirements set out in the Industrial Welfare Commission wage orders and made enforceable under Labor Code Sec. 1194 do not constitute a “general regulation pursuant to police powers” as they “are not *generally* applicable to private persons and corporations” as evidenced by numerous exemptions, and are “not a matter of statewide concern,” in that employees of all other public entities are expressly exempted from coverage).

27 *In re Work Uniform Cases*, *supra*, 133 Cal.App.4th 328, 344 (holding that Labor Code Sec. 2802, which requires employers to reimburse employees for necessary business expenses, is not applicable to the university in that it is not a general police power regulation and “does not relate to a matter of statewide concern in the context in which plaintiffs seek to have it applied.”). The decision contains no analysis or reasons for the court’s conclusion that the statute is not a general police power regulation.

28 *San Francisco Labor Council v. Regents*, *supra*, 26 Cal.3d at 790 (differentiating generally applicable minimum wage statutes from prevailing wage regulations, holding that the latter cannot be construed as a “general regulation pursuant to the police power applicable to private individuals and corporations,” since private construction wages may fall below the prevailing wage).

29 The term “discharge” includes involuntary termination from an ongoing employment relationship and release from employment after completion of a specific job assignment or at the end of the duration for which the employee was hired. *Smith v. Superior Court (L’Oreal USA, Inc.)* (2006) 39 Cal.4th 77. The labor commissioner has interpreted the term, in the context of Sec. 201, to include any layoff without a specified return date within the normal pay period. See DLSE Opinion Letter 1996.05.30.

30 *Mamika v. Barka* (1998) 68 Cal.App.4th 487.

31 Labor Code Sec. 219(a) states that the provisions of Secs. 200-243 cannot “in any way be contravened or set aside by a private agreement, whether written, oral or implied.”

32 Labor Code Sec. 220(b).

33 In 2002, Labor Code Secs. 201 and 202 were amended to allow the state, upon the request of a separating employee, and only under certain narrowly defined conditions, to delay payment of a portion of the employee’s final wages for subsequent deposit into a supplemental retirement plan or for tax deferral purposes.

34 *Division of Labor Law Enforcement v. El Camino Hospital Dist.* (1970) 8 Cal.App.3d Supp. 30.

35 *People v. Moore* (1994) 31 Cal.App.4th 489, 492 fn. 2.

36 *Kistler v. Redwoods Community College Dist.* (1993) 15 Cal. App.4th 1326, 1337 (holding that Labor Code Sec. 218.5, which provides for attorney’s fees in actions for wrongfully withheld wages, not applicable because a community college district is a “municipal corporation” for purposes of Labor Code Sec. 220).

37 *Moore v. Indian Spring Channel Gold Mining Co.* (1918) 37 Cal.App. 370, 375 and 379.

38 See *Smith v. Superior Court*, *supra*, 39 Cal.4th 77, 82 (“The public policy in favor of full and prompt payment of an employee’s earned wages is fundamental and well established.... California has long regarded the timely payment of employee wage claims as indispensable to the public welfare....[B]ecause of the economic position of the average worker and, in particular, his

dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare that he receive his pay when it is due....[T]he policy involves a broad public interest, not merely the interest of the employee....[S]ections 201 and 203... implement[] this fundamental public policy regarding prompt wage payment.”).

39 *Kim v. Regents*, *supra*, 80 Cal.App.4th 160, 166.

40 Cal. Const., Art. XIV, Sec. 1.

41 Labor Code Secs. 70-74, 515, 516-517, 1173-1182.1, 1185.

42 *Industrial Welfare Commission v. Superior Court* (1980) 27 Cal.3d 690, 697-698.

43 The IWC has adopted one minimum wage order of general applicability, and 12 different wage orders covering specified industries (e.g., manufacturing, public housekeeping, mercantile, transportation, etc.), four wage orders covering specified occupations for employees not covered by one of the industrywide orders, and one miscellaneous order (17-2001, which now serves as the default order of last resort by covering employees in any industry or occupation not covered by any other wage order, and not specifically exempted by a wage order that was in effect in 1997, or not otherwise exempted by law). These orders can be found at the IWC’s website at www.dir.ca.gov/iwc/wageorderindustries.htm, and at Title 8, Cal. Code of Regulations, Secs. 11000-11170.

44 See, e.g., IWC Order 4-2001, Sec. 4(A). Order 4 governs the wages, hours, and working conditions of workers employed in professional, technical, clerical, and mechanical occupations who are not covered by an industrywide order. *Harris Feeding Co. v. Department of Industrial Relations* (1990) 224 Cal.App.3d 464.

45 The control prong operates independently from the suffered or permitted-to-work prong, and thus, “hours worked” under state law may include time where the employee is not actually performing labor and not at a worksite. Furthermore, the federal Portal-to-Portal Act, which excludes certain preliminary and postliminary activities from compensable time, has no application to state wage and hour law. *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575. However, there is a somewhat narrower definition of “hours worked” for those employed in the health care industry and covered by Wage Orders 4 or 5, for whom the term is to be interpreted in accordance with the federal Fair Labor Standards Act. (IWC Order 4-2001, Sec. 2[K], Order 5-2001, Sec. 2[K].)

46 *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314.

47 Labor Code Sec. 1197.

48 Labor Code Sec. 1194.

49 *Ibid.*; and Labor Code Sec. 1194.2.

50 See, e.g., IWC Order 4-98, Sec. 1(B).

51 By way of example, IWC Order 4-2001 contains this partial exemption: “Except as provided in Sections 1, 2, 4, 10, and 20, the provisions of this Order shall not apply to any employees directly employed by the State or any political subdivision thereof, including any city, county, or special district.” (IWC Order 4-2001, Sec. 1[B].) Minimum wage requirements are set out in Sec. 4 of the wage order, while Sec. 2 contains the definition of “hours worked,” and Sec. 20 sets out penalties for violations resulting in employee underpayments.

52 See DLSE Opinion Letter 2002.01.29, regarding a transit district’s obligation to pay no less than the minimum wage for a bus driver’s travel time, following the conclusion of the driver’s final run, in returning to the distant location where the driver reported to work to begin the first run.

53 *San Francisco Labor Council v. Regents, supra*, 26 Cal.3d 785, 790.

54 Stats. 1999 ch 134 Sec. 21.

55 Labor Code Sec. 517(a).

56 The overtime requirements of the federal Fair Labor Standards Act are found at 29 USC Sec. 207. These requirements apply to public employers. *Garcia v. San Antonio Metro. Transit Authority* (1985) 469 U.S. 528.

57 Labor Code Sec. 515(b)(2).

58 The absence of this exemption from Order 14 means that the very few public employees who are “employed in an agricultural occupation,” as defined in that wage order, are covered by all of its provisions, including those related to overtime. But Order 14 differs from the other IWC orders in that under that order, an employee must work more than 10 hours in a day or more than 6 days in a workweek to become entitled to overtime compensation. (See Order 14-2001, Secs. 2[D] and 3[A].)

59 *Kim v. Regents, supra*, 80 Cal.App.4th 160, 166. See fn. 24, *supra*.

60 (2008) 164 Cal.App.4th 629.

61 See, e.g., IWC Order 4-2001, Sec. 11(A).

62 *Ibid.* See *Bono Enterprises v. Bradshaw* (1995) 32 Cal. App.4th 968 (disapproved on other grounds in *Tidewater Marine Western, Inc. v. Bradshaw* [1996] 14 Cal.4th 557, 574), holding that because the definition of “hours worked” includes time during which an employee is subject to the employer’s control, meal period during which workers were restricted to employer’s premises constitutes “hours worked” for which employees must be paid. The lessened protection for certain health care workers under Orders 4 and 5 stems from the wage orders’ special definition of “hours worked” for such employees. Secs. 2(G), (J) and (K), IWC Orders 4-2001 and 5-2001.

63 See, e.g., IWC Order 4-2001, Sec. 12(A).

64 Labor Code Sec. 226.7(b).

65 The IWC amended Wage Order 9-2001 in 2004, to make its meal and rest period requirements applicable to “commercial drivers employed by governmental entities.” (IWC Order 9-2001, Sec. 1[B].) However, the wage order further provides that these meal and rest period requirements shall not apply to any public transit drivers covered by a valid collective bargaining agreement if the agreement provides for (1) meal and rest periods, respectively; (2) final and binding arbitration of disputes concerning its meal and rest period provisions, respectively; (3) premium wage rates for all overtime hours worked; and (4) a regular rate of pay of not less than 30 percent more than the state minimum wage. (Order 9-2001, Secs. 11[F], 12[C].) This collective bargaining agreement opt-out for public employees who operate commercial motor vehicles was authorized by the legislature with the enactment of Labor Code Sec. 512.5.

66 *Murphy v. Kenneth Cole Productions, Inc., supra*, 40 Cal.4th 1094, holding that the extra hour of pay under Sec. 226.7 constitutes wages.

67 *Kim v. Regents, supra*, 80 Cal.App.4th 160.

68 *Curcini v. County of Alameda, supra*, 164 Cal.App.4th 629, 644-645. In support of its conclusion that the meal and rest break claims are “matters of compensation” rather than merely matters of working conditions, the court noted that plaintiffs were seeking compensation, pursuant to Labor Code Sec. 226.7, for having been required to work through meal and rest breaks. The court could have quickly disposed of this claim on the ground that the extra hour of pay remedy under Sec. 226.7 is available only for violations of the meal and rest break provisions of the IWC orders, not for violations of Sec. 512. Indeed, Sec. 512 is not enforceable through Sec. 226.7, so the court’s characterization of Sec. 512 as a “matter of compensation” is questionable.

69 The legislature apparently shares the view that Labor Code Sec. 512 does not apply to public employees, as evidenced by its passage of S.B. 124 in 2007, a bill that would have made Sec. 512 applicable to pool lifeguards and stage assistants employed by any city, county, or special district. This bill was vetoed by the governor.

70 DLSE Opinion Letter 2002.01.29, p. 11, fn. 5. The DLSE based this conclusion on Labor Code Sec. 220, reasoning: “The fact that the Legislature expressly excluded these public employers from certain sections contained within this chapter of the Code indicates an intent to make the remaining sections of the chapter [including Secs. 221-224] applicable to such employers.”

71 *City of Oakland v. Hassey* (2008) 163 Cal.App.4th 1477, 1499-1501. The MOU purported to allow the deduction of wages

from a police officer's final paycheck to enable the city to recover training costs if the officer's employment ended before a specified period of time. The court also noted, "it is questionable whether employees may enter into agreements authorizing unlawful deductions" (*Id.* at 501), suggesting that even if the officer had executed an agreement allowing the city to withhold his final paycheck in its entirety, the agreement would be unenforceable as the Fair Labor Standards Act prohibits an assignment of wages to the employer by paycheck deductions that reduce net pay below the minimum wage, even where the employee agreed in writing to the withholding. (*Id.*, at 1491-1493, citing *Heder v. City of Two Rivers* [7th Cir. 2002] 295 F.3d 777,779; *Brennan v. Veterans Cleaning Service, Inc.* [5th Cir. 1973] 482 F.2d 1362, 1369-1370; *Maybue's Super Liquor Stores, Inc. v. Hodgson* [(5th Cir. 1972] 464 F.2d 1196, 1197, 1199.)

72 (1988) 198 Cal.App.3d 374.

73 The court reached this conclusion without even considering Labor Code Secs. 221-224. Instead, the court held that the wage deductions for past overpayments were not expressly permitted under any state law, and violated the provisions of the wage garnishment law and the attachment law, both of which protect wages from creditors. The court observed that "[t]he wage garnishment law provides the exclusive judicial procedure by which a judgment creditor can execute against the wages of a judgment debtor, except for cases of judgments or orders for support," (*California State Employees Assn. v. State of California, supra*, 198 Cal.App.3d at 377), and that it expressly "applies to public employees" (*Id.*, at 377, fn. 3). The court reasoned that allowing the state to reach a state employee's wages by setoff would implicate "fundamental due process considerations" as it "would let it accomplish what neither it nor any other creditor could do by attachment and would defeat the legislative policy" exempting wages from pre-judgment attachment. (*Id.*, at 377, citing *Barnhill v. Robert Saunders & Co.* [1981] 125 Cal.App.3d 1,6.)

74 See n. 71, *supra*.

75 Under the various industry and occupational IWC orders, if "uniforms are required by the employer to be worn as a condition of employment, such uniforms shall be provided and maintained by the employer." (See, e.g., IWC Order 4-2001, Sec. 9[A].) But all of these IWC orders (except for Order 14) expressly make this section inapplicable to employees directly employed by the state or any political subdivision thereof, including any city, county, or special district. (e.g., IWC Order 4-2001, Sec. 1[B].) In contrast, there is nothing in the Labor Code that expressly excludes public employees from Sec. 2802.

76 (2007) 42 Cal.4th 554.

77 *Id.* at 568-570.

78 (1994) 27 Cal.App.4th 168

79 *Id.* at 178-179.

80 (2006) 133 Cal.App.4th 328

81 For purposes of Gov. Code Sec. 19850.1, "state employees" are defined as "employees of the state and its agencies, but not included are employees of the University of California or the California State University." (Gov. Code Sec. 19850[e].) Pursuant to Gov. Code Sec. 19850.1, "State employees shall be responsible for the purchase of uniforms required as a condition of employment. The state shall provide for an annual uniform allowance to state employees for replacement of uniforms...." The court's rationale therefore suggests that Labor Code Sec. 2802 would apply and control as to uniform expenses for employees of the California State University.

82 *In re Work Uniform Cases, supra*, 133 Cal.App.4th at 337-338.

83 *Id.*, at 338-340.

84 *Id.* at 345.

85 To be sure, the court conceded that necessary safety equipment could be a matter of statewide concern, but rejected the contention that an "ordinary work uniform" implicates employee safety. *Id.* at 342. (Cf., *Oakland Police Officers Assn. v. City of Oakland* [1973] 30 Cal.App.3d 96, holding that Labor Code Sec. 6401, which states that "[e]very employer shall furnish...safety devices... which are reasonably adequate to render such employment...safe," requires the city to furnish service revolvers and related equipment to its police officers without charge.)

86 (1976) 55 Cal.App.3d 325.

87 *In re Work Uniform Cases, supra*, 133 Cal.App.4th at 344.

88 (1982) 31 Cal.3d 774.

89 *Id.* at 784.

90 *Millan v. Restaurant Enterprises Group, Inc.* (1993) 14 Cal. App.4th 477, 486 (failure to timely pay accrued vacation wages upon termination as required by Sec. 227.3, also violates Secs. 201-202, and therefore subjects employer to penalties under Sec. 203). However, as discussed above, Labor Code Sec. 220(b) expressly exempts certain categories of public employees from Secs. 201, 202, and 203.

91 *Boothby v. Atlas Mechanical, Inc.* (1992) 6 Cal.App.4th 1595.

92 *Los Angeles County Professional Peace Officers Assn. v. County of Los Angeles* (2004) 115 Cal.App.4th 866, 872, finding that the county's "excess vacation buy-back policy," under which employees were not permitted to cash-out their "excess vacation time" while on disability leave, did not constitute a forfeiture of any accrued vacation time, and thus, did not violate Sec. 227.3.

93 *Kistler v. Redwoods Community College Dist.* (1993) 15 Cal.App.4th 1326, 1332. This assertion cannot be considered as anything but dicta, as the court went on to follow what it called the “general principles of law” that were articulated by the Supreme Court in *Suastez* — that “vacation pay is not a gratuity or a gift, but is, in effect, additional wages for services performed...earned at the time of other wages, but whose receipt is delayed.” *Id.*, citing *Suastez v. Plastic Dress-Up Co.*, *supra*, 31 Cal.3d at 779. Based on these “general principles of law,” and the absence of any district written policy providing that employees may be forced to take unwanted vacation time prior to separation from employment, the court held that the district could not compel employees to take involuntary vacations in order to reduce their accrued balances of wages due upon termination. *Kistler*, *supra*, 15 Cal.App.4th at 1332-1333.

94 (1991) 235 Cal.App.3d 1168, 1179.

95 Education Code Sec. 45197 contains specific provisions governing the accrual, vesting and forfeiture of vacation credit for

classified public school employees, and certain of its provisions unquestionably conflict with Labor Code Sec. 227.3. For example, under subsection (e) of Sec. 45197, “earned vacation shall not become a vested right until completion of at least six months of employment,” and subsection (h) states that upon separation from employment, employees who have not completed six months employment shall not be entitled to the lump sum payment of all earned and unused vacation that is provided to all other employees. But the plaintiff in *Seymour* had been employed for 20 years prior to her retirement, and the decision turned on the court’s controversial interpretation of subsection (d), which provides: “If the employee is not permitted to take his full annual vacation, the amount not taken shall accumulate for use in the next year or be paid for in cash....” The court found an implied forfeiture to arise out of this statutory language, holding that an employee who is permitted to take vacation during the year, but chooses not to, forfeits that vacation time so that there is no carry-over to the next year. *Seymour v. Christiansen*, *supra*, 235 Cal.App.3d at 1177-1178.

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Recent Developments

Local Government

'Anti-Huddling' Policy Is Reasonable Restriction on PSOPBRA

A POLICY prohibiting Los Angeles deputy sheriffs from consulting with an attorney in a group before being interviewed about an officer-involved shooting does not conflict with the Public Safety Officers Procedural Bill of Rights Act, the Meyers-Milias-Brown Act, or protections conveyed by the state or federal constitutions. The Second District Court of Appeal rejected a challenge to the "anti-huddling" policy brought by the Association for Los Angeles Deputy Sheriffs, and upheld the trial court's decision that denied the union's request to enjoin implementation of the policy.

ALADS, which represents the department's nonsupervisory deputies, argued that a long-standing, unwritten employment practice allows deputies who are involved in a shooting to consult collectively, at the same time, with the same legal counsel or union representative. In June 2006, the department notified ALADS of proposed revisions to the policy to ensure that the fact-gathering process be undertaken promptly and with investigatory integrity and objectivity.

The department and the union met to discuss the proposed policy revisions, but reached an impasse. When the department implemented the revisions in November, ALADS asked the court to issue a restraining order, asserting that the department's action violated the MMBA, the Bill of Rights Act, and the deputies' constitutional right to consult with counsel. The department asserted that its anti-huddling policy was a valid workplace regulation. The trial court denied the injunctive relief request, and ALADS appealed.

First, the appellate court dispelled ALADS of its belief that the trial court's order prohibited deputies from consulting with the same lawyer or with different lawyers from the same law firm. "The Department's policy revision only prohibits a group of deputies from meeting with the same lawyer at the same time. We see no language in the Department's anti-huddling policy revision which prevents the same lawyer, or different lawyers from the same law firm, from meeting individually with many different deputies."

The court also clarified that its ruling on ALADS's motion for a preliminary injunction is not an adjudication of the ultimate rights involved in the controversy. The court's role is to balance the respective equities of the parties and preserve the status quo "pending a trial on the merits."

The court rejected ALADS's con-

tention that the anti-huddling policy interferes with the deputies' rights conveyed by Sec. 3303(i) of the Bill of Rights Act to be represented during an interrogation on matters likely to result in punitive action. Relying on *Upland Police Officers Assn. v. City of Upland* (2003) 111 Cal.App.4th 1294, 162 CPER 30, the court clarified that an officer's representation right is not unlimited. Section 3303 permits a police agency to impose reasonable limits

The policy protects a deputy's right to meet with counsel individually.

on a police officer's statutory right to consult with counsel of his or her choosing during an interrogation.

Here, the court concluded that the department's anti-huddling policy is a reasonable restriction. The court agreed with ALADS that an official interrogation following an officer-involved shooting occurs at a critical time. But the policy protects a deputy's right to meet with counsel individually, the court observed. The anti-huddling policy only precludes an officer from getting together in a group with other officers and a lawyer. "The objective of the policy," said the court, is "to assure the collection of accurate witness accounts before the recollection of witnesses can be influenced by the observation of other witnesses."

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After the initial interview, the court stressed, the deputy may engage any lawyer and have an individual or communal relationship with that lawyer. In other words, said the court, “any number of officers may choose to be represented by the same lawyer in any subsequent administrative or criminal proceeding.” Balancing the limited and temporary qualification on a deputy’s right to counsel against the rational

The objective is to assure the collection of accurate witness accounts.

objectives of the anti-huddling policy, the court concluded that the policy revision was reasonable.

The court also concluded that the policy did not abridge the deputies’ constitutional right to consult with counsel. The decision in *Long Beach Police Officer Assn. v. City of Long Beach* (1984) 156 Cal.App.3d 996, 62 CPER 30, did not hold that a policy which prohibited an officer from consulting with an attorney before filing an incident report was unconstitutional, the court stressed. It held that the police department’s unilateral abrogation of the past practice violated the MMBA’s meet and confer obligation.

The court also was not persuaded by ALADS’s argument that the anti-huddling policy deprived

deputies of their First Amendment right of association. The court cited the “well-recognized proposition” that an individual’s First Amendment right includes the right to hire and consult with an attorney. The anti-huddling policy, said the court, does not unconstitutionally infringe on that right.

Finally, applying the three-part test articulated by the Supreme Court in *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 180 CPER 21, the court addressed ALADS’s contention that the department failed to meet and confer over the policy.

The court concluded that the anti-huddling policy will not have a significant adverse effect on wages, hours, or the deputies’ working conditions. Although ALADS asserted that the department has permitted deputies to huddle for over 25 years, the court could find no provision in the parties’ MOU that defines working conditions to include consistent and established practices. For this reason alone, said the court, ALADS has failed to show it is likely to prevail on its meet and confer claim. And, the court added, a peace officer’s Bill of Rights Act privilege to be represented by counsel does not protect a right to huddle in a group with counsel.

Under the second part of the *Claremont* test, the court underscored that the department’s decision to implement its anti-huddling policy was to instill greater public trust in the investigative process. This is a fundamental

managerial decision that is outside the scope of bargaining under the MMBA, the court concluded. In balance, the deputies’ working condition claim is tenuous, whereas the department’s interest is significant. ALADS did not persuade the court that the prior practice that permitted huddling was a recognized working condition.

Finally, the Court of Appeal rejected ALADS’s argument that the

The policy would instill greater public trust in the investigative process.

department’s anti-huddling policy violates the *Weingarten* rule that permits an employee to have a union representative present at an investigatory interview. Noting that the department’s policy expressly permits a deputy to meet with an ALADS’s representative before being interviewed, the court rejected the claim that *Weingarten* supports the principle that a deputy has a communal right to huddle with other deputies and counsel. (*Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* [9-24-08; modified 10-6-08] B197611 [2d Dist.] 166 Cal.App.4th 1625.) *

Legislation Affirms Superior Court Jurisdiction Over Local Interest Arbitration Disputes

ON SEPTEMBER 30, Governor Schwarzenegger signed S.B. 1296, which assures that state superior courts have exclusive jurisdiction over bargaining disputes involving firefighters in local venues that are governed by interest arbitration laws. The bill, sponsored by the California Professional Firefighters, asserts that the Public Employment Relations Board's jurisdiction to rule on unfair practices that arise under the Meyers-Milias-Brown Act does not supersede voter-approved dispute resolution processes.

Proponents of the legislation argued that this bill would restore the status quo prior to 2001, when neither firefighters nor law enforcement employees fell under PERB's jurisdiction and both could rely on local provisions that permit binding interest arbitration. Since law enforcement personnel

were exempted from PERB's jurisdictional expansion and continue to rely on local arbitration ordinances to resolve bargaining impasses, firefighters saw a procedural disparity.

This bill clearly directs that, where arbitration has been enacted with the voters' approval, PERB will not have the authority to intervene and all bargaining impasses involving firefighters will be resolved under the local laws.

S.B. 1296 amends Government Code Sec. 3509, which delineates the power of the board in MMBA jurisdictions, to expressly state that the "superior courts shall have exclusive jurisdiction over actions involving interest arbitration...when the action involves an employee organization that represents firefighters..." (For a complete analysis of the bill, see *CPER* No. 191, pp. 26-28). *

Records of Police Review Commission Must Be Kept Confidential

THE CITY of Berkeley must maintain the confidentiality of records compiled by its police review commission charged with investigating citizen complaints against police officers. Relying on the California Supreme Court decision in *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 180 CPER 42, the First District Court of Appeal found in *Berkeley Police Assn.*

v. City of Berkeley that an evidentiary hearing must be closed to the public even if the commission itself has no power to discipline officers. And, the court held, officers who are subjected to an investigation by the commission are entitled to all rights and protections extended by the Public Safety Officers Procedural Bill of Rights Act.

The Berkeley Police Association challenged the commission's citizen complaint procedure, alleging that the investigative and hearing process violated Penal Code Sec. 832.7 by failing to maintain the confidentiality of police officer personnel records. Relying on *Copley*, the trial court agreed with the association, and the city appealed.

The City of Berkeley created its police review commission in 1973 to provide for a prompt and fair investigation of citizens' complaints against the police department. Under the commission's regulations, the investigative process is triggered by the filing of a written complaint. The commission reviews all relevant police reports and conducts taped interviews with the complainant and any witnesses. The accused officer must submit to an interview.

The investigator provides the commission and the accused officer with a written report, and a board of inquiry hearing then is convened before three of the nine commissioners. The board conducts an evidentiary hearing that is generally open to the public. After deliberation, the board announces its findings on each allegation and provides written findings to the complainant, the accused officer, the city manager, and the chief of police. The commission has no authority to impose or recommend discipline and, according to the record before the court, no officer has been disciplined based on the findings of the commission's board of inquiry. However, the

police chief and city manager are free to use the commission's findings to initiate disciplinary action.

The Berkeley Police Department has a second complaint process operated by an internal affairs bureau. The bureau conducts its own independent investigation of all citizen complaints directed to the commission, but the bureau's investigation is completely confidential and no public hearings are held. The bureau's complaint process culminates in a decision by the chief of police, who decides whether the charges should be sustained and, if so, what discipline to impose.

The court first reviewed the dictates of Penal Code Sec. 832.5, which requires each police department to enact a procedure to investigate citizens' complaints. Section 832.7 mandates that records pertaining to citizen complaints be kept for at least five years. It requires that personnel records and

records maintained under the department's citizen complaint process be kept confidential and not disclosed in any criminal or civil proceeding unless obtained under limited circumstances set out in the Evidence Code.

Several appellate courts wrestled with the reach of these discovery and

The confidentiality statutes apply to all aspects of disciplinary matters.

dissemination limitations before the Supreme Court's ruling in *Copley Press*. In that case, the issue confronting the court was whether the records of the San Diego County Civil Service Commission that referred to a police officer's administrative appeal of dis-

cipline must be disclosed to a news agency under the Public Records Act. First, the court clarified that the confidentiality requirements of Sec. 832.7 apply in the context of an administrative appeal, not only in criminal and civil proceedings. The court reasoned that, in the context of the county's administrative appeal process, the civil service commission functioned as the officer's employing agency. Therefore, any file maintained by the civil service commission regarding a disciplinary appeal is confidential.

In the *Berkeley* case, the court acknowledged that the police review commission, unlike San Diego's civil service commission, is not empowered to hear administrative appeals from disciplinary actions. But, as the court said in *Copley*, it is unlikely that the legislature intended to leave the extent of confidentiality available to

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

-- Vernon Sanders Law, baseball player

CPER's best-selling Pocket Guide 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.

**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>

a peace officer dependent on whether the local jurisdiction maintains all aspects of disciplinary matters and citizen complaints within the law enforcement department or assigns some of those responsibilities to an outside entity. Focusing on the considerations underlying the legislature's policy decision, the *Copley* court concluded that the statutes should not apply differently depending on whether a part of the disciplinary process is handled outside the agency.

In this case, the appellate court rejected the city's argument that the records of its police review commission are not confidential because the commission has no role in the disciplinary process. *Copley* makes it clear that the

confidentiality statutes apply to the handling of "all aspects of disciplinary matters and citizen complaints," without regard to the mechanism that a local jurisdiction sets up to handle these matters. Moreover, added the court, the statutory language does not demand that the officer whose records are sought be involved in a disciplinary proceeding in order for them to be confidential. It is sufficient that the officer be the subject of a citizen complaint.

Even if the statute requires some nexus to disciplinary action, the court continued, the commission's records still are confidential. They are transferred to the chief of police and city manager, who have authority over

police officer discipline. And, adverse findings of the commission can be used as a basis for taking disciplinary action against an officer.

The court found no basis for treating the board of inquiry hearings differently than the commission's records. As a practical matter, said the court, holding a public hearing on a citizen complaint against a police officer would publicly disclose the identity of the officer who is the subject of the complaint. And the public hearing would necessarily result in disclosure of information in the records contained in the commission's investigative files.

In a "friend of the court" brief, the ACLU argued that the confidential-

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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

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

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

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>

ity protections extended by the Penal Code only guard records that pertain to internal investigations conducted by police departments and, since the police review commission operates independently of the Berkeley police department, the commission's records are not confidential. The Court of Appeal, again looking to *Copley*, explained that the statutes are aimed at protecting the confidentiality of citizen complaints against police officers and the legislature did not intend to allow a local jurisdiction to circumvent that protection by the manner in which it assigns responsibility for the investigation of those complaints. The fact that the commission is independent of the police department and does not itself impose disciplinary actions does not exempt its records from the confidentiality statutes, said the court.

Also rejected was what the court called the ACLU's "spirited policy argument in support of the openness and transparency of Berkeley's system for civilian oversight of police." Dissemination of information about citizen complaints serves as a deterrent against police misconduct, the ACLU argued, and closing off the commission's process to the public will create suspicion and generate mistrust within the community.

The commission still will meet in public session to set department policies, countered the court. Even if a closed investigative process is less effective in providing civilian oversight, "that is a matter that must be

addressed to the Legislature," which weighed the competing interests and came down "on the side of protecting the confidentiality of records and information gathered in the course of investigating citizen complaints against police officers."

The court also upheld the lower court's conclusion that the procedures outlined in the Bill of Rights Act apply in commission proceedings. Focusing on the police chief's authority to order an officer to submit to the commission's interview and the language used in Sec. 3303 of the act, the court concluded:

When officers are made to appear for interrogation or a factfinding hearing by order of their employer and under penalty of disciplinary

sanction...for failing to comply, this is tantamount to being subjected to interrogation by the officer's "commanding officer, or another member of the employing public safety department."...The statute applies to investigations that "could lead to punitive action." Berkeley has admitted that the police chief or city manager can take disciplinary action against an officer based in whole or in part on [the commission's] findings. No more than that is required.

For this reason, the court found a mandatory duty on Berkeley's part to apply the Bill of Rights Act protections to the commission's proceedings. (*Berkeley Police Assn. v. City of Berkeley* [2008] 167 Cal.App.4th 385.) *

Future Pension Hikes in Orange County Must Win Voter Approval

ON NOVEMBER 4, voters in Orange County overwhelmingly gave their support to Measure J, a local ordinance that will require support from the electorate for all future increases to county employees' retirement benefits. The plan was proposed back in July by Supervisor John Moorlach, who has been a sharp critic of the pension increases that were awarded to county employees back in 2001 and 2004. As a result of those enhanced retirement benefits, the county is facing a \$3 billion unfunded liability. The measure was placed on the November ballot by a unanimous vote of the board of supervisors.

The ordinance — which won support from over 75 percent of the electorate — requires voter approval of any increases in retirement benefits for county workers and elected officials. The new law does not prevent the county from negotiating tentative agreements for pension increases with the employee organizations representing county employees. However, no tentative agreement that emerges from the collective bargaining process can become binding until it is approved by a majority of the voters.

The ordinance adds the following language to the county charter: "The Board of Supervisors shall have no

authority to enter into final or binding agreements with any bargaining unit regarding retirement system benefit increases until and unless those increases to retirement system benefits are approved by a majority of those qualified electors voting on the matter.”

The charter amendment also requires that, before any proposed benefit increase can be placed on the ballot, the county retirement system must prepare an actuarial study of the cost and the funded and unfunded liability that can be attributed to the benefit changes. The actuarial study must be available to the public, and a summary of the study must be published in the ballot pamphlet.

Exempted from the voter approval requirement are statutorily mandated cost-of-living adjustments, salary increases, and annual leave or compensatory time cash-outs.

From the outset, county labor leaders were critical of the board of supervisors for putting the measure on the ballot, charging that the elected officials were attempting to side step their responsibility to make the hard fiscal decisions. Union leaders also pointed out that there are no plans in the works — or likely, given the current economy — to increase employee pensions.

Passage of Measure J does not alter existing pension formulas. However, in February, the county filed a lawsuit in an attempt to partially invalidate the pension benefit increases that were

granted to the county deputy sheriffs effective in June 2002, arguing that the retroactive portion of the benefit formula violates the state constitution. The lawsuit has been moved to the Los Angeles County Superior Court, where it is pending.

Currently, only San Francisco and San Diego have laws in place that require voter approval of pension increases. The Orange County law takes effect January 1. *

Public Schools

School Bonds and Parcel Taxes Pass Overwhelmingly, With a Few Exceptions

CALIFORNIANS went to the polls in record numbers on November 4, and in spite of — or because of — the economic crisis, they voted for local school bonds, school facility improvement districts, and parcel tax measures by large margins. Seventy-seven of the 86 local general obligation bonds passed, raising \$21.8 billion for local school construction. Nine of 10 school improvement facility district measures passed as did 18 of 22 parcel tax measures.

These results are especially impressive in light of the fact that school bonds must be approved by 55 percent of voters and parcel taxes require a two-thirds vote to pass. Three of the four losing parcel tax measures received more than a majority of the vote, but failed to reach the two-thirds threshold.

In the winning column were 23 Los Angeles County school bonds, including the Los Angeles Unified School District's \$7-billion Measure Q, the largest ever for a California school district. It won support from 68.9 percent of voters. The Los Angeles Community College District will receive \$3.5 billion as a result of the passage of Measure K by a nearly 70 percent margin.

All seven bond measures passed in San Diego County, as did all three bond measures and all four parcel tax measures in Santa Clara County.

In the Bay Area, 22 school districts asked voters to consider 14 parcel taxes and eight school construction bonds. All but one passed. The exception was Oakland Unified School District's Measure N, which, if successful, would

Measure N faced widespread opposition from some unusual places.

have levied an annual \$120 parcel tax for 10 years, yielding more than \$12 million annually, of which 85 percent would have gone to teachers' salaries. The final tally was 61 percent in favor, less than the two-thirds majority needed to pass.

Measure N, entitled the "Outstanding Teachers for all Oakland Students Act," faced widespread opposition from some unusual places. Surprisingly, the teachers union and almost all of the seven-member school board opposed the measure. The

Oakland Education Association called the measure "Jack O'Connell's Stealth Parcel Tax" because, it maintained, Superintendent of Public Instruction O'Connell placed the measure on the ballot at the last minute with the help of state administrator and trustee Vince Matthews, without discussing it with the union or the school board. Matthews oversees the district's finances because the board lost fiscal authority in 2003 when Oakland schools went bankrupt. The union claimed that O'Connell and Matthews moved so fast that opponents did not even have enough time to write an opposing argument for the measure in the voters handbook.

The union had several reasons for its opposition. First, the remaining 15 percent of the funds raised through the parcel tax would have gone to the district's 33 charter schools, where employees are not unionized. The union believes charter schools drain money from the district with little oversight and accountability, and awarding them more money would erode the district's public school system even further, according to OEA President Betty Olsen-Jones. Second, while passage of Measure N would have resulted in a 7 percent raise for teachers, other school employees would not have received any of the funds. Third, the union believed this was a terrible time to ask voters for more money, given the current financial crisis and the fact that Oakland voters passed another parcel tax benefitting schools just eight months ago.

The *Oakland Tribune*, the city's main newspaper, reluctantly joined the union and the board in opposing the measure, citing the same reasons given by the union. "Our primary concern, which Measure N does not address, is how the money raised will be distributed to charter schools and who would oversee the process to make sure the money is used wisely," said an editorial urging voters to reject the measure. "Some charter schools have performed very well, while others clearly have not."

Noel Gallo, the only school board member to support Measure N, said Oakland teachers' salaries are the lowest in the Bay Area, and he argued

In Oakland, a teacher's starting salary is \$39,000, compared to \$52,000 in San Francisco.

that they need to be raised in order to attract and keep qualified teachers. An Oakland teacher's starting salary is \$39,000, compared to \$52,000 in San Francisco, and there is a huge rate of turnover every year. "This has a significant impact on the district's low-performing schools," he said. He worried that failure of the measure might mean that teachers will not even be able to keep their benefit packages intact going forward. *

Education Budget Unsettled — How Low Will It Go?

GOVERNOR Schwarzenegger gave some bad news to educators at a special closed-door meeting on October 28. As a result of the worsening economy, he estimated the current size of the gap between revenues and expenditures in the budget he signed in September to be between \$5 billion and \$8 billion, and maybe more. The governor indicated he would call for an immediate reduction in the education budget by anywhere from \$2 billion to \$4 billion at a special session of the legislature. He later refined his proposal, seeking a \$2.5 billion cut.

School spending is especially vulnerable because it represents 40 percent of the state's general fund budget and, as state revenues plummet, the level of funding required under Proposition 98 goes down, too.

Educators responded that mid-year cuts at this level would cripple schools. School districts approved their 2008-09 budgets at the end of June, before the state budget was finalized in September. "It would be nothing short of catastrophic because we are under way," said Scott Plotkin, executive director of the California School Boards Association. "Teachers are teaching, and bus drivers are driving, and there's no way schools can cut like that in the middle of the school year."

By law, teachers cannot be laid off unless they are notified months in

advance. School officials throughout the state issued approximately 20,000 preliminary layoff notices last March, anticipating millions of dollars in budget cuts. (See story in *CPER* No. 189, pp. 42-43.) But the notices were rescinded when the threatened reductions did not materialize.

Now, mid-year, "you can't just hand out pink slips," explained Los Angeles Unified School District Superintendent David L. Brewer. "Teachers have protections, they have union agreements."

Schwarzenegger is hoping to close at least some of the gap by raising the sales tax, although he warned that it probably would not be enough, and deep cuts to schools may be unavoidable. Republicans in the legislature plan to stand firm against any increase in the sales tax and suggest that money be shifted to education from other programs.

A report issued by the nonpartisan Legislative Analyst's Office in mid-November indicates that the budget deficit may be as much as \$28 billion over the next two years, unless drastic steps are taken. Legislative Analyst Mac Taylor says the state faces a "monumental problem" and that the numbers are "just truly awful." However, his report recommends that the mid-year cut in education be limited to \$1 billion because districts have locked



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

-- Pete Seeger, folksinger

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

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

Pocket Guide to K-12 Certificated Employee Classification and Dismissal

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

<http://cper.berkeley.edu>

in year-long decisions on staff and class size. It suggests eliminating school cost-of-living adjustments, suspending professional development fees, and raising community college fees.

Adding to the dismal picture for the state's schools, the California Lottery reported a \$260 million drop in revenue for the fiscal year ending June 30. This translates to \$106 million less income for schools during the current fiscal year.

The state's ongoing fiscal woes, and continuing uncertainty about how much schools will have to spend, are making it difficult for districts and unions to negotiate contracts. "The state budget crisis is severely impacting our ability to collectively bargain because districts are required to do a three-year projection on revenues before we can sign off on bargaining agreements," explained Pittsburg Superintendent Barbara Wilson.

The one bright spot in the picture is the passage in the recent election of a number of school bonds and parcel taxes that will go to fund education, as reported in this issue of *CPER* at pp. 42-43. However, districts recognize that these revenues, while welcome, are not going to fix the problem and will not be available in time to help with mid-year cuts. Despite passage of Los Angeles Unified School District's \$7-billion Measure Q — the largest ever for a California school district — LAUSD issued an order requiring an immediate hiring freeze, and a halt to using district credit cards and spending on most contracts. Only purchases for health, safety, legal requirements, school construction, and school lunches are allowed. The district also is considering shifting teachers around in the middle of the year based on attendance figures. Because 83 percent of

LAUSD's budget is spent on payroll, a mid-year cut of \$300,000, the amount anticipated if the governor's plan is adopted, would require massive layoffs. But any mid-year layoffs would have to come from bureaucratic and probationary positions because, under their contract, permanent teachers are entitled to 100-day notices before being laid off.

Most districts throughout the state are contemplating severe cost-cutting measures. For example, the West Contra Costa school board is planning to close as many as five schools next year and five more the following year, to help close the gap on a projected \$12.1 million deficit next year. The district anticipates it will save \$300,000 a year in utilities and maintenance costs for each elementary school that it shutsters, and \$800,000 for each middle and high school. It also hopes to sell the land on which the schools are located for additional income. *

Legislative Round-Up

THESE BILLS reached Governor Schwarzenegger's desk during the weeks leading up to the October 1, 2008, legislative deadline.

The governor signed the following bills into law:

A.B. 131, an urgency statute by Assembly Member Jim Beall, Jr. (D-San Jose), authorizes a local public school district to employ an individual to provide instruction to three- and four-year-old pupils who have been diagnosed as autistic.

A.B. 591, authored by Assembly Member Mervin Dymally (D-Los Angeles), requires that any person employed to teach adult or community college classes for not more than 67 percent of a weekly full-time assignment be classified as a temporary employee. This changes existing law, which classifies as temporary employees those who teach for not more than 60 percent of full-time.

A.B. 1871, by Assembly Member Joe Coto (D-San Jose), authorizes the Commission on Teacher Credentialing to issue an authorization rather than a certificate to specified credential holders to provide services to limited-English-proficient students.

A.B. 2302, an urgency statute introduced by Assembly Members Karen Bass (D-Los Angeles) and Mike Feuer (D-Los Angeles), authorizes local public school districts to assign a teacher who holds a level 1 education

specialist credential that authorizes him or her to instruct individuals with mild and moderate disabilities to teach pupils with autism.

A.B. 2390, authored by Assembly Member Betty Karnette (D-Long Beach), extends to members of the State Teachers' Retirement System who retired between June 1, 2007, and December 31, 2007, the right to purchase credit for service at an educational institution located outside

One bill lays the foundation for a statewide education data system.

the United States. It also extends the period for certain exemptions from post-retirement compensation to June 30, 2010.

S.B. 1104, authored by Senator Jack Scott (D-Altadena), repeals the Commission on Teacher Credentialing's authority to issue a two-year preliminary designated subjects teaching credential and to renew that credential. The bill revises the requirements and remakes it as a three-year "preliminary designated subjects career technical education teaching credential." The new law also provides for a five-year career teaching credential. It also

limits the current clear designated subjects teaching credential for vocational education or adult education to adult education only.

S.B. 1105, introduced by Senator Bob Margett (R-Arcadia), and coauthored by Assembly Member Todd Spitzer (R-Orange), and **S.B. 1110**, introduced by Senator Jack Scott (D-Altadena), allow the state to revoke the licenses of teachers who plead "no contest" to certain sex crimes and drug offenses or who have had their licenses revoked in another state. (For a complete explanation of both bills, see *CPER* No. 191, pp. 40-41.)

S.B. 1112, introduced by Senator Scott, extends from July 1, 2009, to July 1, 2014, the sunset date for provisions of current laws imposing class-size reduction penalties for districts that fail to assign no more than 20 pupils per certified teacher in grades K through 3.

S.B. 1186, coauthored by Senators Scott and Gloria Romero (D-East Los Angeles), requires a district that seeks a waiver of teachers' preparation or licensing requirements to first recruit a candidate who enrolls in an approved internship program in the region of the district, and then a candidate who is scheduled to complete preliminary credential requirements within six months. Existing law allows the Commission on Teacher Credentialing to issue a credential to a person who demonstrates proficiency in basic reading, writing, and mathematics skills in the English language by passing only the

state basic skills proficiency test. This bill permits an applicant for a credential to demonstrate proficiency also by passing the SAT Reasoning Test, the ACT English and math tests, or the California State University Early Assessment Program. It deletes from Ed. Code Sec. 44380 the legislative finding that there is a shortage of teachers of technology and instead provides that there is a shortage of special education teachers. It makes some changes in the state Certified Staff Mentoring Program.

S.B. 1298, introduced by Senator Joseph Simitian (D-Palo Alto), lays the foundation for a comprehensive statewide education data system in California. It requires the Commission on Teacher Credentialing, the State Board of Education, and the State Department of Education to provide the State Chief Information Officer with information regarding teacher distribution, educator credential status, pupil assessment, and accountability. This will include data that relates to standardized test results, the high school exit examination, the English Language Development Test, and the Academic Performance Index. The system also will receive adequate yearly progress data and calculations, graduation and drop out rates, and demographics of pupils and teachers. "Information and data drives where parents send their children to school, allows teachers to better understand and respond to the needs of their students and affects what policies elected officials pursue,"

said Governor Schwarzenegger in his signing statement.

S.B. 1303, by Senator George Runner (R-Lancaster), permits a school employee placed on compulsory leave after being charged with a sex or controlled substance offense to receive his or her full compensation for the period of leave if he or she is acquitted of the offense or if the charges are dropped without establishing guilt.

*In his veto message,
the governor said
current law already
provides protection to
review the contents in
a personnel file.*

If charges are dismissed after the employee's completion of a drug diversion program, the district must pay the employee any accrued leave and differential pay when he or she returns to service in the school district.

S.B. 1370, introduced by Senator Leland Yee (D-San Francisco/San Mateo), limits the right of students enrolled in a secondary educational institution, U.C., CSU, or a community college to sue for a violation of his or her constitutional right to freedom of speech and of the press, to students who are enrolled at the time the institution made or enforced the

impermissible rule. It also protects an employee of any such institution from dismissal, suspension, discipline, reassignment, transfer, or other retaliation for protecting a pupil engaged in protected conduct.

S.B. 1660, introduced by Senator Romero, permits school districts to pay additional bonuses to experienced and credentialed science and math teachers who volunteer to take assignments at poor-performing schools. (For a complete explanation of the bill, see *CPER* No. 190, p. 37.)

The governor vetoed **A.B. 2167**. Introduced by Assembly Member Kevin de Leon (D-Los Angeles), it would have prohibited the placement of a false or unsubstantiated document in the personnel records of a classified school district employee. It would have entitled the employee to challenge, and have removed, the document through the collective bargaining grievance procedure or the agency's grievance procedure. In his veto statement, the governor said, "Current law already provides adequate protection for school employees to review the contents and provide rebuttal to documents in their personnel file. Enacting this bill could result in hindering the reasonable process of school management personnel to fairly evaluate and discipline employees." *

Adult Education Teachers Not Entitled to Overtime Pay

ADULT EDUCATION teachers are not entitled to pay for time spent outside the classroom, the Second District Court of Appeal ruled in *Kettenring v. Los Angeles Unified School Dist.* The court concluded that adult education teachers fall within the professional exemption to an Industrial Welfare Commission wage order and that the salary structure under which the district's teachers were paid does not violate the California Education Code.

Factual Background

The collective bargaining agreement between LAUSD and United Teachers of Los Angeles covers the employment terms of both regular and adult education teachers assigned more than 10 hours a week. It provides that adult education teachers are compensated on a flat hourly rate for each unit-hour of classroom instruction. All teachers, including those in adult education, are required under the contract to be on site 10 minutes before and after their first and last class of the day. They also are required to perform related professional duties outside of classroom hours, such as planning and preparation for instruction, grading papers, and attending meetings.

Ernest Kettenring and Veta Patrick, both adult education teachers for the district, filed a lawsuit on behalf of themselves and all other adult educa-

tion teachers. They alleged that the district violated Labor Code Sec. 1197 and Wage Order 4-2001 by failing to pay adult education teachers at least the hourly minimum wage for hours worked outside of the classroom. Kettenring and Patrick made claims under the Labor Code for unpaid minimum wages and for failure to pay wages timely. The trial court ruled against Kettenring and Patrick. Kettenring appealed.

Court of Appeal Decision

Labor Code Sec. 515(a) authorizes the IWC to create an exemption from

The salary basis test determines whether employees are exempt.

overtime pay for "executive, administrative, and professional employees." Wage Order 4-2001, which provides that employers must pay employees not less than the minimum wage for all hours worked, includes a professional exemption. It applies to anyone "licensed or certified by the State of California and...primarily engaged in the practice of...teaching," who "customarily and regularly exercises discretion and independent judgment

in the performance of duties," and who "earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment," the court explained.

Kettenring admitted that adult education teachers meet all of the criteria for the exemption, with one exception. He argued that the compensation structure is not a true "salary" for purposes of the Wage Order's professional exemption. The Court of Appeal disagreed.

California follows the federal Fair Labor Standards Act "salary basis test" to determine whether employees who are classified by their employers as "salaried" are in fact exempt from the overtime provisions of the law, instructed the court. Federal regulations provide that an employee is considered paid on a salary basis if he or she regularly receives each pay period a predetermined amount that is not subject to reduction because of variations in the quality or quantity of the work performed.

The collective bargaining agreement establishes that adult education teachers receive a "predetermined amount constituting all or part of their compensation, which amount is not subject to reduction because of variations in the quantity of work performed." Based on this language, the court concluded that the district demonstrated that the adult education teachers are paid on a salary basis and qualify for application of the professional exemption permitted by Wage Order 4-2001.

The court also rejected Kettenring's contention that the district's pay structure violates Education Code Sec. 45025. That section provides that any district employee who works in a position requiring certification qualifications and who serves less than the minimum school day may specifically contract to serve as a part-time employee. The statute also states that compensation for these part-time employees shall bear "the same ratio to the amount provided full-time employees as the time actually served by such part-time employees bears to the time actually served by full-time employees of the same grade or assignment."

By its terms, Sec. 45025 does not apply to any person classified as

a temporary employee under Secs. 44919 and 44929.25. It is this last provision that makes Kettenring's claim untenable, said the court. Section 44929.25 states, in part, "any person who is employed to teach adults for not more than 60 percent of the hours per week considered a full-time assignment for permanent employees having comparable duties shall be classified as a temporary employee...." In this case, Kettenring described part-time adult education teachers as those who teach up to 18 hours a week. Because a full-time assignment is 30 hours a week, 18 hours a week is 60 percent of a full-time assignment. "The part-time adult education teachers are thus 'temporary employees' under section 44929.25, and are not subject to the

proportionality requirement of section 45025," concluded the court.

Undaunted, Kettenring argued that, in order to be considered exempt from the proportionality requirement of Sec. 45025, part-time adult education teachers also must be classified as temporary employees under Sec. 44919. Not so, said the court. In *Peralta Federation of Teachers v. Peralta Community College Dist.* (1979) 24 Cal.3d 369, 42 CPER 60, the California Supreme Court held that the word "and" in Sec. 45025 did not require that both Secs. 44929.25 and 44919 apply before a teacher is considered a temporary employee. (*Kettenring v. Los Angeles Unified School Dist.* [2008] 167 Cal.App.4th 507.) *

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

-- Robert Frost.poet

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.

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

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>

Teachers Claim Free Speech Rights Violated

ON OCTOBER 21, the Mt. Diablo Education Association filed an unfair practice charge with the Public Employment Relations Board alleging that the Mt. Diablo Unified School District violated teachers' right to free speech by directing principals and other managers not to allow employees to display political materials on school property. The memo was issued in September, prior to the November 4 election.

Linda Ortega, a fourth-grade teacher at El Monte Elementary

The union argues the directive transforms all school property into permanent 'no free speech zones.'

School in Concord, was told by her principal to remove a school board campaign button while she was off-duty attending a weekend campus festival. Lory Quam, who teaches social studies at Pine Hollow Middle School in Concord, was told by his principal to either remove signs supporting two school board candidates from his car located in the school parking lot or move his vehicle to the street.

Mark York, executive director of MDEA, told *CPER* that the district's directive, in essence, transforms all school property into permanent "no free speech zones" for teachers, even when they are not engaged in teaching. It oversteps the district's authority and violates the employees' constitutional rights, according to the union and the California Teachers Association. "We believe teachers and all public employees have the right to communicate their views with each other and to the public at large as long as they're not doing it during classroom time," said CTA attorney Priscilla Winslow.

The district has taken the position that signs and buttons displayed by teachers could influence impressionable students, in violation of the state's Education Code.

PERB General Counsel Tami Borgert told *CPER* that the charge is under investigation by the regional attorney in the board's Oakland office. *

Higher Education

California's Financial Woes Force Salary Negotiations at CSU

THE CALIFORNIA State University Employees Union, California Faculty Association, and Union of American Physicians and Dentists have been called back to the bargaining table. Each recently had negotiated a contract with the California State University that included wage increases. But those raises are unlikely to materialize any time soon.

The California Faculty Association was not surprised to learn that the raises it expected in this and the next two years may not be forthcoming. CSU informed the union that it intended to reopen negotiations over salary increases that had been promised in the most recent contract. In a statement, CFA President Lillian Taiz said it was not unexpected. In light of the economic hardships that face the state, CFA knew it was only a matter of time before CSU brought the union back to the bargaining table and had been preparing for this possibility for months.

The agreement between CFA and the university, reached in May 2007, and running until June 2010, included salary increases effective in July 2008, August 2009, and September 2010. This year's raise was upheld due to the delay in passing the state's budget.

Soon after the budget's adoption, CFA inquired as to the funds' release. The CSU Chancellor's Office responded with official notice of its intent to reopen bargaining on pay raises.

In a statement, the union explained why it was not surprised by the announcement. "The administration

*The union recognized
it was unlikely that
funding would reach
adequate levels to save
negotiated raises.*

has the right to call for new bargaining in years in which CSU funding falls below a minimum level." The contract gives CSU the power to determine whether salary increases are reasonable given the level of funding. Should the university determine that funds are inadequate, it has the right to initiate a meet and confer process with the union.

The parties are also bound by state law. HEERA Sec. 3572(b) explains that when an agreement requires legislative approval for funding and

the legislature or governor fail to fully fund the agreement, those provisions that are affected by the lack of funds must be referred back for additional bargaining.

In the past, the legislature's failure to provide adequate funding has been supplemented by the Higher Education Compact. Governor Schwarzenegger, CSU Chancellor Reed, and then University of California President Dynes agreed to the compact in 2004. It was intended to provide a 4 percent increase to the universities' prior year's base budget for basic needs including salary increases, health benefits, maintenance, and inflation. The compact was originally scheduled to take effect during the 2005-06 school year and continue through 2010-11. This year, the governor refused to fund the compact.

Eventually the governor approved millions of dollars for higher education to fill the void left by a gutted budget and the reneged compact. Unfortunately, this still left CSU with \$215 million dollars less than it would have received under the compact.

As California's budget crises persisted throughout the year, CSUEU recognized it was unlikely that funding would reach adequate levels to save their negotiated raises. The union approached CSU with an offer to begin negotiating over the contract provisions in anticipation of the obligation to do so once the budget was passed. The parties held two bargaining sessions with no results. Then, in October, CSUEU received the same letter

that was sent to CFA. As *CPER* went to press, negotiations had not yet been scheduled.

UAPD, also expecting raises this year, will join CSU at the bargaining

table to determine what if any salary increases they will receive. The union's contract is set to expire in June 2009. Negotiations on the new contract may begin as early as January. *

university and its employees to, once again, contribute to the plan.

Talk of reinstituting employee contributions to the UCRP is nothing new. In 2006, the regents authorized a series of actions aimed at ensuring the UCRP would remain at least 100 percent funded. Among those actions was the resumption of contributions to the plan beginning July 1, 2007. Fortunately, the market smiled on the UCRP and, by the end of June, the plan was 115 percent funded. There were those who suggested that the future of the plan depended on the restoration of contributions while the plan was operating with a strong surplus. The regents decided to postpone contributions but recognized the

U.C. and Employees to Resume Contributions to UCRP

THE UNIVERSITY of California calls it a "holiday" for workers. U.C. employees call it a windfall for the university. Either way, for 18 years, neither employer nor employees have made contributions to the University of California Retirement Plan. During the past two decades, the UCRP was

well over 100 percent funded. Now, in the midst of an economic crisis that continues to affect every sector, including education, the U.C. retirement plan is on the brink of dipping below its 100 percent funded benchmark. The U.C. regents have reacted by approving a policy that requires the

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

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

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

Pocket Guide to the Higher Education Employer-Employee Relations Act

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

reality that contributions would be required in the near future.

New Funding Policy

At the regents meeting in September, the committee on finance recommended that the board adopt a new funding policy for the UCRP. The foundation for the policy is a three-year amortization period for any initial surplus. The policy thus far has been to allocate the entire surplus amount to the current year and roll over the surplus to the next, effectively serving as a one-year amortization. While the current year would be funded, it was uncertain whether future years would be as well.

The new policy presupposes that there will not be a surplus in the future, and so funds will be allocated to future years in anticipation of a deficit. Any initial surplus at the time of the next actuarial valuation, scheduled for release on July 1, will be divided and distributed to each of the next three years.

The new policy calls for contributions to the plan by the university and plan members. Each year, the regents will determine what the contributions should be and how they should be split between members and the university. The policy declares that in no event would the university's contributions be lower than member contributions. The recommended contribution levels will account for the normal cost of funding the plan plus an amortization charge for any unfunded accrued liability —

or minus an amortization credit for any surplus.

Any surplus that develops after the initiation of the policy will be amortized as a level dollar amount over 15 years. The committee called the "level dollar amortization" a more prudent and conservative approach than the one previously used, "level percentage of payroll," which assumed a constant employee count. Typically, a level percentage of payroll approach yields smaller payouts in the early years of amortization than does the level dollar approach.

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U.C.'s Message to Employees

Nearly 80 percent of all U.C. employees never have had to contribute to the retirement plan. The university continues to drive home the point that its employees have been in a unique position in the past 18 years — they were not required to contribute to their own retirement plan. A letter from the university to employees points out that the closest comparison to the U.C. retirement plan, CalPERS, mandates that employees share the cost of funding.

In a letter dated November 10, 2008, U.C. President Mark Yudof reiterated to university employees the retirement plan's dire situation. He noted that as of October 31, "the UCRP investment portfolio has experienced an estimated decline of approximately 24 percent for the current fiscal year, and an overall decline of 28.3 percent since June 30, 2007." The UCRP's funding level has been on a steady decline, from 105 percent funded in June 2007, to 103 percent funded in June 2008, to 100 percent funded as of October 8, 2008. Yudof assured employees that the university and the retirement plan would weather the storm. But he added, "The immediate situation only underscores, however, that for the long-term financial health of UCRP, contributions must resume in 2009, both from employees and the University."

Employee Response

University employees understand the importance of a well-funded retirement plan but have expressed concern about the university's demand that employees pick up the slack. For example, UPTE opposes employee contributions at this time. The union explains that, while the retirement plan was well funded, the university discontinued its contributions and began diverting funds it received from the state and other sources to other expenses. UPTE contends that the university should have planned for the future and saved the funds for a scenario like the one it now confronts.

Underscoring a major point of contention for U.C. unions, UPTE argues that the university has misplaced its priorities. The union alluded to executive compensation, an albatross around the university's neck for the past several years, and the high salary paid to recently hired President Yudof.

Also of concern is the lack of employee representation on the retirement plan's governing board. The regents have been reluctant to create such a position. Because of U.C.'s unique constitutional status, simple legislation is insufficient to require the university to create one. Rather, a constitutional amendment is needed. ACA 5 is a bill that proposes an amendment to the California Constitution that would create an employee position on the retirement plan's governing board. A bill that proposes a constitutional amendment requires a two-thirds vote of approval by the state's Assembly and Senate before it can be presented to voters. (For more on ACA 5, see story in *CPER* No. 191, pp. 46-48.) Currently, ACA 5 is in the Assembly awaiting its third reading on the floor.

Next Steps

It is expected that employee contributions will begin as diversions from contributions currently being made to the U.C. defined contribution plan. Employees contribute a mandatory 2 to 7.5 percent of their pretax monthly earnings — depending on their UCRP membership classification — to the DCP, and an additional optional

amount in post-tax dollars. The DCP is an individual retirement account aimed to supplement the UCRP.

Exactly where the regents will set the actual contribution amounts for 2009 had not been revealed as *CPER* went to press. *

Five-Year Contract for U.C. and Patient Care Technicians

ONE-HALF of a negotiating battle that has lasted over a year has come to a close. The American Federation of State, County and Municipal Employees, Local 3299, and the University of California have reached agreement on a new contract covering patient care technicians at university hospitals and health centers.

AFSCME Local 3299 represents 20,000 workers at U.C. hospitals, health centers, and campuses in the patient care technical and service workers bargaining units. Negotiations between the patient care unit and the university began in August 2007. The service workers joined the talks two months later. When both units' negotiations reached impasse in March 2008, separate factfinders were assigned to each. (For more on the early stages of negotiations, see story in *CPER* No. 188, pp. 54-56.)

With no agreement in sight, employees in both units voted to strike. While the patient care unit eventually agreed to cancel the action, the service unit engaged in a five-day strike in defiance of a court order. (For more on the court order and strike, see story in *CPER* No. 191, CPER 42-46.)

On October 20, AFSCME and U.C. issued separate statements announcing that a tentative agreement had been reached for the patient care unit. In November, union members voted overwhelmingly to ratify the agreement. AFSCME continues to bargain with the university on behalf of the service workers. Topping the list of changes from the previous contract, the new patient care agreement has a five year duration — the prior lasted three years. Other “hot button” issues include market wages, a new step program, benefits, and overtime.

Market Wage Increase

AFSCME held a hard line on efforts to bring its members' salaries up to the market rate. The union had long argued that U.C.'s patient care technicians earned far less than their counterparts at other facilities. In March, the union presented the factfinder with two different surveys, each showing lags in the market rate. One study found discrepancies ranging from 11 percent for a pharmacy technician II at UCSF to 58 percent for a hospital assistant I at U.C. Davis. The other survey revealed gaps ranging from

17 percent for senior nursing aides at UCSD to 50 percent for medical office service coordinator II's at U.C. Davis and hospital assistant II's at UCLA. Further, at U.C. Irvine, a survey found that 27 of the 38 patient care technician titles lagged behind the market rate for similar titles at other medical facilities, and 10 of those 27 were deficient by more than 10 percent.

The university insisted that its own study, which included a larger number of medical facilities and employers, more accurately reflected how U.C. patient care technician salaries compare with the rest of the market. It found that there were lags at various locations throughout the U.C. hospital system that ranged from 3.5 to 15 percent.

*For the first time,
patient care techni-
cians will have a
minimum wage*

The two sides could scarcely agree on one of the more basic issues in the negotiations over market lags: the definition of the "market." While AFSCME found that a senior vocational nurse at UCLA earned 18 percent below market wages, the university found the lag was only 2.3 percent. Even more impressive, AFSCME determined that a medical assistant I at U.C. Davis earned 38 percent less than its counterpart at another facility.

U.C. contended that same employee is paid 8 percent *more* than the market average.

Perhaps encouraged by the recent agreement reached by SEIU United Healthcare Workers West and Catholic Healthcare West, the university and AFSCME found numbers on which they could agree. The new contract provides a minimum of 18 to 20 percent wage increases over the life of the contract — 4 percent retroactive to October 15, 2007; 5 percent in October 2008; 3 percent in October 2009; and 3 percent plus an additional 1 percent for a payroll pool to be established by the university, after consultation with the union, in October 2010, and 2011.

Minimum Wage Increase

The agreement represents the first time patient care technicians at U.C. will have a minimum wage. AFSCME proposed a systemwide figure of \$15 — \$16 for licensed titles. The amount was based on a study by the California Budget Project that calculated the wage rates necessary for a modest standard of living for a single parent with two children. According to the factfinder, the study showed that to live without any public assistance or charity, an hourly income of \$23.03 in Sacramento to \$27.53 in San Francisco is necessary. AFSCME maintained that more than 9,000 of its patient care technicians earned less and that 2,400 workers earned less than AFSCME's proposed \$15 minimum wage.

The university argued that even the living wage ordinance in San Francisco tops out at \$11.03 for employers that provide health benefits. Additionally, the factfinder pointed out that none of U.C.'s competitors offered minimum wages of \$15. While she suggested that the implementation of the minimum wage was something to which U.C. could agree — noting that U.C. never contended that it was unable to pay higher wages — she left the issue to the university's discretion.

In June, the university had offered to include a minimum wage in the new contract. The recently reached agreement includes a plan to bring hourly wages to a \$15 minimum for those employed as of the date of contract

*The step system
includes a 2 percent
automatic increase
each year.*

ratification, and \$14.50 for all titles, by the end of the five-year contract. According to the university, the wage increases total \$127 million over five years, including \$18 million in the first year alone.

Step Program

In addition to wage increases, AFSCME advocated for the installment of a step process to replace the range system that existed under former contracts. Previously, only the

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

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

Pocket Guide to Workplace Rights of Public Employees

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

UCSF campus used steps. However, even there, progression from one step to the next was not required. As the factfinder pointed out, systemwide, the only language that governed where on the range an employee should be placed was recently added to provide a remedy for workers who discovered that a newly hired employee in the same classification was being paid at least 5 percent more. The union noted that without an automatic step system, employees have been hired at the bottom of their range only to remain there throughout their career while new employees, with no experience, have been hired and paid 4.9 percent more.

AFSCME proposed a system in which steps would be 2.5 percent

apart and based on years of service. An employee would move one step for every two years of completed service in the same job classification outside of U.C., up to the midpoint of the step range for his or her classification. An employee who has worked in the same job classification since his or her original hire date at U.C. would move one step per completed year of service in the classification. In the second and third years of the contract, employees would move to the next step on the wage scale on the anniversary date of hire within the classification.

AFSCME proposed that new employees begin at the "Start Step" of the range. But, if an employee has experience in the classification, he or

she should be credited with one step for two years of completed service in the same classification.

The university proposed that the open-range system be maintained for the 2007-08 year, but with range increases. U.C. suggested waiting until the second year of the contract to implement a step process that would consist of 2-percent steps with a range of approximately 2-4 percent. Employees would be placed in the step closest to their current rate of pay, or one step higher if there were no matching pay rate.

U.C. also proposed to limit steps to those employees who earned a satisfactory rating or better on their most recent performance evaluation.

The university pointed to the performance-based step system for UPTE members. AFSCME contended that any unsatisfactory performance should be handled through the disciplinary system. The union also suggested that the university might be tempted to manipulate evaluations in an effort to control wages and the budget.

The factfinder observed that in 2005, the parties engaged in a joint study to determine the feasibility of transitioning to a step system. Findings uncovered that among 38 of the competitors to which U.C. loses employees, 94 percent had step systems in place, and 88 percent of those provide for movement based on time in step.

The new contract provides a step system that includes a 2 percent automatic step increase each year on July 1, beginning in 2009, through 2012, until each employee reaches the maximum rate. Current employees will be placed in a step up to 10 percent higher within 120 days of contract ratification, with experience and seniority recognized retroactively to September 1, 2008.

Benefits

The issue of healthcare has had a dual impact on the way parties approach the bargaining table. Rising costs have made it nearly impossible for employees to pay for medical needs. Meanwhile, rising premiums have made it increasingly difficult for employers to offer comprehensive health benefit packages.

The university proposed no substantial change to the previous con-

tract, which required U.C. to treat the patient care technicians the same as other similarly situated employees and waived the union's right to bargain over changes to health benefits. The university noted, however, that it could be willing to reopen the agreement solely to bargain over health benefits for 2009 and 2010. A recent university contract with the California Nurses Association yielded a reopener provision for negotiating health benefits for those years.

The agreement strikes a balance between the two healthcare proposals.

AFSCME contended that U.C. should offer a comprehensive health plan for which the university would pay all premiums. Further, the union proposed the benefits of the existing plans be maintained, and that employee contributions to the plans not increase throughout the life of the contract.

The agreement strikes a balance between the two proposals. In a first for patient care technicians, the contract will include provisions for collective bargaining on employee health benefits — as well as pension benefits. The university must negotiate with the union should it seek to increase employee premium costs more than

12 percent over a two-year period or propose to discontinue any of the most popular plans.

Likewise, U.C. will be required to reopen negotiations over pension benefits should it determine that increased employee contributions to the U.C. retirement plan or a decrease in retirement benefits is necessary.

The union has told its members that, should the reopener negotiations fail to result in an agreement, the Higher Education Employer-Employee Relations Act permits the right to conduct a strike. However, the union may run up against the same barrier that prevented its patient care technicians from striking earlier this year. The university had insisted the strike be barred because it would have endangered public health and safety.

Overtime Pay

An anomaly of California constitutional law provides U.C. with the ability to deny an employee the traditional one-and-one-half times straight pay for time worked beyond eight hours in a day. While California law requires overtime to include such calculations, the federal overtime laws only require overtime pay after 40 hours in a week. The university has long contended that it is not subject to the California overtime provisions. Additionally, the university has enjoyed the ability to demand that employees work more than eight hours in a day, while not compensating them at the traditionally recognized California overtime rate.

The previous contract permitted the university to determine when overtime is needed and which employees will be assigned. Further, overtime was paid only at the traditional one-and-one-half times the straight time rate — or, in the alternative, in the form of compensatory time — at the option of the university and if certain conditions were met.

The contract will, for the first time, recognize an employee's time worked in addition to their daily shift — which can be 8 or 10 hours, depending on the position. While not effective until October 1, 2010, the new contract will provide one-and-one-half times the straight rate of pay to patient care technicians who work over their regular 8 or 10 hour shift and double pay for any time worked over 12 hours. Additionally, employees who work more than 80 hours in a two-week period will receive overtime pay.

With respect to the university's policy of insisting on overtime work, the agreement restricts U.C. to using seniority to determine which employees will be forced to work overtime as well as the order in which volunteer overtime is assigned.

Other Key Provisions

The contract also guarantees the union 15 minutes to speak at employee orientations held during lunch or rest breaks. The union had proposed 30 minutes.

Educational leave, which was limited to 24 hours in a contract year,

is increased. Retroactive to October of this year, employees are permitted to take 32 hours of such leave. Starting

in October 2009, employees will be allowed 40 hours of educational leave during a contract year. *

New Contract Gives U.C. Police Salary-Range Increase

IN WHAT the University of California described as an expeditious bargaining session, the Federated University Police Officers Association and U.C. have come to terms on a three-year contract. In anticipation of their contract's expiration in June, negotiations for a successor agreement got underway in April. Union members ratified the agreement in October.

FUPOA, which represents 200 police officers across the U.C. system, has a history of speedy negotiations with the university. Over the years, university press releases announcing new contract agreements praise the union for its professionalism and attribute the swiftness of the negotiations to the collaborative effort of both parties.

The new agreement includes general salary increases ranging from 2 to 8 percent, retroactive to October 1. The amount of the increase will depend on the campus and the local market conditions. At U.C. Irvine, officers will receive an 8 percent salary range increase. U.C. Davis's amended salary range begins at \$57,060 and tops out at \$68,928. U.C. Santa Cruz's new salary range is \$64,878 to \$78,369.

The contract also includes 4 percent longevity pay for officers with 10 or more years of active service at the university and at least one year at the top step, along with a satisfactory or better performance evaluation.

Police officers at U.C. will continue to receive the same health benefits as unrepresented employees. The agreement provides for reopen negotiations on wages and several other items each year of the contract. *

State Employment

Governor Proposes to Legislate Compensation Takeaways

LUCKILY FOR THE governor, but not state employees, all but one collective bargaining agreement has expired. Facing a ballooning budget deficit, the governor proposed in early November to legislate the elimination of two holidays, implementation of monthly furloughs, and reduction of other compensation for state workers. Highway patrol officers, who are covered by a memorandum of understanding in effect until July 2010, are not likely to be affected by any bills that come out of the special legislative session. Unions are insisting the administration must negotiate any changes under the Dills Act, but also are urging members to flood legislators' offices with calls and emails protesting the takeaways.

Revenue Crisis

Most of the MOUs covering state employees expired June 30, although attorneys and correctional officers have been working without a contract much longer. Bargaining had been sporadic and centered on non-economic items during the budget impasse that ended in late September. Even after the budget was enacted, the Department of Personnel Administration told bargaining representatives that it needed time to analyze the budget before it

could negotiate economic proposals.

Just as DPA returned to the negotiating table at the beginning of November, the governor called a special session of the legislature to deal with a budget deficit of more than \$11 billion for the current fiscal year. Observing that state spending had remained "relatively flat" for the past three years, he asserted that a dramatic drop in expected revenues required new taxes to protect education and vital services. He proposed \$4.7 billion in new revenues from a temporary sales tax increase, imposition of taxes on some services, an oil severance tax, and higher alcohol and excise taxes.

But the proposed new revenue sources alone will not close the budget gap. The governor also proposed \$4.5 billion in cuts, including state employee compensation changes that would save \$320 million in 2008-09.

'Legislative End-Run'

In a November 6 letter to state workers, the governor explained that he wanted to eliminate the Columbus Day holiday and celebrate Lincoln's birthday on Presidents' Day. Washington's birthday is already celebrated on Presidents' Day. The governor also proposed granting holiday credit,

rather than overtime pay, to employees who work on holidays.

Employees would be furloughed one day each month through June 2010, under the proposal. The furlough plan would reduce salaries about 5 percent but not affect retirement and other benefits. In addition, the governor is interested in allowing departments to choose to operate four days a week, with employees working four 10-hour days.

*Bargaining had
been sporadic
and centered on
non-economic items.*

The governor renewed his demand that sick and vacation leave not be counted when determining whether overtime pay is due. While some unions already have agreed that only actual hours worked will be counted toward the threshold for overtime pay, others have refused to give up the benefit in bargaining.

If enacted, the governor's proposals would save approximately \$1.4 billion over two years. However, legislators must agree before any of the changes can be made. DPA spokesperson Lynelle Jolley told CPER that the department is engaging unions in discussions about the proposals. For example, the administration might close down state government offices

one day a month, but a different kind of furlough would be acceptable as long as it saves the same amount of money.

Unions did receive the same proposals at the bargaining table in November. But their agreement is not necessary, according to Jolley, since legislation would override Government Code Sec. 3517.8, the section of the Dills Act that continues to give effect to an expired MOU during negotiations for a successor contract. If the contracts had been in effect, DPA would have tried to renegotiate them for the same cost savings, she asserted, but the state will not attempt to renegotiate the unexpired contract with the California Association of Highway Patrolmen.

DPA recognizes there will be some obstacles to implementing the

furlough proposal. Employees who are exempt from overtime under the Fair Labor Standards Act lose their exempt status if furloughed only one day in a week. If they work more than 40 hours that week, they are then due overtime pay. Exempt employees may be furloughed a week at a time. But some unions, such as the California Attorneys, Administrative Law Judges and Hearing Officers in State Employment, doubt that a week-long furlough is workable for some employees. "It is difficult to imagine how the State can effectively conduct its legal business without having its attorneys present and able to attend court dates whenever they occur," the CASE board of directors wrote on its website.

Twenty-four-hour operations cannot close down, but some patient-

to-staff and inmate-to-staff ratios would increase, employee representatives point out. Any cost savings from furloughs will be offset by increases in overtime in 24-hour operations, they assert.

The unions insist that proposals on employee compensation belong at the bargaining table. The American Federation of State, County and Municipal Employees, Local 2620, may file an unfair practice charge claiming that the governor is violating the Dills Act. The California Association of Professional Scientists is suggesting that members remind the legislature how the governor vetoed their salary survey bill last year. The governor wrote in his veto message, "If the State of California is to have good faith collective bargaining, then employee

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

-- Dorothy Parker, writer

This second edition includes recent developments relating to legislative approval of collective bargaining agreements; a discussion of recent Supreme Court cases that recognize civil service law limits; and a section on PERB procedures, including recent 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>

wages, hours and terms and conditions must not be legislated.” The governor used the same argument when the California Correctional Peace Officers Association attempted to obtain a raise from the legislature in 2007.

Unions also point out that employees will take a double hit — reduced salaries *and* higher taxes. In addition, many state workers have crushing workloads caused by successive years of budget cuts. The Service Employees International Union, Local 1000, points out that 13,000 positions remain vacant, not counting the 10,000

non-permanent employees who were laid off in August. Implementation of the furlough proposal “would be equivalent to cutting another 11,000 state positions,” the union asserts.

Meanwhile, since the governor cannot force his proposals on employees in branches of state government other than the executive branch, the legislature and judiciary, as well as the state’s universities, will not be affected by the governor’s proposals. Legislators will feel no pain, as a non-legislative board just granted lawmakers an increase in their per diem pay. *

officer’s findings were positive, the person found to have retaliated could ask for a hearing. If the executive officer decided there was no retaliation, an employee could ask for a hearing. However, since they had no right to a hearing, many whistleblowers took their cases to court.

Few complaints have been stalled at the board as long as those of DSS employees Ruby Cornejo and Michelle Dille. However, not many have been resolved satisfactorily. In 2003, according to the board’s annual report to the legislature, 52 complaints were filed, although 3 were withdrawn and 14 were not accepted because they were defective. Of the remaining 35, 22 were denied within the year and only 1 was settled. None was granted by the board. Twelve remained pending at the end of the year.

Does the Whistleblower Protection Act Live Up to Its Name?

TWO DEPARTMENT of Social Services employees claim to have suffered retaliation after they reported what they believed were inadequate criminal background checks on foster parents and home care licensees in 2003. Their cases are still pending before the State Personnel Board. A review of SPB reports shows that the agency grants very few whistleblower complaints. And there is limited recourse in court if a state employee receives a notice of adverse findings. An appellate court disapproved SPB regulations that purported to allow employees who received adverse findings to go to court, and legislation by Senator Leland Yee that would have given whistleblowers

greater access to the courts was unsuccessful.

SPB’s Record

Employees who believe that they have suffered retaliation because they reported governmental wrongdoing may file a complaint with the SPB. After an investigation, the executive officer of the board is required to issue a notice of findings within 60 days. Prior to 2006, the notice of findings was based almost entirely on a review of written materials. No hearing occurred unless the executive officer found questions of fact that could not be determined without an evidentiary hearing. If the executive

In a rare event, one complaint was granted during the notice of findings process.

Because the annual reports do not explain what happens to cases that have not yet been resolved by June of the following year, CPER contacted SPB’s acting chief counsel, Bruce Monfross, for more information. In 2004, 23 of 46 complaints were accepted. Fourteen were dismissed. In a rare event, one complaint was granted during

the notice of findings process, and one was granted after a hearing. Five complaints were withdrawn, and one was settled.

In 2005, 47 of 61 complaints were accepted; 3 were withdrawn. The executive officer dismissed 32 complaints. Eight settled, and 4 went to hearing, including the cases of Cornejo and Dille, which entailed over 100 days of hearing but have not yet been decided. Of the other two, one complaint was granted and one dismissed.

In 2006, the board amended its regulations to allow the executive officer to send some complaints to either a full evidentiary hearing or an informal hearing, in which the administrative law judge would question witnesses and not rely solely on written presentations. The board also clarified its regulations to provide that a whistleblower who had received a notice of findings, including adverse findings, had “exhausted his administrative remedies” and could proceed to court.

Despite the greater opportunity to present evidence, in 2006, no complaints were granted, although 11 were settled. Twelve are still in the hearing process. In 2007, 34 complaints were accepted. Only one has been settled, 6 dismissed, and 18 are still pending. None has been granted.

Court’s Ruling

Employees whose cases were denied have attempted to sue their departments for whistleblower retaliation. A section of the Government

Code that prohibits an employee from filing in court unless the employee first filed an SPB complaint and the board “has issued or failed to issue findings” appears to say an employee can proceed to court once the board has acted. But an appellate court held in 2007 that adverse findings must be overturned by petition to the court before an employee can file a lawsuit for damages. (See story about *State Board of Chiropractic Examiners v. Superior Court [Arbuckle]* in CPER No. 183, pp. 67-70.) In that case, the court criticized the new regulations which purported to allow an employee to file a lawsuit after receiving a notice of adverse findings. The doctrine of exhaustion of administrative remedies cannot be altered by the SPB, the court scoffed. The decision is being reviewed by the California Supreme Court. Oral argument was heard December 2, and a decision is expected within a few months.

Appellate courts that have addressed the issue advise that an employee who receives a notice of adverse findings should ask for a hearing before the SPB in an attempt to overturn the findings there. If no hearing is granted, the SPB decision becomes final and the employee must file a petition for writ of administrative mandate from the court to overturn that decision. Monfross told CPER that employees whose complaints are denied now are asking for court hearings, but he was unaware of any requests that have been granted. As a result, employees

who wish to sue for damages first must overturn the SPB decision through an expensive court proceeding in which the standard for reversing the board is very difficult to meet.

Legislature’s Attempt

In one appellate decision earlier this year, the court suggested that the legislature amend the California Whistleblower Protection Act if it intended employees to be able to sue without overturning SPB findings. Senator Leland Yee (D-San Francisco) responded with S.B. 1267. That bill as initially drafted would have made it clear that an employee had a right to proceed to court after filing a complaint and receiving a response from the SPB. However, as the budget crisis developed, the chance of the bill passing diminished. Instead, Yee carried S.B. 1505, which would have required evidentiary hearings of no longer than 10 days for whistleblower retaliation complaints and allowed the board to award attorneys’ fees to successful whistleblowers, among other changes. But the governor vetoed the bill. (See the following story.)

Monfross pronounced the governor’s veto “a shame.” “It would have brought needed coherence to the procedure,” he continued. Monfross does not consider the SPB’s statistical rate of granting complaints a problem, however. Looking only at the cases granted is misleading, he insists, since many are successfully settled. He asserted that the federal agency for

whistleblowers has a similarly low rate of positive findings.

As a result of the veto, whistleblowers who suspect retaliation still have an uphill battle. As the Government Accountability Project asserted in a letter to Senator Yee in March, "While California always has had one

of the nation's more modern state whistleblower statutes, critical flaws have blocked it from achieving its promise of justice for employees who 'commit the truth' in challenges to abuses of power that betray the public trust." *

requirements for service of documents are now listed in Government Code Sec. 18575. The new law also requires that a person filing an appeal or complaint with the SPB formally serve the papers on the Appeals Division of the board using one of the accepted forms of service. Several sections of the Government Code that allowed disciplinary appeals to be taken to arbitration were repealed since the California Supreme Court found those provisions unconstitutional in 2005.

SPB Wins Two, Loses One

THE STATE PERSONNEL Board recommended three pieces of legislation that went to the governor. One fell victim to the "budget delay" veto.

Aging Workforce Measure

The state's need for high-level civil service employees is addressed in S.B. 1472 (Ashburn, R-Bakersfield). The law will increase the opportunity for individuals who were employed by the legislature or in exempt positions to apply for Career Executive Assignments, the highest level of civil service employees. CEAs play a major role in the development and implementation of policy and usually are in the first-three levels of an agency's bureaucratic structure. Former legislative and exempt employees with at least two years of service were eligible to take promotional examinations for civil service positions within one year of leaving the legislative or exempt position. After that, they would have

had to wait for positions to be opened to the general public. The new law removes the one-year limit for applying for promotional examinations for CEA positions.

The SPB explained that approximately 700 CEAs will be retiring in the next few years. S.B. 1472 will allow knowledgeable former state employees to compete for CEA positions with current state employees, increasing the pool of management talent.

Service of Documents, Cleanup

Beware new SPB service requirements. A.B. 3042, introduced by the Assembly Committee on Public Employees, Retirement and Social Security, expands the acceptable ways to serve documents related to SPB proceedings. It now allows express service by carriers such as United Parcel Service and Federal Express, in addition to the United States Postal Service and personal delivery. Detailed

Whistleblower Procedures

S.B. 1505 (Yee, D-San Francisco) was vetoed by the governor. The bill would have made several changes to the procedures for employees who file complaints with the SPB that allege they have been subjected to retaliation for reporting wrongdoing within state government. Among other changes, the bill would have extended protection to former employees, allowed the SPB to award attorneys' fees, clarified when an employee who has filed an SPB whistleblower complaint can go to court, and required evidentiary hearings on whistleblower complaints. The governor's veto message stated only that the bill was not a high enough priority to gain his signature in light of the historic delay in passing the budget. *

NEW!

On January 1, 2008, California firefighters gained many of the same rights as peace officers, and more.

Now, firefighters have a new resource.

Pocket Guide to the Firefighters Bill of Rights Act

By J. Scott Teidemann
1st edition (2008) \$16

Firefighters have a resource comparable to CPER's bestselling *Pocket Guide to the Public Safety Officers Procedural Bill of Rights Act*, known statewide as the definitive guide to peace officers' rights and obligations. The new guide is a *must* for individual firefighters and for all those involved in internal affairs and discipline.

The FBOR guide provides:

- an overview of the requirements of the Act;
- the text of the Act as well as pertinent provisions of the Administrative Procedure Act applicable to appeals;
- a catalog of major court decisions likely to be important in deciding issues under the Act; a table of cases, and a glossary of terms.

The FBOR is largely modeled on the PSOPRA, which has protected peace officers for over 30 years. Thus, there is an existing body of case law and practical experience that may be called on when implementing the new law. This booklet cites cases decided under the PSOPBRA that are likely to influence how the courts interpret the FBOR. Nonetheless, there are some significant differences between the two laws that warrant careful attention. Those differences are highlighted.

To view the FBOR Guide's Table of Contents or to order this and other CPER publications, go to

<http://cper.berkeley.edu>

Majority of New Laws for State Employees Address Retirement

Retirement Fraud

The legislature finally granted the California Public Employees Retirement System's wish for a new crime of retirement fraud, but only after the urging of the California Public Employee Post-Employment Benefits Commission. (See story in *CPER* No. 190, pp. 56-60.) A.B. 1844 (Hernandez, D-West Covina) amends the Teachers' Retirement Law, the Public Employees' Retirement Law, and the County Employees' Retirement Law of 1937 to criminalize the provision of knowingly false information, or the failure to disclose an important fact in order to receive or assist another in obtaining a retirement benefit or to support or oppose an application for a retirement benefit. It will also be a crime to accept payment of a benefit and retain it with knowledge that one is not entitled to it. During the legislative process, the fine for violation of the new law was reduced from \$20,000 to \$5,000, but the misdemeanor still will be punishable by up to a year in jail in addition to the fine. The criminal court also may require the violator to repay unlawfully obtained benefits to the retirement system or otherwise provide restitution to a victim.

CalPERS had been sponsoring similar legislation for several years. The agency asserts it has had difficulty convincing some prosecutors to follow

through with cases of fraud because the general crimes of making false claims, grand theft, or perjury do not fit the true nature of retirement fraud. The bill strengthens the ability of the retirement systems to investigate cases of suspected fraud by allowing them to obtain information from insurers to determine whether an individual is entitled to a benefit. PERS also can

*The agency
must present cost
information at a pub-
lic meeting at least
two weeks before adop-
tion of the benefit*

use information from the Employment Development Department when seeking remedies for retirement benefit fraud.

Timely Reports

State law currently requires provision of annual pension audits and financial reports to the Controller's Office, but the controller sometimes has delayed publishing the information. A.B. 1844 would require the controller to post pension data within

12 months of receiving it, and in no case later than 18 months after the end of the fiscal year. As recommended by the post-employment benefits commission, the bill would have required agencies that offer other post-employment benefits — like retirement health benefits — to provide the controller with the actuarial valuation report required by GASB 45. However, the bill was stripped of that mandate in late summer.

Actuarial Presence

S.B. 1123 (Wiggins, D-Santa Rosa) applies to both pensions and OPEB, and requires that an actuary determine the future costs of a proposed benefit change, including the change in value of accrued benefits and any additional accrued liability. Exceptions apply for changes in an annual premium increase that do not exceed 3 percent under a contract of insurance, or changes in non-pension post-employment benefits that are government-mandated or offered by an insurance carrier in connection with a contract of insurance.

The agency must present cost information at a public meeting at least two weeks before adoption of the benefit change. The item may not be placed on the consent calendar, and the actuary must attend the governing board's meeting to answer questions about future costs if they will exceed one-half of 1 percent annually. As applied to the state legislature, the actuary's projection of future costs will be made public in policy and fiscal com-

mittee meetings. Once adopted, the chief executive officer of the governing board, or the director of the state Department of Personnel Administration, must sign a statement acknowledging that he or she understood the current and future costs of the benefit change “as determined by the actuary.”

Advisory Board

S.B. 1123 establishes an eight-member California Actuarial Advisory Panel. Each unpaid panel member must be an actuary, with one member each appointed by the Teachers’ Retirement Board, the Public Employees’ Retirement System, the University of California Board of Regents, the State Association of County Retirement Systems, the Speaker of the Assembly, and the Senate Rules Committee. The other two are appointed by the governor. The panel will be responsible for defining a range of model actuarial policies and best practices for public retirement systems, developing pricing and disclosure standards for benefit improvements, gathering model funding policies and practices, and providing advice and comments to retirement systems and public agencies. Staff of the controller will provide support to the advisory panel.

Service Credits

A.B. 2838 (Duvall, R-Yorba Linda) allows an employee who returns from an unpaid but approved leave of absence for illness or injury to purchase service credit in PERS. The

unexpected opportunity is that an employee may purchase service credit for leaves that took place before the law was enacted.

Tracking System

A.B. 2202 (Caballero, D-Salinas) will allow CalPERS to monitor the employment of part-time, seasonal, and temporary employees for PERS eligibility. On request of the PERS board, every state, school, and local contracting agency must provide information relating to retired annuitants

and other employees who are not PERS members.

PERS explained that the data will help identify employees who have become eligible for PERS membership, such as part-time school employees who also work part-time for a county. PERS will be better able to monitor the employment of retired annuitants, who are allowed to work only 960 hours annually while receiving pension payments. The law provides that the information CalPERS collects will remain confidential. *

Legislature Cannot Mandate That State Engineers Be Used for Highway Projects

THANKS TO Proposition 35, the Consulting Engineers and Land Surveyors of California has won another round in its turf battle with the Professional Engineers in California Government. The Court of Appeal held that the legislature cannot require a California agency to use state civil service engineers and architects on public works projects. Under Prop. 35, the California Department of Transportation and other governmental entities must be free to decide whether to use state employees or to contract with private firms for architectural and engineering services.

Project Restrictions

PECG, which represents state-employed engineers, architects, and

land surveyors in Unit 9, has battled private contracting for decades. Under Article VII of the state constitution it won most of those turf wars. Article VII establishes a civil service system

The union convinced the legislature to restrict engineering work on an HOV lane to Caltrans employees.

under which appointment and promotions in state employment must be based on merit. While the civil service article does not expressly outlaw contracts for services with private entities,

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It's not enough that we do our best; sometimes we have to do what's required.

-- Sir Winston Churchill, statesman

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

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

Pocket Guide to Due Process in Public Employment

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

<http://cper.berkeley.edu>

courts have found that it limits private contracting because outsourcing traditional state services would eventually erode the civil service system.

In November 2000, however, the electorate passed Prop. 35, which added Article XXII to the Constitution. Article XXII provides that the “State of California and all other governmental entities...shall be allowed to contract with qualified private entities for architectural and engineering services for all public works of improvement. The choice and authority to contract shall extend to all phases of project development, including permitting and environmental studies, rights-of-way services, design phase services and construction phase services.” It also states, “Nothing contained in Article VII of this Constitution shall be construed

to limit, restrict or prohibit the State or any other governmental entities... from contracting with private entities for the performance of architectural and engineering services.”

Ever since Prop. 35 passed, PEGC has been trying to find a way to make public agencies use state engineers and architects, instead of private firms, for public works projects. In 2006, the union convinced the legislature to restrict engineering work on a state high-occupancy vehicle lane to Caltrans’ civil service employees. The bill authorized the Los Angeles County Metropolitan Transportation Authority to use a design-build procurement process to construct the HOV lane, but required that civil service employees prepare the “performance specifications and any plans, preliminary engineering, environmental documents,

prebid services, and project reports.” It also required that Caltrans employees perform construction inspection, materials testing, and quality-control inspection services on the project.

CELSOC asked the trial court for a determination that the civil service requirements of the legislation violated Article XXII and for an order prohibiting Caltrans from implementing them. Caltrans did not oppose CELSOC’s motion for judgment on the pleadings. The trial court declared specified sections of the bill unconstitutional and enjoined Caltrans from implementing them. PEGC, which was allowed to intervene in the lawsuit after the trial court issued its judgment, appealed.

‘Tortured Interpretation’ Rejected

PEGC did not dispute that civil service provisions of the HOV bill

conflicted with the portion of Article XXII that allows public agencies to contract with private architectural and engineering firms. But, PEGC contended, the civil service restrictions were permissible under a section of Prop. 35 that authorized the legislature to use different methods of procurement for design-build projects. In design-build projects, both the design and construction of a project are completed by a single entity, unlike the design-build-bid process, in which the best-qualified entity is selected to design a project and competitive bids are used to choose the firm that performs the construction. PEGC argued that Prop. 35 added to the Government Code a section which preserved the legislature's authority "to statutorily provide different procurement methods for design-build projects." Therefore, the union argued, the legislature was permitted to require that services be procured only from civil service engineers and architects.

The court labeled this contention "a tortured interpretation of the statutory language." Proposition 35 unambiguously provides that public agencies "shall be allowed" to enter into contracts with private firms, the court stressed. Since voters intended to remove restrictions on contracting for architectural and engineering services and to promote competition to obtain the best quality and value for taxpayers, any exception surely would have been plainly stated, reasoned the

court. But, it observed, there are no provisions that state the freedom to contract out does not apply to design-build projects.

One statutory amendment made by Prop. 35 provides, "All architectural and engineering services shall be procured pursuant to a fair, competitive selection process which prohibits governmental agency employees from participating in the selection process when they have a...relationship with any private entity seeking the contract." This provision shows that the term "procurement method" refers to the manner of selecting the private contractor, the court reasoned, such as selecting a firm based on quality rather than cost.

PEGC insisted, however, that the term "procurement method" referred to procurement of the project rather than the contract for services. Using a common rule of statutory interpretation, it argued that the HOV legislation could not be declared unconstitutional if there was a reasonable interpretation of the bill that did not conflict with Prop. 35. The court dismissed the argument, pointing out that the union's interpretation of the phrase would allow the legislature to eviscerate Prop. 35 by designating all future projects as design-build projects required to use civil service employees. Since there is no evidence that voters intended to have an "escape hatch," the court said, PEGC's interpretation would negate the primary purpose of

the initiative and was unreasonable.

The court affirmed the trial court's conclusion, saying, "Caltrans *may choose* to have this work performed by its employees, but the Legislature *cannot mandate* that Caltrans do so." (*Consulting Engineers and Land Surveyors of California v. California Department of Transportation* [2008] 167 Cal.App.4th 1453.) *

Discrimination

California Supreme Court Holds Equitable Tolling Applies to FEHA

IN A UNANIMOUS decision, the California Supreme Court ruled that the doctrine of equitable tolling applies to the one-year statutory time limit for filing administrative complaints of discrimination under California's Fair Employment and Housing Act. In *McDonald v. Antelope Valley Community College Dist.*, the court agreed with the Second District Court of Appeal's conclusion that the time for filing a claim with the Department of Fair Employment and Housing can, in the proper circumstance, stop running while the complainant pursues internal remedies with her employer. (For a complete discussion of the Court of Appeal decision, see *CPER* No. 185, pp. 70-72. See also *CPER* No. 186, p. 66.)

Three community college district employees, John McDonald, Sylvia Brown, and Sallie Stryker, filed complaints with the DFEH, alleging racial discrimination, racial harassment, and retaliation. After receiving right to sue letters from the agency, they filed a lawsuit against the district. The trial court dismissed the case, finding that the DFEH complaints had not been filed within one year from the date the alleged unlawful practices occurred, as required by the FEHA.

The appellate court reversed the trial court's decision as to McDonald, finding that one of the acts of retaliation he alleged occurred within one year prior to the filing of his DFEH complaint. And the appellate court found that Brown, too, had filed an internal complaint with the district within one year prior to the last act of alleged discrimination and that the filing of that complaint tolled the statute of limitations while she pursued her internal complaint remedies with the district.

The California Supreme Court granted the district's petition for review, but limited it to a single issue: whether equitable tolling may apply to the voluntary pursuit of internal administrative remedies prior to filing a FEHA claim. It concluded that the answer is "yes."

The court instructed that equitable tolling of a statute of limitations is a judicially created doctrine "designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations — timely notice to the defendant of the plaintiff's claims — has been satisfied." The doctrine suspends or extends a statute of limitations "to

ensure fundamental practicality and fairness."

Equitable tolling applies where an injured individual has several legal remedies, and reasonably and in good faith elects to pursue one of them, said the court. It eases the pressure on parties to seek redress in two separate forums at the same time, risking conflicting decisions on the same issue. It also "affords grievants the opportunity to pursue informal remedies, a process we have repeatedly encouraged," the court explained.

Can equitable tolling apply to the voluntary pursuit of internal administrative remedies?

Equitable tolling is automatic where exhaustion of an administrative remedy is mandatory prior to filing a lawsuit. However, according to *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 164 CPER 44, exhaustion of internal administrative remedies before filing a FEHA claim is not mandatory. Relying on *Schifando*, the district argued that equitable tolling should not apply. The court disagreed. It has long held "that equitable tolling may extend even to the *voluntary* pursuit of alternate remedies," pointing to *Campbell v. Graham-Armstrong* (1973) 9 Cal.3d 482, *Elkins v. Derby* (1974) 12

Cal.3d 410, and *Addison v. State of California* (1978) 21 Cal.3d 313. “Contrary to the district’s argument,” said the court, “our decision in [*Schifando*] casts no doubt on the established availability of equitable tolling during pursuit of voluntary alternate remedies.” The court ruled in *Schifando* that the plaintiff was not required to pursue internal administrative remedies before filing a FEHA action, but it made no finding as to the availability of equitable tolling if an individual voluntarily pursues an administrative remedy.

The court found that the internal remedy Brown pursued within the community college system offers the sort of benefits equitable tolling is designed to preserve. They require the community college to investigate any formal complaint of discrimination and to advise the complainant of his or her right to file a charge with the DFEH. The college must provide the chancellor with a written report that summarizes its investigation and findings, the proposed resolution, steps taken to prevent recurrence of similar problems, and the complainant’s appeal rights. The complainant can appeal to the community college governing board. The chancellor must review the report and determine if there is reasonable cause to believe there has been a violation. If so, it must conduct a separate investigation that may lead to an informal or formal resolution, including a full evidentiary hearing. The chancellor has the authority to remedy the violation by any lawful means.

“These procedures thus afford a complainant and the community college district a full opportunity to formally or informally resolve a dispute in a way that will, in many cases, minimize or eliminate entirely the need for further judicial proceedings,” the court concluded. “Equitable tolling during pursuit of this internal remedy affords all the benefits that we have generally recognized justify tolling; conversely, nothing about the voluntary nature of

Equitable tolling is not immune to the operation of statutes of limitations.

the procedures diminishes the benefits of tolling here.”

The court recognized, however, that the doctrine of equitable tolling is not immune to the operation of statutes of limitations. The legislature can expressly negate the application of the doctrine in the wording of the statute. And, “even in the absence of an explicit prohibition, a court may conclude that either the text of a statute or a manifest legislative policy underlying it cannot be reconciled with permitting equitable tolling,” the court said.

An examination of the text of the FEHA found no express limit on the bases for tolling, nor implicit of legislative intent to preclude it, concluded

the court. Nor could it discern any fundamental policy that would categorically foreclose equitable tolling in all FEHA cases. “To the contrary,” said the court, “we have explained that the express provisions of the FEHA evince a legislative intent that it and its statute of limitations must be liberally interpreted in favor of both allowing attempts at reconciliation and ultimately resolving claims on the merits.”

In support, the court pointed to Sec. 12993(a) of the act, which requires that “the provisions of [the FEHA] shall be construed liberally for the accomplishment of [its] purposes.” And, it referred to previous cases where it held that this liberal construction extends to the FEHA’s statute of limitations, citing *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 150 CPER 70, *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 122 CPER 82, and *Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 174 CPER 23.

Although those cases did not involve equitable tolling, “here, the same legislative policy favoring liberal construction of the statute of limitations supports an interpretation of the FEHA under which the limitations period is equitably tolled while the employee and employer pursue resolution of any grievance through an internal administrative procedure,” found the court. “Tolling promotes resort to such procedures; if at least some percentage of grievances is thereby resolved, the number of complaints under the FEHA is reduced; and for those that

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

-- John Cage, composer

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

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

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

Pocket Guide to the Basics of Labor Relations

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

<http://cper.berkeley.edu>

are pursued under the FEHA, tolling increases the likelihood that those potentially meritorious claims will in fact be resolved on the merits," it reasoned.

The court also found support for its position in legislative history. In one instance, the state legislature amended Sec. 12965 of the FEHA to expressly adopt the Court of Appeal's holding in *Downs v. Department of Water & Power* (1997) 58 Cal.App.4th 1093, that the timely filing of a charge with the federal Equal Employment Opportunity Commission alleging a violation of Title VII tolls the FEHA statute of limitations during the EEOC investigation.

The court was not persuaded by the district's argument that the preemption provisions of Sec. 12933(c) of the act mandate a different result. That section states that it is the intention of the legislature "to occupy the field of regulation of discrimination in employment...." In prior cases, the court held that this section "speaks only to state-local relations and preempts only local laws," not other state laws.

The district's final argument, that tolling should be unavailable because Brown had voluntarily abandoned the internal grievance process, met a similar fate. "Neither we nor the Court of Appeal have ever made equitable tolling contingent on a plaintiff's waiting for resolution of an alternate

proceeding, not otherwise subject to mandatory exhaustion, prior to institution of further proceedings," said the court. To require that the complainant complete the internal procedure in order to invoke equitable tolling "would encourage potential defendants with control over such procedures to drag their feet as a way of forestalling a potential DFEH claim," it explained. (*McDonald v. Antelope Valley Community College Dist.* [2008] 45 Cal.4th 88.) *

Public Sector Arbitration

Reckless Driving Supplies 'Just Cause' for 10-Day Suspension

SERVING AS A hearing officer for the Los Angeles Board of Civil Service Commissioners, arbitrator Phil Tamoush sustained a 10-day suspension sanctioning a police service representative who was accused by the Los Angeles Police Department of reckless driving, causing a traffic collision, and leaving the scene of an accident. Despite the appellant's 21-year career with the department and evidence that she was under the care of a psychologist and taking prescription drugs for depression at the time of the incident, Tamoush found her "egregious" conduct clearly warranted discipline.

The primary witness to the incident was FBI Agent Easter, who observed the appellant driving at 100 miles an hour on the Pacific Coast Highway. As Agent Easter proceeded along the highway, he discovered a vehicle that had sustained rear-end damage and assumed it was the appellant's vehicle that had hit the car. When Agent Easter next saw the appellant's car, its airbag was inflated, and it had two flat tires and front-end damage. When he observed the appellant fail to stop at a red light and driving erratically, he turned on his red lights and siren and pursued the appellant.

She then drove her vehicle into a park, turned it around, and headed directly at Agent Easter's car. A pedestrian was forced to jump out of the way, and Agent Easter had to swerve to prevent a head-on collision.

A Los Angeles County deputy sheriff saw the appellant leave the park, pursued by Agent Easter. He, too, activated his lights and siren and joined the chase. When the appellant pulled into a shopping center, her car was boxed in by Agent Easter and the deputy sheriff.

A second deputy sheriff was called to the scene and observed the appellant acting in an odd manner. She was non-responsive to his inquiries and continuously referred to God. The deputy suspected that the appellant was under the influence of drugs and found four prescription drug bottles in her purse. She was taken into custody and booked for assault with a deadly

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A positive attitude may not solve all your problems, but it will annoy enough people to make it worth the effort.

-- Herm Albright, writer

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weapon, her vehicle.

Despite clues that the appellant was under the influence of medication, she was not tested for the presence of drugs in her system at the time of the incident. A police officer in charge of the department's drug recognition training program testified that, while the medications the appellant had been taking could have affected her driving ability, he could not confidently say that she was under the influence of any drugs at the time of the incident.

The appellant's doctor testified that she told him she had no recollection of the incident. When called as a witness by the department, the appellant said she had been disoriented and "heard God talking to her." When she saw Agent Easter's car approaching, she believed God was telling her to get away. Although she testified that she had no other recollection of the incident, the appellant did not deny she had been driving erratically, caused an accident, and left the scene.

Captain Lance Smith conducted an investigation and recommended to the police chief that the appellant be suspended for 10 days. He sustained the charges and applied the minimum discipline recommended in the penalty guide for a second offense. The appellant had been suspended for five days for a DUI offense the prior year.

Crediting the testimony of Agent Easter and the deputy sheriff, Arbitrator Tamoush concluded that the appellant had been speeding, had ignored the sirens and lights of the

police vehicles, caused a major traffic accident, and had to be "captured" and arrested. This conduct, he concluded, supports the accusations laid out in the department's charges that the appellant drove her car in a reckless manner, left the scene of a traffic collision, and failed to yield to police officers.

From the evidence presented, Hearing Officer Tamoush found just cause for the discipline. He viewed the 10-day suspension as corrective in nature and consistent with principles of progressive discipline. He recommended that the civil service commission sustain the suspension and warned the appellant that further deterioration of her behavior could result in discharge. (*Appellant and Los Angeles Police Dept.; Representatives: Myrlin Rebuldela [senior management analyst] representing the department; Michael Williamson [commission executive assistant] representing the appellant. Hearing Officer: Philip Tamoush*). *

Arbitration Log

- **Contract Interpretation**
- **Past Practice**
- **Overtime**

State of California Department of Motor Vehicles and Service Employees International Union, Loc. 1000 (6-30-08; 14 pp.). *Representatives:* Frolan Aguilin (labor relations counsel) for the department; Jake Hurley (SEIU legal division) for the union. *Arbitrator:* Bonnie G. Bogue.

Issue: Did the department violate the collective bargaining agreement when it used established production standards in determining overtime assignments? If so, what is the appropriate remedy?

Union's position: (1) The plain meaning of Sec. 19.11.4 of the parties' agreement reveals a seniority-based overtime system, subject only to the conditions present in the section, which do not include departmental production standards. There was no discussion at the bargaining table that "qualified employee" as used in the section meant those who met production standards. The contract thereby forecloses the use of such standards as an eligibility requirement for voluntary overtime.

(2) It is undisputed that the parties, when negotiating to roll over language of Sec. 19.11.4 from the 2002-03 contract into the 2003-05 contract, intended to eliminate all existing past practices, including that of using production standards as an eligibility requirement for overtime, and to replace those practices

with a system based solely on seniority.

Employer's position: (1) The contract does not limit the DMV's managerial right pursuant to its 30-year practice of using established production standards in assigning overtime. The contract language is clear and unambiguous. The plain meaning of the word "qualified" in the section supports the proposition that the state retained the right to determine the personnel eligible for overtime.

(2) The bargaining history does not support the union's contention that management's determination of whether an employee is "qualified" is limited to whether he or she is trained to do the job.

(3) The grievance must be denied based on the parties' past practice. Since ratification of the 2002-03 agreement, the DMV has followed the same established practice that it has for 30 years, consistently applying the same production standards when deciding which employees are "qualified" to be eligible for overtime. This grievance is the first time the union challenged the practice.

Arbitrator's holding: Grievance denied.

Arbitrator's reasoning: (1) The language of the section is subject to more than one plausible interpretation. Therefore, context must be considered to determine the meaning of "qualified."

(2) The bargaining history for the 2002-03 contract reveals the union's purpose was to introduce the seniority principle to the distribution of overtime. It was successful in achieving that goal. The state was successful in requiring that employees first be deemed "qualified" to be eligible for voluntary overtime. It accepted the union's proposal that seniority would govern who, from those found to be "equally qualified," would get the assignment. While the bargaining history showed that both sides acknowledged the need to have people working overtime who had particular or specialized skills necessary for certain assignments, there was no evidence that the union proposed any language to define the terms "qualified" or "equally qualified." No one recalled the negotiators discussing the established practice in the DMV of assigning overtime only to employees who met established production standards.

(3) The DMV's pre-existing practice of denying overtime to employees who

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do not meet performance standards was not identified by union negotiators as one it wanted to supersede with the new seniority provisions. This supports the conclusion that neither party understood that would be an effect of the new language.

(4) The new voluntary overtime provision went into effect in 2002. The DMV continued to exclude employees who did not meet performance standards. But the union raised no objection to this practice until the present grievance was filed, four years after the provision first went into effect, and two years after another round of negotiations rolled the same language into the 2003-05 MOU.

(5) Section 22.1.A states that any other prior or existing agreement is superseded by the contract. The union is incorrect when it argues that this means the language of Sec. 19.11.4 supersedes the DMV's practice. The parties did not negotiate any definition of the term "qualified" that would supersede the practice.

(6) The language of Sec. 19.11.4 on its face reserves to management the discretion to determine who is "equally qualified" because it requires that determination to be made but provides no standards to govern that determination.

(7) The management rights clause expressly reserves to management the right to determine the procedures and standards for assigning and scheduling employees, and to determine the personnel by which operations are to be conducted. This includes overtime assignments. Section 19.11.4 expressly

limits the exercise of that right by requiring the employer to determine which employees are "equally qualified," but it does not limit management's discretion in making that determination.

(Binding Grievance Arbitration)

• **Contract Interpretation**
• **Equity Increases**

Service Employees International Union, Loc. No. 1000, and State of California, Dept. of Corrections and Rehabilitation (7-2-08; 7 pp.). *Representatives:* Brooke D. Pierman, Esq., for the union; Dana R. Brown (labor relations counsel) for the state. *Arbitrator:* C. Allen Pool.

Issue: Did the state violate provisions of the memoranda of understanding for Bargaining Units 17 and 20 by not providing California Department of Corrections and Rehabilitation employees the January 1, 2007, equity adjustments? If so, what is the appropriate remedy?

Association's position: (1) A federal judge has placed the state's prison medical system in receivership due to constitutionally inadequate medical care. A court order allows the receiver to request that the court waive state law or contractual agreements under some circumstances.

(2) In mid-2006, the state and the union, which represents registered nurses and other medical personnel, negotiated salary equity adjustments for several classifications effective January 1, 2007. The state refused to implement the negotiated equity increases on the grounds that a court order had invalidated the salary provisions of the MOU.

(3) Independent of the MOU, the receiver obtained a waiver of state law to provide an 18 percent increase to some of the same classifications in October 2006. But the receiver did not request a waiver of the state's contractual obligations, and the court order did not invalidate the MOU.

(4) The equity adjustments are not a windfall. The parties did not tie the equity adjustments to any maximum salary. The state should uphold its end of the bargain.

Employer's position: (1) The equity adjustments were tied to the maximum salary rate negotiated in the MOU.

(2) The receiver's order destroyed the subject matter of the agreement for equity adjustments because the employees in the classifications already had received the equity adjustments under the court order.

(3) The employees already were made whole because they received more from the receiver's order than they would have from the negotiated equity adjustments. The negotiated adjustments would be a windfall, giving them a salary above both the amount negotiated by the parties and the amount ordered by the court.

Arbitrator's holding: Grievance sustained.

Arbitrator's reasoning: (1) The plain language of the MOU provided for an equity adjustment for the designated medical personnel.

(2) The evidence did not support the state's contention that the receiver's order invalidated the salary and equity adjustment provisions in the MOU. The receiver's motion requested a waiver of

state law, not a waiver of the contract, and did not address the MOU in any way. The state did not raise in court proceedings the issue of the impact of the order on the existing MOU.

(3) Nothing in the evidence showed that the union and the state had agreed to tie the equity adjustments to the salary schedule that existed at the time they bargained. Any such condition would have to be clear and explicit. The arbitrator has no power to add to, subtract from, or modify the MOU.

(Binding Grievance Arbitration)

• Discipline

• Sick Leave Abuse

Rialto Professional Firefighters, IAFF, Loc. 3688, and City of Rialto, (8-5-08; 16 pp.). *Representatives*: Stuart D. Adams (Adams, Ferrone & Ferrone) for the union; Steve Filarsky (Filarsky & Watt) for the city. *Arbitrator*: Joseph Gentile (CSMCS No. ARB-06-0255).

Issue: Did the appellant firefighter engage in the misconduct charged and for which he was disciplined?

City's position: (1) On a day when the appellant claimed to be unable to work due to an inflamed wrist and on his following day off, he was videotaped lifting two children's bicycles and a car

seat, opening and closing the tailgate of his car, and washing his car.

(2) On the videotape, the appellant did not appear to be grimacing in pain or favoring his wrist while performing these duties.

(3) During an internal affairs investigation, the appellant's responses were evasive and demonstrated an attempt to obfuscate and conceal facts.

(4) The appellant's actions were dishonest and violated the public trust.

Union's position: (1) The appellant elected not to come to work because of doubts about his ability to lift a gurney and use hand tools.

(2) He returned to his normal duties and did not miss any work after his absence.

(3) The appellant is a long-term firefighter who has not abused his sick leave benefits and had accumulated over 1,000 hours in his sick leave bank.

Arbitrator's holding: Appeal sustained.

Arbitrator's reasoning: (1) The evidence does not establish that the appellant engaged in the misconduct charged. While the videotape did not show the appellant nursing his wrist, he was performing routine and ordinary activities. This does not show that the

appellant was able to perform his duties as a firefighter.

(2) The appellant is not a malingerer nor has he abusively used his sick leave.

(3) The appellant's inability to recall with specificity the uneventful activities he performed while off work does not demonstrate untruthfulness, especially given the internal investigative setting during which he was questioned.

(Advisory Arbitration)

• Contract Interpretation

• Retirement Benefits

California Federation of Interpreters, the Newspaper Guild-Communications Workers of America, Loc. 39521, Interpreter Unit and Superior Court of Santa Cruz County (8-20-08; 16 pp.). *Representatives*: Concepcion Lozano-Batista (Weinberg, Roger & Rosenfeld) for the union; Sarah Levitan Kaatz (Lozano Smith) for the district. *Arbitrator*: William E. Riker.

Issue 1: Did the employer violate the bargaining agreement when it failed to provide to the Interpreter's Unit the pension offset negotiated and provided to SEIU Local 521? If so, what shall be the remedy?

Issue 2: Is the court required under the MOU with CFI Local 39521 to give the interpreters a 3.75 percent salary increase to offset an increase to the employee's contribution to PERS?

Union's position: (1) Region 2 of the California Courts has an MOU with CFI, the union that is the exclusive representative of court interpreters. Article 23 provides that employees covered by the MOU are entitled to the same benefits as those attained by the largest bargaining

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unit in the local trial court. SEIU Local 521 is the largest unit to negotiate with the Santa Cruz Superior Court.

(2) The 2007-10 MOU between the Santa Cruz Superior Court and Local 521 provides that, effective the first pay period in January 2008, the court will contribute the full employer share toward the CalPERS retirement formula, and each employee will contribute the full employee's share of 7 percent, an increase in the contribution rate. To offset the employee's additional payment, the court agreed to raise the hourly rate for the minimum step pay range for each classification by 3.75 percent.

(3) Interpreters are entitled to the same 3.75 percent pension offset effective January 2008.

Employer's position: (1) The MOU is clear and unambiguous that the interpreters receive the "same retirement plan at the same benefit level" as SEIU, and the court is in compliance. An increase in the base salary rate is not part of the retirement plan, nor is it a level of benefit under the MOU.

(2) Under the MOU, the interpreters are entitled to meet and confer on the impact of a change in SEIU's benefits. Interpreters are not entitled to receive automatically what SEIU received during negotiations.

(3) If the union believes that the court failed to meet and confer, CFI should have filed a charge with the Public Employment Relations Board. If the union's position is that the parties had one meet-and-confer session and reached impasse, it should have declared impasse.

Arbitrator's holding: Grievance sustained.

Arbitrator's reasoning: (1) The contract language is clear and unambiguous. The intent is to assure that the interpreters will not pay more in pension contributions than employees represented by SEIU.

(2) The 3.75 percent increase in hourly pay negotiated by SEIU was more than the amount needed to offset the employees' pension contribution increase. The excess was added as a "sweetener" to encourage SEIU members to ratify the MOU. That additional increase is not applicable to the interpreters. They only are entitled to be made whole for an increase in their pension contributions.

(3) Because the Trial Court Interpreter's Act mandates the interpreters' salary must be uniform throughout the region, the 3.75 percent increase may not be applied as a wage adjustment. Rather, it is to be applied to an alternative benefit, such as an extra holiday, a reduction in the work day/week, an alternative schedule, or a similar benefit of equal value to the applicable percentage increase.

(4) The parties freely elected to move the dispute to final and binding arbitration, thereby waiving resort to any alternate process.

(Binding Grievance Arbitration)

- **Discipline**
- **Just Cause**

Contra Costa County Fire Protection Dist. and United Professional Fire Fighters of Contra Costa County, Loc. 1230 (10-21-08; 14 pp.).
Representatives: Cynthia Schwerin, for

the county; David Holsberry (Davis, Cowell & Bowe) for the union. *Arbitrator:* Katherine J. Thomson (CSMCS No. ARB-07-0383).

Issue: Was the grievant's termination proper under the MOU? If not, what is the appropriate remedy?

County's position: (1) The grievant falsified an Advanced Cardiac Life Support refresher certificate, which was required for accreditation to work as a paramedic in the county. Even after being warned to tell the truth, the grievant denied his wrongful conduct repeatedly for a month. Only at the urging of his union representative did he admit that he had falsified the certificate.

(2) The grievant did not offer convincing excuses for his misconduct. His doctor's letter listing the grievant's medications and his opinion that they could have led to bad judgment was not subject to cross-examination. Divorce and the death of colleagues do not mitigate the grievant's misconduct.

(3) Termination for a first offense is appropriate for severe misconduct. Length of service should not be considered in assessing the appropriateness of discharge when egregious conduct is involved.

(4) The county terminated the grievant because he could not be trusted to work in a critical public safety role as a firefighter and paramedic. The fact that the fire chief has not terminated anyone in 10 years demonstrates the seriousness of the grievant's misconduct in his view. The decision to terminate was reasonable.

(5) The grievant's misconduct was not similar to the misconduct of Em-

ployee X. Employee X, who reported overtime he did not work, was demoted two ranks so that he would not supervise overtime reporting. Demotion is not possible for the grievant because he would be responsible for public safety even in a firefighter position.

Union's position: (1) Although the grievant committed serious misconduct, he is entitled to progressive discipline. He has an unblemished 17-year record. He initially obtained his paramedic license for the fire district's benefit, and has assisted in emergency medical services training. His supervisor praised him at the hearing. This work history shows that the grievant's error was out of character and that he is not beyond rehabilitation.

(2) The grievant believed he had a current ACLS certificate. His personal life was in chaos due to his divorce and move. The medication he was taking for his mental condition may have caused bad judgment. The grievant has apologized and has taken steps to ensure that his misconduct will not recur.

(3) The county has followed principles of progressive discipline in other cases of falsification and dishonesty. Employee X was not fired even though he falsified overtime records, manipulated the overtime rotation system, and denied any misconduct for four months. He had a related written reprimand in his file. He was demoted, suspended, and required to sign a last chance agreement and reimburse fraudulently obtained pay.

(4) The county overstated the harm the grievant's misconduct caused. The grievant renewed the certificate in a few weeks and never acted as a paramedic

without it. His license never lapsed since the ACLS recertification is not required by the state.

(5) A carefully drafted remedy can meet the county's interests in paramedic liability, its concerns about recurrence of the grievant's misconduct, and its interest in sending a message to employees about dishonesty.

Arbitrator's holding: Grievance sustained.

Arbitrator's reasoning: (1) The fire district exaggerated the seriousness of the falsification because it failed to understand the grievant's motive. The grievant altered the certificate when he believed he had taken the ACLS course. He falsified the certificate not to gain financially or evade recertification, but because he could not find the certificate due to his personal circumstances. While the divorce and the difficulty of trying to buy two residences and move do not excuse the falsification, they do demonstrate his motive.

(2) Management did not give the grievant's unblemished long-term career proper consideration. The grievant received merit raises and a promotion. He completed paramedic classes when the fire district expanded its services. He has not shirked continuing education requirements.

(3) The grievant's history indicates that his misconduct was uncharacteristic. It happened during a period of extraordinary upheaval and stress. At the time the grievant falsified the certificate and lied about it, his mental condition was sufficiently abnormal that he was under medical treatment.

(4) The grievant's misconduct in submitting a false certificate for a course he believed he had taken was not any more egregious or dishonest than that of Employee X, who lied about repeatedly falsifying records for his financial gain at a cost to the fire district. There is no evidence to justify the harsher treatment of the grievant.

(6) The grievant shall be demoted and suspended for 60 days. He shall be reinstated subject to the county's right to discharge him if it has cause to discipline him for any dishonest conduct in the next four years.

(Binding Grievance Arbitration)

Public Employment Relations Board

Orders & Decisions

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

Dills Act Cases

Unfair Practice Rulings

Implementation of new retirement policy did not trigger bargaining obligation: DPA.

(*AFSCME Loc. 2620 v. State of California (Dept. of Personnel Administration)*, No. 1978-S, 9-26-08; 12 pp. dec. By Member Wesley, with Members McKeag and Rystrom.)

Holding: The state did not commit a unilateral change when the governor signed into law an alternate retirement program and the department did not negotiate prior to its implementation.

Case summary: In August 2004, Governor Schwarzenegger signed S.B. 1105, which provided an alternate retirement program (ARP) for first-time state miscellaneous employees hired on or after the effective date of the law.

AFSCME filed an unfair practice charge alleging that the law's enactment and its implementation by the department unilaterally changed newly hired employees' CalPERS retirement options as provided by their MOU.

PERB agreed to hold the charge in abeyance pending the decision of an appellate court in a case reviewing the retirement program. In March 2006, the court in *California Assn. of Professional Scientists v. Schwarzenegger* (2006) 137 Cal.App.4th 371, 177 CPER 22, interpreted nearly identical MOU language to determine whether S.B. 1105 impaired contractual rights. The court concluded it did not.

AFSCME's charge went forward, and an ALJ issued a

proposed decision finding AFSCME did not make a prima facie showing of an unlawful unilateral change. Relying on the *CAPS* decision, the ALJ found no policy change under the MOU. The ALJ explained that when the state enacted and implemented changes as part of the ARP, it did not depart from the terms of the MOU.

The board rejected AFSCME's contention that the ALJ's reliance on *CAPS* was misplaced because the court did not decide whether the state's change in pension policy was an unfair practice under the Dills Act. Nevertheless, PERB said, the court's legal and factual determinations about the ARP are binding to the extent that they impact the board's Dills Act analysis.

The board turned aside AFSCME's argument that the ALJ's reading of *CAPS* was overbroad. The union contended that the court held only that the language in the MOU did not preclude the state from changing pension benefits for *prospective* employees. It did not decide that the state made no change in pension benefits policy for bargaining unit employees overall. PERB agreed with the state's argument that "the ARP, by its terms, became the new retirement plan for all state miscellaneous employees hired after August 11, 2004, without any qualifications." The board found significance in the *CAPS* court's recognition that the legislature expressly had required parties to negotiate over previous changes to pension benefits but did not do so with respect to S.B. 1105.

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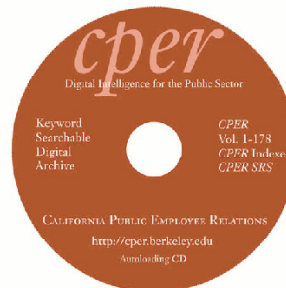
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The union insisted that even if the state was not contractually precluded from passing a law to change the pension benefits available to prospective employees, it was obligated to give the union notice and an opportunity to bargain over the decision to implement the ARP.

PERB found no such duty. It cited the California Constitution, which permits the legislature to exercise any and all legislative powers that are not denied by the constitution. While the Dills Act gives DPA, as a state employer, the authority to bargain with state unions to determine terms and conditions of employment, the act “does not preclude the Legislature itself from unilaterally adopting, enacting or implementing terms and conditions of employment which, if implemented by DPA without legislative direction, would have been an unfair practice if not negotiated.” DPA’s implementation of the ARP was an act of compliance with laws prescribed by the legislature.

Likewise, the board found that the state did not commit an unlawful unilateral change when the governor signed S.B. 1105 into law because the governor was carrying out a function directed by the constitution.

EERA Cases

Unfair Practice Rulings

No evidence of surface bargaining: Temple City USD.

(*Temple City Educators Assn., CTA/NEA v. Temple City Unified School Dist.*, No. 1972, 8-26-08; 17 pp. dec. By Member Wesley, with Chair Neuwald and Members McKeag and Rystrom.)

Holding: The ALJ’s proposed decision was reversed and the unfair practice charge dismissed because the district did not engage in surface bargaining.

Case summary: In February 2002, the district and the union began negotiations for a successor agreement for the 2002-03 school year. The union declared impasse and, with the help of a mediator, the parties reached a tentative agreement on December 2 — “TA1.” It provided for a 1.759 percent salary increase.

Union members quickly ratified TA1, and the district was scheduled to ratify the agreement on December 18. However,

on December 6, the governor announced a \$25 billion budget deficit and proposed unprecedented mid-year cuts in education funding. As a result, the district anticipated a reduction of \$834,000. In response, district negotiators informed the union that it did not intend to ratify TA1. District negotiators explained that, were the district to approve TA1, it would need to cut \$784,854 by the end of the fiscal year to maintain a mandatory 3 percent reserve.

Discussions between the parties led to “TA2.” It was presented to the union on December 14. TA2 modified language to provide for a deferment of the salary schedule increase until the state budget reductions were determined, “hopefully, in mid- or late January 2003,” followed by future collaboration between the parties. The language expressed the intent of both parties and the district board “to fund the originally negotiated salary schedule increase, or whatever portion of that increase can be supported through such cuts.”

Facing a January 1 deadline, at which point union members would be forced to pay their health care premiums out-of-pocket, the union’s bargaining team drafted a counterproposal — “TA3.” It deferred the salary increase, but only until February 2003, and called for collaboration to identify cuts “when the state budget reductions are determined in January 2003.” TA3 also expressed an intent to fund the originally negotiated schedule increase, but omitted the phrase “or whatever portion of that increase can be supported through such cuts.”

The parties met to discuss TA2 and TA3, each side favoring its own proposal. District negotiators viewed TA2 as more flexible because it lacked the date requirements in TA3, which the district felt could be unattainable. The union suggested changing the February date to April, and the district said it could work with that, but no consensus was reached as to which tentative agreement would be submitted to the district board.

On December 18, the district board met to review the tentative agreements. Contrary to the ALJ, who found that the district negotiating team presented only TA2 to the board, PERB found that the team presented all three proposals and that the board preferred TA2. After the board voted to adopt the agreement, it announced that union would have to ratify the proposal before it could be implemented. If the union chose not to accept the proposal, the district recognized its obligation to return to the bargaining table.

Union negotiators recommended that its members ratify TA2 because it believed it had no choice if it wanted to have the benefits package in place by January 1. Union members ratified TA2 the following day.

In March, the legislature approved a budget that avoided drastic cuts in education funding by deferring a large portion of the cuts to the 2003-04 fiscal year. As a result, rather than the anticipated \$834,000 in mid-year cuts, the district found it actually would lose \$200,000.

When the parties met, the union insisted that the district fund the salary increase before it would discuss any cuts in negotiable items. District negotiators replied that, while it could fund a raise in the current year, the future of education financing was too uncertain to implement a raise and still maintain the mandatory 3 percent reserve over the next two years. This was the first time the district mentioned the need to make a three-year budget projection.

At an April meeting, district negotiators proposed an off-schedule salary increase of less than 1.759 percent. The union countered with a 1.759 percent off-schedule payment or, alternatively, a 1.2 percent on-schedule increase. The district rejected these proposals.

The union filed its unfair practice charge in June, insisting that because the originally proposed education cuts never came to fruition, the district was in no worse a position than when it submitted the first Interim Report for 2002-03 in December 2002, which included the 1.759 percent salary increase. The union argued that the district always had the ability to implement the increase but manipulated its budget to reflect otherwise.

The ALJ found the district failed to negotiate in good faith by engaging in surface bargaining when it unilaterally adopted TA2 without the union's agreement, without the union's knowledge that it would be presented to the district board, and without an opportunity to comment on the district's action or negotiate for another position. The ALJ also found the district breached its duty to bargain in good faith when it refused to implement a salary increase despite available funds and withdrew an agreement to grant a one-time off-schedule payment.

To determine surface bargaining, PERB analyzed the totality of its conduct. One factor that tends to prove that a

party engaged in surface bargaining is to renege on tentative agreements the parties have made.

The ALJ found that the district engaged in surface bargaining when it abandoned TA1 and approved TA2, knowing it was unacceptable to the union. Further, the ALJ agreed with the union's contention that the district never considered TA3 before voting to adopt TA2.

PERB disagreed with the ALJ's findings. The board explained that the district was not required to ratify TA1 because of the proposed unprecedented and severe mid-year cuts in education funding. A good faith rejection of a tentative agreement revives the duty to bargain, and the board found the district did so when it considered the union-proposed TA3 before approving TA2.

The board rejected the ALJ's reliance on *Placerville USD* (1978) No. 69, to find that the district's approval of TA2 was an unlawful modification of the parties' tentative agreement. Here, unlike in *Placerville USD*, the district's decision lacked finality. The board cited the district's communication to the union that TA2 would not be implemented until the union ratified it. The board viewed the district's approval of TA2 as a counterproposal the union was free to accept or reject.

PERB also rejected the ALJ's finding that the district's reliance on a three-year budget projection to deny a salary increase, and the withdrawal of an agreement to grant a one-time off-schedule payment, evidenced a failure to bargain in good faith. The union insisted that because the proposed mid-year cuts were not as severe as originally anticipated, the district was obligated under the terms of TA2 to implement the originally negotiated salary increase. However, the board agreed with the district that the agreement merely required the parties to "collaboratively work together" to seek agreement on a salary increase. The language of the agreement did not mandate that a salary increase be implemented without further negotiations if sufficient funds were available. Additionally, there was evidence that the parties never actually reached agreement on a salary increase. "In essence," PERB explained, "the parties agreed to continue negotiations over salary and no agreement was reached before TCEA filed its charge."

The board also rejected the ALJ's finding that the district reneged on a tentative agreement to grant a one-time off-schedule payment. It found the record did not support a

determination that the parties reached agreement on such a bonus.

Charge dismissed as untimely, beyond PERB's statutory jurisdiction: Los Angeles City & County School Employees Union, Loc. 99.

(*Grove v. Los Angeles City and County School Employees Union*, Loc. 99, No. 1973, 8-26-08; 7 pp. dec. By Member Rystrom, with Members Wesley and Dowdin Calvillo.)

Holding: The charging party's unfair practice charge was untimely and raised a constitutional claim outside of PERB's jurisdiction.

Case summary: The charging party is a bus driver employed by the Los Angeles USD and a member of a bargaining unit represented by the union.

In January 2007, he advised the union of his intent to resign his membership and requested a deduction in his union dues to the amount chargeable under the First Amendment. He wrote another letter in April, complaining that his union dues had not been reduced. On June 13, 2007, the union denied his request for a dues reduction because it was not made during the window period specified in the collective bargaining agreement. The charging party sent a third letter in August, in which he acknowledged the union's refusal to affect the requested dues reduction. He renewed his previous request for an immediate reduction.

The charging party filed an unfair practice charge on February 13, 2008. He alleged that by failing to honor his dues deduction request following his resignation, the union violated EERA and his constitutional right to resign from union membership at any time. PERB agreed with the board agent's dismissal of the charge as untimely. An unfair practice charge must be filed within six months of the unlawful conduct or discovery of the alleged unlawful conduct. Here, the board determined that the union's letter dated June 13, 2007, notified the charging party that his dues would not be reduced. The charging party acknowledged receipt of that letter in his response dated August 10. Accordingly, the board concluded that the statute of limitations began to run on June 13, the date the charging party knew or should have known that the union would not reduce his dues.

Citing the continuing violation doctrine, the charging party alleged that the statute of limitations was renewed every time he received a paycheck with the full union dues deducted. The board explained that the continuing violation doctrine requires an employee to show an independent violation within the limitation period and that the nature of the respondent's actions changed. Here, PERB found, the charging party failed to provide evidence or legal authority to support his claim that the subsequent deductions constituted "changed offenses."

PERB also agreed with the B.A. that it lacked the jurisdiction to decide the alleged First Amendment challenge to the union's actions.

No duty to reopen bargaining after mutual mistake: Berkeley USD.

(*Berkeley Federation of Teachers v. Berkeley Unified School Dist.*, No. 1976, 9-9-08; 10 pp. dec. By Member Dowdin Calvillo, with Members McKeag and Rystrom.)

Holding: A party's entitlement to rescind a contract provision based on mutual mistake of fact does not create a duty to bargain over a replacement provision.

Case summary: During negotiations for a collective bargaining agreement in 2005, the district told the federation that it was *legally prohibited* from using parcel tax revenue to fund its mandated reserve. The reserve would have to be funded entirely from unrestricted funds, thus reducing the amount available for employee wages and benefits. According to the federation, the district's statements induced the federation to agree to a less-favorable provision.

After negotiations ended, the Alameda County Office of Education approved the district's 2006 and 2007 budgets, even though it used parcel tax revenue to partially fund the reserve. In November or December 2006, the federation discovered that the district *could* legally use parcel tax revenue to fund the reserve.

On January 9, 2007, the federation informed the district that the assertion that the district could not use parcel tax revenue to fund the reserve was either "a miscommunication mistake" or a "knowing and deliberate inaccuracy." The federation demanded to reopen negotiations over the previously negotiated provision because it had been agreed to "under false pretenses and we now know the truth." Two weeks later,

the district refused the federation's bargaining demand. On February 2, the federation filed its unfair practice charge alleging a refusal to bargain and seeking an order compelling the district to do so.

The federation appealed the board agent's dismissal of the charge. It argued that because the contract provision was the product of mutual mistake of fact, the provision must be rescinded and the parties therefore have an obligation to meet and confer over a replacement provision. The federation contended that the district's refusal to meet and confer violates EERA. On appeal, the district contended that the federation's charge was untimely and, even if there was a failure to bargain in good faith, the charge should be dismissed.

PERB rejected the district's argument that the federation's charge was untimely. The board noted that the six-month time limit begins when the party knows or should know that an alleged violation has occurred. While the federation learned of the mutual mistake longer than six months before it filed the charge, a mutual mistake in itself is not a violation. Rather, the refusal to meet and confer over a negotiable issue violates EERA. Thus, the six-month statute of limitations began to run when the district refused to reopen negotiations. Since the federation filed its charge less than one month from that date, the charge was timely filed.

PERB and NLRB cases establish that a party's entitlement to rescind a contract provision based on a mistake of fact has limited significance. In *San Diego Unified School Dist.* (2007) No. 1883, 813 CPER 94, the board held that rescission based on unilateral mistake of fact could provide a defense to a bad faith bargaining charge. In that case, however, PERB found the employer's failure to exercise diligence during negotiations prevented it from establishing a mistake of fact defense.

The NLRB has recognized rescission based on a unilateral mistake as a defense when a party refuses to execute a collective bargaining agreement. Neither PERB nor the NLRB has recognized rescission based on mutual mistake of fact as a defense to an unfair practice charge. The board

declined to extend the application of rescission based on mutual mistake of fact and held that a party's entitlement to rescind a contract provision based on mutual mistake of fact does not create a duty to bargain over a replacement provision.

The board cited strong policy reasons to support its holding. "Allowing a party to use rescission based on mutual mistake as a means to re-open the CBA would undermine the integrity and stability of the bargaining process by putting the CBA in a perpetual state of uncertainty."

Such a rule would lead to careless bargaining. PERB said the bargaining table is the proper place to resolve mutual mistakes that occur in the bargaining process. The board said the courts are a last resort if one party is unwilling to surrender a windfall received through mutual mistake.

Lack of nexus defeats retaliation charge: San Mateo County CCD.

(*Collins v. San Mateo County Community College Dist.*, No. 1980, 10-17-08; 12 pp. By Member Dowdin Calvillo, with Chair Neuwald and Member McKeag.)

Holding: The factual allegations in the charge do not establish that the charging party suffered retaliation because he engaged in protected activity.

Case summary: A board agent dismissed the charging party's unfair practice charge alleging that the district retaliated against him for engaging in protected activity. The B.A. found that the charge failed to allege any protected activity within the six months prior to the filing of the charge. The B.A. also found that the charge failed to allege a nexus between the protected activity and the alleged retaliation.

On appeal, the board first declined to consider a new allegation and supporting evidence not presented to the board agent.

The board then found that representation of the charging party by a union official on two occasions sufficiently alleged that he had engaged in protected activity. The district had knowledge of this activity. The board also found that the charging party suffered adverse action when the district placed him on administrative leave, sent him for

a fitness-for-duty examination, and cancelled a psychology class he had been teaching.

However, PERB found insufficient factual allegations to demonstrate a nexus between the charging party's union representation and his placement on administrative leave. No facts alleged that the charging party was treated differently from other similarly situated employees or that the district departed from established procedures. Nor is there an allegation that the district gave the charging party inconsistent or vague reasons for placing him on leave or sending him to a fitness-for-duty exam. There is no allegation that the district harbored animus toward the union.

For the same reasons, the board found no connection between the charging party's protected activity and the district's decision to cancel the psychology class. The board also noted that the protected activity alleged in connection to the class cancellation occurred after the adverse action.

Complaint to issue on DFR claim: SEIU, Loc. 221.

(*Meredith v. SEIU*, Loc. 221, No. 1982, 10-24-08; 12 pp. dec. By Member Dowdin Calvillo, with Chair Neuwald and Member Wesley.)

Holding: The charge sufficiently alleged a pattern of conduct which demonstrated that the union arbitrarily failed to represent the charging party, thus establishing a prima facie case of a breach of the duty of fair representation.

Case summary: The charging party, a school custodian, filed an unfair practice charge against SEIU alleging that it violated the collective bargaining agreement with the district, failed to represent him regarding a demotion, caused the district to violate EERA, and failed to meet and confer with the district in good faith. A board agent dismissed the entire charge. PERB affirmed the B.A.'s dismissal with the exception of the allegations regarding the duty of fair representation, which it remanded to the general counsel for issuance of a complaint.

The board explained that because it lacked jurisdiction to enforce the agreement between the union and the district, it upheld the B.A.'s dismissal of the allegation that SEIU violated the collective bargaining agreement. Further,

the board affirmed the B.A.'s conclusion that the charging party lacked standing to charge a failure to meet and confer. However, PERB found the allegations sufficient to establish a prima facie case of a breach of the duty of fair representation.

During a meeting between the charging party and his supervisor, he requested union representation. At the time, an SEIU representative was on campus to meet with employees under the charging party's supervision. Immediately after this meeting, the charging party was asked to meet with the school principal. The SEIU representative attended the meeting but did so on behalf of employees who had filed grievances against the charging party. Thus, PERB explained, the charging party was afforded no union representation at either meeting despite his requests.

As a result of poor performance evaluations, the charging party was rejected on probation and not promoted to head custodian. The charging party twice contacted the union about filing a grievance over this decision. His first meeting with a union representative was interrupted by the chapter president, who argued with the representative over whether he had a right to meet with the charging party. The chapter president instructed the representative to keep his meeting brief. Two months later, the union assigned a new representative to the charging party's grievances. After one meeting, the representative stopped communicating with the charging party.

Viewed as a whole, PERB found that SEIU made no effort to represent the charging party regarding his rejection on probation, and thus failed to make an honest and reasonable determination about the merits of his case. The board concluded that the charge alleged a pattern of conduct by the union which was arbitrary. This is sufficient to establish a prima facie case.

The board affirmed the B.A.'s dismissal of the allegation that SEIU caused the district to violate EERA when the union solicited grievances against him and failed to represent him. PERB explained that the charging party first must show the district committed an unfair practice. While the charging party engaged in protected activity by requesting

union representation, the charge failed to establish that the district rejected him on probation as a result of that activity. And, PERB noted, even if his rejection was retaliatory, the charging party failed to show that the union-solicited grievances against him caused or attempted to cause the district to retaliate against him because of his protected activities. Under PERB precedent, the charging party must allege that the union acted affirmatively to encourage or assist the employer in discrimination or retaliation against the charging party. Mere allegations that the union breached its duty of fair representation are insufficient.

HEERA Cases

Unfair Practice Rulings

Charge alleging duty of fair representation breach not timely filed: AFSCME.

(*Owens v. American Federation of State, County and Municipal Employees*, No. 1974-H, 8-29-08; 5 pp. By Chair Neuwald, with Members McKeag and Rystrom.)

Holding: The unfair practice charge alleging that AFSCME breached its duty of fair representation was filed more than six months after the charging party knew or should have known that further assistance from the union was unlikely.

Case summary: The charging party, a custodian at the Lawrence Berkeley National Laboratory, received a five-day suspension without pay. She requested that AFSCME file a grievance on her behalf, and it did so on December 22, 2005.

The laboratory determined that the discipline was warranted on January 11, 2006, and an AFSCME representative telephoned the charging party the next day to inform her that a grievance would not be pursued. Four days later, on January 16, the same representative sent a letter reiterating that a grievance would not go forward. The charging party filed an unfair practice charge on August 25, 2006. In a proposed decision, a PERB administrative law judge dismissed the charge as untimely.

On appeal, the charging party asserted that there was no evidence that she had received notice that AFSCME did not intend to pursue her grievance. The board deferred to the ALJ's credibility finding that, at the latest, the charging party was notified of the union's position in the letter sent on January 16. As a result, the six-month statute of limitations began to run at that time and expired in July 2006. Therefore, the unfair practice charge, date stamped by the board on August 25, 2006, was untimely.

The board did not consider the charging party's contention that the charge was filed on June 19, 2006, as evidenced by proof of service reflecting that date. PERB Reg. 32635(b) precludes a charging party from raising new supporting evidence on appeal absent good cause. The charging party failed to introduce the proof of service during the hearing before the ALJ and presented no good cause for failing to do so.

Request to withdraw appeal granted: CUE.

(*Coalition of University Employees v. Regents of the University of California*, No. 1981-H, 10-17-08; 2 pp. dec. By Member McKeag, with Members Wesley and Dowdin Calvillo.)

Holding: The charging party's request to withdraw its appeal is granted.

Case summary: CUE appealed a board agent's partial dismissal of its unfair practice charge alleging the university violated HEERA when it unilaterally altered the parties' collective bargaining agreement by replacing bargaining unit positions with non-bargaining unit positions.

CUE notified the board that the parties resolved the matter and requested withdrawal of its appeal. The request was granted.

MMBA Cases

Unfair Practice Rulings

City retaliated against union president; union failed to bargain in good faith: City of Torrance.

(*Torrance Municipal Employees, AFSCME Loc. 1117 v. City of Torrance*, No. 1971-M, 8-21-08; 32 pp. dec. By Member Dowdin Calvillo, with Chair Neuwald and Member McKeag.)

Holding: The city retaliated against the local union president by requesting reimbursement for released time in excess of a prior agreement. The union refused to bargain in good faith over the amount of presidential released time.

Case summary: AFSCME filed an unfair practice charge alleging the city retaliated against its local president, Jeannie Moorman, by reducing her union business released time from five to three days a week and demanding that she reimburse the city for excessive released time over a six-month period. The city filed an unfair practice charge alleging AFSCME refused to meet and confer over the city's proposal to reduce presidential released time to one day a week.

According to the 2002 agreement, the AFSCME president was provided with three days of released time — Tuesday, Wednesday, and Friday — for union business. Moorman, who worked at the city library, had difficulty completing work due to the time spent on union business. A budget modification approved by a city council committee shifted the cost of Moorman's released time to the city manager's office. The city librarian told Moorman that she would be released to work on union business *full time*. Thereafter, Moorman worked on union business five days a week, marking her timesheet accordingly.

The following month, the city council unanimously adopted a budget that included the new library staffing. Soon after, both the city librarian and Moorman's immediate supervisor informed the entire library staff that Moorman would be leaving the library to work full time on union business.

During the subsequent mayoral election, AFSCME and Moorman, in her capacity as president, actively supported the opponent of Frank Scotto, before Scotto was elected mayor.

After the election, Moorman was asked to provide her payroll records for the preceding six months. Two days later, the city manager told Moorman she was required to report

to the library on Mondays and Fridays. Moorman believed the reduction in presidential released time took place because she "backed the wrong candidate" in the election.

When Moorman met with Mayor Scotto the following week, he told her that he could not work with AFSCME as long as she was president.

Moorman filed a grievance over the city's order that she report to work on Mondays and Fridays. The assistant city manager denied the grievance and asserted that the order to report to work merely enforced the 2002 agreement which provided for presidential releases on Tuesday, Wednesday, and Thursday. The assistant city manager told Moorman that any Monday or Friday that she spent on union business was unauthorized time away from work and a violation of the agreement. AFSCME appealed the denial to the principal librarian.

One day after AFSCME's appeal, Moorman was informed that she had taken 19.9 days of unauthorized released time. Moorman was asked whether she preferred to have the time charged to her vacation leave or to repay the city. AFSCME claimed the change in presidential released time was a retaliatory unilateral change, and it demanded to meet and confer on the subject of presidential released time. The city agreed to meet and confer and postpone the demand for reimbursement pending resolution of the issue. Days later, AFSCME filed its unfair practice charge.

When the union and the city met to discuss the released time issue, the city proposed to rescind the 2002 agreement and amend the MOU to provide for a one-day-a-week presidential released time policy. AFSCME contended that the 2002 agreement was not subject to renegotiation and that it only was willing to discuss the city's order that Moorman return to work on Mondays and Fridays. The city filed its own unfair practice charge alleging a failure to negotiate in good faith and ordered Moorman to return to work Mondays and Fridays as directed by the 2002 agreement.

A PERB administrative law judge found that the city retaliated against Moorman for engaging in protected activities, including campaigning against Scotto, when it reduced

her released time and demanded reimbursement for allegedly unauthorized time off. The ALJ also concluded that AFSCME failed to meet and confer by limiting the scope of bargaining to the reduction in released time to three days. Both parties filed exceptions to the ALJ's proposed decision.

PERB rejected the city's assertion that the MMBA does not establish a claim for retaliation because neither MMBA Sec. 3506 nor PERB Reg. 32603(a) uses the word "reprisal" in listing conduct that constitutes an unfair practice. The board relied on past decisions in which it held that reprisals are a prohibited form of discrimination.

The board also turned aside the city's contention that Moorman's political activity was not protected because it did not pertain to employer-employee relations. Moorman's actions were taken in the context of an effort by AFSCME to oppose Scotto's candidacy for mayor because he was perceived as less favorable to unions. The board viewed this as a matter of employer-employee relations "because the election of that candidate could have a detrimental effect on those relations and, in turn, on the working conditions of AFSCME's members."

PERB found the city took no adverse action when it ordered Moorman to return to work at the library on Mondays and Fridays per the 2002 agreement. The board explained that it is not an unfair practice for an employer to enforce a clear contractual right, even if it has not done so in the past.

The board agreed with the ALJ that the demand that Moorman reimburse the city for 19.9 days of released time was an adverse action because it would result in loss of pay or vacation leave. Further, PERB found the initiation of the investigation into whether Moorman took unauthorized released time was an adverse action.

The board determined that the adverse action was taken close in time to her protected activity. It agreed with the union and the ALJ that there had been a cursory investigation into whether Moorman had taken unauthorized and excessive released time. This is a factor that tends to show improper motive. PERB criticized the city's contention

that it was Moorman's obligation to inform the city that she would be on full released time. The board noted that Moorman attempted to explain her understanding of her released time privileges through emails that alluded to her full-time work on union business. PERB found that the city manager's and mayor's inaction after receipt of the explanations further supported an inference of retaliation.

The board found Scotto's expressions of union animus supported an inference of retaliation. Both as councilman and mayor, Scotto stated his reluctance to work with Moorman, as union president, and with the union itself. The city insisted that because the mayor has only one vote on the seven-member city council, his actions cannot bind the city. But the board concluded that Scotto's statements *can* be imputed to the city for purposes of determining MMBA violations. While neither the ALJ nor the board found any direct evidence of Scotto's involvement in the adverse action, both found a strong inference that the city manager's actions were taken at Scotto's direction or at least tacitly approved by him.

The board explained that because there were both valid and invalid motivations for the adverse action against Moorman, the city must establish that it would have taken the action even if she had not engaged in protected activity. PERB acknowledged the city's right to enforce the 2002 agreement, but could not conclude that the city would have taken action had Moorman not engaged in protected activity.

Next, PERB addressed the allegation that the city interfered with Moorman's statutory rights. This claim does not require there to have been an unlawful motive. Rather, a charging party must show that the employee engaged in protected activity, the employer engaged in conduct that tends to interfere with the exercise of the activities, and there was no legitimate business reason for the employer's conduct. PERB agreed that the city's enforcement of the 2002 agreement was a legitimate business reason for demanding Moorman's return to work on Mondays and Fridays. However, the board held that the city could not threaten her with discipline and demand reimbursement of released

time based on its cursory investigation. In light of Scotto's comments, the board viewed the demand for reimbursement as an effort to force Moorman to step down, rather than to enforce the agreement. Thus, the board concluded that the city failed to establish a legitimate business reason to justify conduct that tended to interfere with Moorman's rights under the MMBA.

PERB also examined whether AFSCME violated MMBA Sec. 3505 and PERB Reg. 32603(c) by refusing to bargain over the city's proposed reduction in presidential released time to one day a week. Because released time is a matter within the scope of representation, a refusal to bargain over it is a per se violation. While the board noted that AFSCME did not absolutely refuse to discuss the subject of presidential released time, the union refused to entertain the city's proposal. PERB also rejected the union's assertion that it had engaged in "hard bargaining," which can occur only once the parties have begun bargaining.

AFSCME contended that the city waived its right to bargain over presidential released time when it entered into the 2002 agreement. The board noted that the 2002 agreement was the product of negotiations between the parties, but was an atypical agreement because it had no fixed term. Because of this, PERB reasoned, either the agreement was never subject to renegotiation, or it was subject to renegotiation at any time. The board considered the first alternative to be "antithetical to the collective bargaining framework established by MMBA." AFSCME did not assert that the terms of the 2002 agreements were off limits to negotiations in perpetuity. Rather, it argued that its terms could be negotiated only in anticipation of a new agreement. Thus there was no duty to negotiate the terms of the 2002 agreement during the term of the parties' 2005-07 MOU. The board noted that as the MOU made no reference to the 2002 agreement, it was not part of the MOU. Thus, PERB determined that the 2002 agreement was subject to renegotiation at any time and AFSCME violated its duty to meet and confer in good faith when it refused to bargain.

PERB rejected the ALJ's proposed remedy to restore Moorman's presidential released time to five days a week.

Rather, the board ordered the city to cease and desist from any efforts to discipline Moorman, including its demand for reimbursement.

The board adopted the ALJ's proposed order requiring AFSCME to meet and confer in good faith over the issue of presidential released time at the city's request.

Protected activity and adverse action alleged, but not nexus: County of Merced.

(*American Federation of State, County and Municipal Employees, Loc. 2703 v. County of Merced*, No. 1975-M, 9-5-08; 5 pp. + 11 pp. R.A. dec. By Member Dowdin Calvillo, with Chair Neuwald, and Members McKeag and Wesley.)

Holding: The allegations support the finding that the employee engaged in protected activity and suffered an adverse action, but the necessary nexus between the two is not alleged in the charge.

Case summary: AFSCME charged that the county engaged in a series of acts of retaliation against an employee because of his protected activities. The board agent concluded that the employee had not engaged in protected activity, had not suffered an adverse action, and/or had failed to demonstrate that the adverse action was motivated by his protected activity.

Reviewing the B.A.'s dismissal, the board affirmed the conclusion that neither the employee's union membership nor the assertion that AFSCME had represented him "during various disputes with the county" was sufficient to establish protected activity. However, the claim that the county downgraded a suspension to a written warning after the employee and AFSCME questioned the level of discipline was adequate to allege protected conduct.

The board disagreed with the B.A.'s interpretation of *State of California (Dept. of Health Services)* (1999) Dec. No. 1357-S, 139 CPER 60, which held that notice from an employer that it would seek adverse action is not itself an adverse action. That case does not apply to all notices of intent to impose discipline, said the board, but only when the employer's notice does not indicate that it has made a firm decision on the matter. The board cited case law

demonstrating that unequivocal notice of the employer's intent to impose discipline is an adverse action.

Here, the board found the county's written notice to the employee that it intended to begin the termination process if he did not return to work was not unequivocal notice of intent to terminate and, therefore, did not constitute adverse action. However, the board found that the county's directive that the employee vacate his county-provided residence eliminated a work-related benefit and was an adverse action.

Nonetheless, the board affirmed the B.A.'s conclusion that the charge failed to establish that the county took adverse action against the employee because of his protected activity.

Alleged contract violation not unilateral change: City of Long Beach.

(*Montoya v. City of Long Beach*, No. 1977-M, 9-16-08; 15 pp. dec. By Member Dowdin Calvillo, with Members McKeag and Rystrom.)

Holding: The charge was as untimely and failed to state a prima face case of either unilateral change or retaliation.

Case summary: The charging party worked for the city as a business systems specialist. The collective bargaining agreement provided that employees who use their personal vehicle to travel between job sites will be reimbursed at a flat monthly rate plus mileage. However, the city's past practice was to reimburse employees only for mileage over 300 miles a month.

In July 2007, the union filed a grievance on the charging party's behalf claiming that he was entitled to reimbursement at the flat monthly rate plus mileage. The city agreed to pay the charging party the flat monthly rate plus mileage in excess of 270 miles a month. The grievance proceeded to arbitration but was dismissed based on the city's past practice of paying the flat monthly rate only when the employee traveled at least 300 miles in a month.

Around the same time, the charging party filed a second grievance claiming he was discriminated against when

the city hired less-qualified candidates to fill positions for which he applied.

On July 12, the charging party was assigned to work at the fire department headquarters, which he considered to be a demotion. Two months later, the fire department ended his assignment.

In September, the charging party filed a complaint with the EEOC alleging discrimination. One month later, he received a counseling memorandum, which was placed in his personnel file. It addressed his failure to provide quality customer service and warned that failure to improve might result in disciplinary action.

The charging party filed his unfair practice charge on January 24, 2008, alleging the city violated the MMBA by refusing to reimburse him for mileage pursuant to the MOU. On April 3, he amended the charge to allege that the city demoted him and issued the counseling memorandum in retaliation for filing grievances and a complaint with the EEOC.

A board agent dismissed the unilateral change allegation because it failed to establish that the city had an obligation to meet and confer with the charging party or that the alleged MOU violation had an impact on the terms and conditions of employment. The B.A. agreed that the charging party engaged in protected activity when he filed grievances with the city, but not when he filed a complaint with the EEOC. Further, the alleged demotion to the fire headquarters occurred more than six months before the charge was filed. Although the counseling memorandum was issued within the six-month statute of limitations, the board agent found no nexus between the charging party's protected activity and the adverse action.

On appeal, the city urged PERB to dismiss the matter because the charging party had not properly served the city with the appeal or his supplemental filing. The board explained that service had been defective, but noted that the city had received notice of the filings and granted an extension to respond. Thus, because the city was not prejudiced by the defective service, the board excused the failure to comply with PERB regulations.

The board agreed with the B.A.'s dismissal of the allegation citing a violation of the reimbursement provision of the MOU. PERB does not have jurisdiction to remedy a violation of a collective bargaining agreement unless the violation also constitutes an unlawful unilateral change. Here, the city's failure to reimburse the charging party for mileage as provided by the MOU was an isolated contract breach. The charging party lacked standing to allege a unilateral change because the city was under no obligation to meet and confer with him.

PERB agreed that the charging party engaged in protected activity when he filed his grievance and that, while the alleged demotion occurred more than six months before the charge was filed, the counseling memorandum filed within the limitations period was an adverse action. Nevertheless, the board found an insufficient nexus between the grievance and the counseling memo. First, the memo was issued 10 months after the charging party filed his grievance. And, the charging party failed to allege facts to show that he was treated differently than any other employee or that the memo departed from established procedures.

Administrative Appeal Rulings

Request for oral argument must accompany statement of exceptions: County of Riverside.

(*Brewington v. County of Riverside*, No. Ad-376-M, 8-29-08; 3 pp. By Chair Neuwald, with Members McKeag and Dowdin Calvillo.)

Holding: The county's request for oral argument was untimely filed.

Case summary: An administrative law judge issued a proposed decision on April 25, 2008. The county was granted an extension of time to file exceptions and did so on June 5. The county's request for oral argument was not filed with its statement of exceptions; it was filed separately on July 17. The board's appeals assistant denied the request as untimely.

PERB Reg. 32315 demands that a party seeking to present oral argument before the board in support of its

exceptions to a proposed decision file a written request "with the statement of exceptions." The county acknowledged it had not complied with this regulation, but argued that its request was timely because the county's current attorneys were not the counsel of record during the PERB hearing. The board observed that the counsel seeking oral argument are the same ones granted an extension of time to prepare and file exceptions to the ALJ's proposed decision. Accordingly, the board denied the county's appeal of the administrative determination.

Trial Court Act Cases

Unfair Practice Rulings

Discipline of union president not discrimination based on protected activity: Los Angeles County Superior Court.

(*American Federation of State, County and Municipal Employees, Loc. 575 v. Los Angeles County Superior Court*, No. 1979-C, 10-7-08; 24 pp. By Member Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: Although one of the union president's email messages and her use of a courtroom for a union meeting were protected activities, the court established that it would have disciplined the employee regardless of her unprotected activities.

Case summary: A court employee and union president was suspended for violating the court's email and courtroom reservation policies. AFSCME alleged in its unfair practice charge that the court applied its policies in a manner that discriminates on the basis of union activity. A PERB administrative law judge agreed, finding that the union president was disciplined for protected activity and in violation of a presumptive right of access to the court's internal means of communication under the Trial Court Act. The court appealed the ALJ's proposed decision.

Leaving aside whether there is a statutory right of access to electronic communication systems under the Trial Court Act, the board focused on the court's local rules

adopted pursuant to Sec. 71636(a) to determine whether the court had enforced its email policy and room reservation policy in a discriminatory manner.

Union emails that violate an employer's lawful restriction on non-business use are not protected activity, the board ruled. To determine whether the emails for which the union president was disciplined were protected, the board set out a two-part test. It focused first on establishing the extent of permissible non-business email use under the court's policy, which prohibits use of the email system "in a manner or to a degree that is disruptive or detrimental to the Court or to the employee's performance."

Witnesses testified that the policy is primarily aimed at preventing employees from sending broadcast emails to large groups. After reviewing the emails sent by four employees, PERB concluded that the court allows employees to send non-business emails to small groups of employees at a single location, but not to all staff at a single location or to all court staff throughout the county court system.

Measured against this definition of the policy, the board found that three of the union president's emails that were sent to all bargaining unit members were prohibited by the court's policy and not protected activity. A fourth email, sent to a small group of clerks at one courthouse, was within the range of permissible non-business email and, therefore, was protected activity.

Because the written notice of intent to suspend the union president made reference to this email, the board reasoned that the court must have considered this email message to be a violation of its policy *because of its union content*. This is evidence of discriminatory intent, said PERB, and is sufficient to establish a nexus between the union president's protected activity and her suspension. Therefore, concluded PERB, AFSCME established a prima facie case of discrimination.

The board rejected AFSCME's assertion that, once the court allowed its executive officer to send a broadcast email about contract negotiations, it could not prohibit the same conduct by union members. The court is not required to grant AFSCME an exemption from its email use policy,

especially where the union had ample alternative means of communicating with court employees.

The complaint also alleged that the court had discriminated against the union president by threatening to suspend her for failing to make a written request to use a courtroom for a union meeting. Finding that the court allowed employees to reserve courtrooms for union meetings in the courthouse where they worked without submitting a written request, PERB found the union president did not violate the court's policy and had engaged in protected activity. The record includes written confirmation that the court intended to discipline the union president because she sought to reserve the courtroom for union business. The board found this admission sufficient to establish the requisite nexus between the suspension and protected activity. Accordingly, AFSCME established a prima facie case of discrimination.

However, because the union president's suspension was based on protected and unprotected activity, the board applied the "but for" test to determine whether the court would have taken the adverse action if the union president had not engaged in protected activity. PERB concluded that the employee would have been suspended for unauthorized use of the email system, even without the courtroom policy violation, and therefore was not disciplined for her protected activity.

Activity Reports

ALJ Proposed Decisions

Sacramento Regional Office — Final Decisions

AFSCME Council 57, Loc.146 v. Sacramento Housing and Redevelopment Agency, Case SA-CE-476-M. ALJ Shawn P. Cloughesy. (Issued 7-31-08; final 8-26-08; HO-U-943-M.) The union alleged a unilateral change of policy when the agency reassigned various inspections from specialist to generalist classifications without prior notice and meeting and conferring over the decision and the effects of the change. The ALJ found a unilateral change in assigning the inspection work to the maintenance worker, but not to the maintenance technician. The inspection duties were “reasonably comprehended” with the existing duties of the maintenance technician, which required an advanced level of skill. The maintenance worker duties encompassed general repair and installation work.

Coalition of University Employees v. Regents of the University of California (Davis), Case SA-CE-265-H. ALJ Christine A. Bologna. (Issued 8-20-08; final 9-16-08; HO-U-944-H.) The employee received a letter of expectations and a “needs improvement” rating in an annual performance evaluation. Her supervisor also told her that her reclassification to a higher-level position would not be submitted. After the employee said she would file a grievance, the supervisor allegedly offered to reevaluate and reclassify her position if the employee would not file the grievance. The ALJ did not credit the testimony of either the employee or supervisor. The complaint was dismissed as the charging party did not meet her burden of proof.

McKnight v. Fresno City Employees Assn., Case SA-CO-65-M. ALJ Bernard McMonigle. (Issued 8-22-08; final 9-18-08; HO-U-947-M.) Interference with employee rights was found where the employee organization collected agency fees without sending the non-member a *Hudson* notice. Because the employee organization did not file an answer to the complaint and its lack of participation in the PERB process in a similar case, the ALJ found that the employee organization waived its right to a hearing. Under PERB Reg. 32644, the failure to file an answer is deemed an admission of material facts. Cease and desist was ordered along with a refund of agency fees.

Los Angeles Regional Office — Final Decisions

Rio Teachers Assn. v. Rio School Dist., Case LA-CE-5090-E. ALJ Ann L. Weinman. (Issued 7-28-08; final 8-25-08; HO-U-

942-E.) The duty to provide information was violated where the district failed to provide attendance data for 2004-05, contending it was beset with other problems. A violation also was found where employer accusations were not supported and the union activist was disciplined because of protected activity. The district did not unilaterally change the teacher transfer policy when it applied the contractual language. But it did unilaterally change the policy concerning use of the copier by limiting the number of copies. In the past, the association was able to use the copier without limitations. Interference with association rights was found when teachers were prohibited from bringing balloons with sad faces to back-to-school night.

Lynwood Teachers Assn. v. Lynwood Unified School Dist., Case LA-CE-5113-E. ALJ Ann L. Weinman. (Issued 8-20-08; final 9-16-08; HO-U-945-E.) An unlawful unilateral change in policy was found where the district terminated one health plan and implemented two new ones. The district tried to reinstate the terminated plan, but could not. The new health plans doubled employees’ out-of-pocket costs for medication, x-ray and lab tests, and emergency room visits. This change had a material and significant effect on employees and was within the scope of bargaining. The district was ordered to reinstate the terminated health plan or modify the new plans to provide the same level of benefits.

AFSCME Loc. 127 & San Diego Municipal Employees Assn. v. City of San Diego, Case LA-CE-352-M. ALJ Thomas J. Allen. (Issued 8-22-08; final 9-18-08; HO-U-946-M.) The city failed to bargain in good faith and follow its own impasse procedures regarding local voter-passed propositions concerning retirement benefit increases and contracting out. The city also violated its obligation to bargain over the guidebook implementing the contracting out. The city was ordered to cease and desist, follow impasse procedures, and rescind the guidebook.

Saqib v. Orange County Superior Court, Case LA-CE-14-C. ALJ Philip E. Callis. (Issued 9-24-08; final 10-21-08; HO-U-948-C.) No improper reprisal was found where the employee was released from probation after an investigation found no merit to her allegations of harassment by other employees but found she was improperly promoting gossip. The charging party’s contention that she was the subject of reprisal based on the protected activity of self-representation was rejected.

El Dorado Criminal Attorneys Assn. v. County of El Dorado, Case SA-CE-451-M. ALJ Shawn P. Cloughesy. (Issued 10-17-08; final 11-13-08; HO-U-949-M.) The complaint was dismissed where the county negotiator tentatively agreed to an agreement the board of supervisors rejected and had not authorized their negotiators to accept. MMBA Sec. 3505.1 permits a board to reject a tentative agreement, even if it played an active role in negotiations. The association did not show the board's rejection significantly thwarted the bargaining process.

San Francisco Regional Office — Final Decisions

SEIU Loc. 1021 v. Sonoma County Superior Court, Case SF-CE-8-C. ALJ Philip E. Callis. (Issued 10-17-08; final 11-13-08; HO-U-950-C.) The court's ban on all union buttons and insignia in courtrooms and at public counters violated court employees' right to participate in union activities. The court failed to establish sufficient "special circumstances" to justify the blanket prohibition. The court also made a unilateral change when it imposed the ban without meeting and conferring. The court was ordered to rescind its policy banning buttons, cease and desist, and post notice of the violation. Employees' conduct of posting a union sign on a judge's bench and disrupting court during a demonstration was not protected.

Sacramento Regional Office — Decisions Not Final

Modesto City Employees Assn. v. City of Modesto, Case SA-CE-486-M. ALJ Christine A. Bologna. (Issued 7-14-08; exceptions filed 8-8-08.) In January 2006, a former union president and senior environmental compliance officer with 18 years of service totaled his truck and was suspended for three days. In November 2006, he rear-ended a garbage truck and received notice for a five-day suspension. In a letter dated April 23, 2007, the department director presented settlement offers to the union attorney. The attorney filed a notice of appeal to arbitration. The city insisted on a five-day suspension. The union argued the suspension was increased to five days from a lesser penalty contained in the April 23 letter because an appeal was filed. The ALJ found the letter was not a notice of discipline but merely contained settlement offers; the employer remained free to defend the five-day suspension. No prima facie case of discrimination was established.

California Correctional Peace Officers Assn. v. State of California (Department of Corrections & Rehabilitation), Case SA-CE-1595-S. ALJ Bernard McMonigle. (Issued 10-2-08; exceptions filed 11-10-08.) A long-standing MOU provision required department collection of fair share fees from bargaining unit employees upon request by the union, but the union had not enforced that provision with regard to retired annuitants employed on a temporary basis. Because of a significant increase in the number of retired annuitants, the union requested collection of their fair share fees. The employer refused. PERB issued a complaint alleging a unilateral change in non-collection of the fees. In its answer, the department asserted that retired annuitants are not in the bargaining unit. The union amended the complaint to allege a unilateral change in removing retired annuitants from the unit. The ALJ found that retired annuitants had been in the bargaining unit since the original PERB decision defined the unit. He also found the union had not waived its right under the MOU to collect fair share fees from retired annuitants. The department was ordered to return retired annuitants to bargaining unit and to collect fair share fees.

AFSCME Loc. 2703 v. County of Merced, Case SA-CE-501-M. ALJ Philip E. Callis. (Issued 10-24-08; exceptions due 11-18-08.) The union did not establish a nexus between the exercise of protected activities and the denial of promotion. There was a 14-month delay between the two events. Shifting justifications for management's failure to promote the employee were caused by changed circumstances that required management to leave the position open while another position was reclassified. Management's expressions of irritation at the union did not establish anti-union animus.

San Francisco Regional Office — Decisions Not Final

Regents of the University of California and UPTE, CWA Local 9119 and California Nurses Assn., Case SF-UM-626-H. ALJ Donn Ginoza. (Issued 9-12-08; exceptions filed 11-3-08.) The exclusive representatives petitioned for a unit modification regarding the placement of case managers who oversee treatment of patients admitted to the medical centers. UPTE contended they should be in the health care professional unit; CNA contended they should be in the registered nurses bargaining unit; and the regents argued they should

be statutorily excluded as supervisors. The ALJ found the case managers belonged in the health care professional unit because they provide patient care in an indirect capacity and are distinct from registered nurses who provide direct patient care. There was insufficient evidence that case managers exercise independent judgment in “responsibly directing” other employees. That requires an assessment of personnel skills in the interest of management and accountability for performance deficiencies of subordinates.

SEIU Loc. 1021 v. County of Sonoma, Case SF-CE-509-M. ALJ Donn Ginoza. (Issued 10-10-08; exceptions due 11-26-08.) The county has a long, unwritten practice, pre-dating collective bargaining, of providing medical benefits for retirees. The current MOU between the parties contains a provision that retired employees would receive a health benefit “in the same amount...as it contributes to an active employee.” However, all retirees, including those from the SEIU bargaining unit, have long had their premiums paid in the same amount as unrepresented active managers. Without bargaining, the employer changed the health care premium contributions for managers and retirees. The ALJ found a unilateral failure to bargain. The county’s argument that the decision was not negotiable under the County Retirement Law of 1937 was rejected. Its contention that, by ambiguity in MOU language, SEIU waived bargaining also was found unpersuasive. The ALJ ordered a return to the status quo and a make-whole remedy for retirees even though they are not “employees” under the MMBA.

Los Angeles Regional Office — Decisions Not Final

San Diego Firefighters, Loc. 145, IAFF v. City of San Diego (Office of the City Attorney), Case LA-CE-294-M. ALJ Philip E. Callis. (Issued 8-15-08; exceptions filed 9-29-08.) A city attorney’s posting of documents on his website inviting employees to rescind retirement service credits purchased under the city’s MOU bypassed the union. The attorney was ordered to remove the forms from the website, cease and desist, and post notice of the violation. The attorney’s request that the union suspend its president and its chief negotiator to step down were made without any “threats of reprisal or force or promise of a benefit” and thus were considered forms of employer free speech.

Isenberg v. Los Angeles Unified School Dist., Case LA-CE-5118-E. ALJ Ann L. Weinman. (Issued 9-2-08; exceptions filed 9-15-08.) No violation was found. Twice, the charging party was not selected to fill a technical advisor vacancy by the joint selection committee set up under the MOU. The committee included the principal and the chapter chair. The charging party filed a complaint under the MOU’s dispute resolution procedure after another teacher was selected. The successful applicant, an intern, later was found to be ineligible. The charging party complained to district headquarters, fellow employees, and CSULA about the intern, and wrote to the California Commission on Teacher Credentialing to question the intern’s credential. The principal called the charging party “despicable” for trying to ruin the intern’s career. The joint committee then rejected the charging party a third time. No nexus was found since the charging party had been passed over twice before engaging in protected activity. There was no evidence that the principal controlled the selection panel.

Felicijan & W. Hetman v. Santa Ana Educators Assn., Case LA-CO-1226-E. ALJ Thomas J. Allen. (Issued 9-18-08; exceptions filed 10-28-08.) Two teachers alleged that the employee organization violated its duty of fair representation while they were on a 39-month reemployment list. Both teachers were found not to be “employees” covered by EERA Sec. 3540.1(j). An individual on a reemployment list is not employed pursuant to Ed. Code Sec. 44978.1. The duty of fair representation complaint was dismissed.

SEIU Loc. 1997 v. City of Riverside, Case LA-CE-347-M. ALJ Philip E. Callis. (Issued 9-25-08; exceptions filed 10-20-08.) In 1999, the parties entered into a written agreement that mini-bus drivers were selected to fill a higher time-base (half-time to full-time) by seniority. In subsequent negotiations, the parties agreed that the MOU “will supersede all side letters.” The MOU provided that promotions would include consideration of skills and ability. SEIU was unsuccessful in negotiating the terms of the 1999 agreement for mini-bus drivers into the MOU. After the MOU was adopted, the city filled higher time-base driver positions by merit rather than seniority. The ALJ found that bargaining did not change the policy regarding mini-bus drivers. The city violated its obligation to bargain when it made the change and was ordered to reinstate the former policy.

Laborers International Union, Loc. 777 v. County of Riverside, Case LA-CE-373-M. ALJ Philip E. Callis. (Issued 9-29-08; exceptions filed 10-20-08.) Information technology employees were paid pursuant to a non-negotiated plan with LIUNA calculated using base salary plus “dynamic pay,” which was determined by the number of “hot skills” used on the job. The non-negotiated plan allowed the county to amend the plan subject to meet and confer obligations. The county decided to discontinue the plan and return to the traditional step-and-grade plan for IT employees. SEIU agreed to the change provided the county would consider individual requests for pay increases due to new skills obtained. The county refused. SEIU requested to bargain over this change, and the county declined. The ALJ found a violation of the obligation to bargain over change in wages. He also rejected the defense of waiver as changes to the non-negotiated plan were still subject to meet and confer obligations.

Report of the Office of the General Counsel

Injunctive Relief Cases

Seven requests for injunctive relief were filed between July 1, 2008, and October 31, 2008. One of these requests was granted, on limited grounds; the other six were denied. A request pending at the time of the last report was denied during this reporting period. (A request made during an earlier reporting period remains pending.)

Requests Granted

Regents of the University of California v. AFSCME Loc. 3299, IR No. 553, Case SF-CO-168-H. On July 7, 2008, U.C. filed a request for injunctive relief to enjoin planned strike activity at U.C. medical centers by two bargaining units represented by the union: the service unit and the patient care technical unit. On July 10, 2008, the board granted the request on two limited grounds: (1) the union’s failure to provide U.C. the exact dates of the planned service unit strike should be enjoined; and (2) the identified “essential employees” in the patient care technical unit should be enjoined from honoring the service unit strike during working hours.

Requests Denied

San Bernardino Public Employees Assn. v. City of Rancho Cucamonga, IR No. 552, Case LA-CE-461-M. On June 25, 2008, the union sought to enjoin the city from implementing certain local-rule provisions and to compel the city to recognize the union as the exclusive representative. On July 1, the board denied the request.

California Correctional Peace Officers Assn. v. State of California (Department of Personnel Administration), IR No. 554, Case SA-CE-1621-S. On August 14, 2008, the union filed a request for injunctive relief to maintain the status quo concerning paid union leave so members could attend the union’s annual convention as in past years. On August 20, the board denied the request.

Livingston et al. v. City and County of San Francisco (Juvenile Probation Dept.), IR No. 555, Case SF-CE-581-M. On August 20, 2008, Livingston filed an injunctive to enjoin the city from changing the process of assigning employee work shifts. On August 26, the board denied the request.

Grossmont-Cuyamaca Community College Dist. v. California School Employees Assn. Loc. 720, IR No. 556, Case LA-CO-1357-E. On September 11, 2008, the district sought to compel the union to return to the bargaining table outside of the statutory impasse process. On September 17, the board denied the request.

County of Riverside v. SEIU Loc. 721, IR. No. 557, Case LA-CO-85-M. On September 15, 2008, the county filed a request for injunctive relief to (1) enjoin the union from accessing hospital areas to solicit new membership or distribute flyers; (2) restrict the union’s access rights in the workplace; and (3) permit the county to rescind the union’s access rights entirely, at its discretion, based on demonstrative evidence of interference with patient care. On September 22, the board denied the request.

San Leandro Teachers Assn. v. San Leandro Unified School Dist., IR No. 558, Case SF-CE-2730-E. On October 3, 2008, the union filed a request for injunctive relief to (1) compel the district to permit union-endorsed candidates for the governing board to speak at the union’s meetings on district property; and (2) enjoin the district from requiring that candidates for the governing board must be invited if such meetings are held. On October 8, the board denied the request.

Sonoma County Law Enforcement Assn. v. County of Sonoma, IR. No. 559, Case SF-CE-594-M. On October 14, 2008, the union filed a request for injunctive relief to enjoin the county from implementing a last, best, and final offer before a determination is made by the Court of Appeal in a matter involving the constitutionality of California Code of Civil Procedure Secs. 1299 et seq. On October 21, 2008, the board denied the request.

Requests Pending

Sacramento County Deputy Sheriffs Assn. v. County of Sacramento, IR. No. 526, Case SA-CE-485-M. On August 7, 2007, the union filed a request for injunctive relief alleging the county violated the MMBA by interfering with and dominating the union's ability to conduct business. On August 15, 2007, the board directed its staff to expeditiously process the underlying unfair practice charge and reserved its authority with respect to the injunctive relief request.

Litigation Activity

One new litigation case was opened between July 1, 2008, and October 31, 2008.

PERB; Regents of the University of California v. AFSCME Loc. 3299, San Francisco Superior Court Case No. CGC-08-477392. (No. SF-CO-168-H; IR No. 553.) In July 2008, the court granted PERB's request for a temporary restraining order to enjoin (1) the union's failure to provide U.C. with the exact dates of the service unit strike; and (2) the identified "essential employees" in the patient care technical unit from honoring the service unit's strike during working hours.

General

On October 27, 2008, PERB took action at a public meeting to reduce the daily rate for PERB-appointed factfinding chairpersons to \$100, with a maximum contract duration in each case of three days. This is due to PERB's budget reductions for fiscal year 2008-09. Consistent with state law, the chairpersons are entitled to necessary travel and other expenses. More information concerning the board's decision and PERB's current budget is available at <http://www.perb.ca.gov/news/default.aspx>.