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## LETTER FROM THE EDITOR

Dear *CPER* Readers:

Sometimes, the labor and employment law stars align and we are inundated with such important events that the journal practically writes itself. Well, not really. But this issue of *CPER* is a real page-turner!

Three important cases that transform the law recently were released. First, in the 5-4 *Pyett* decision, the U.S. Supreme Court concluded that a collective bargaining agreement *can* require union members to arbitrate discrimination claims. Of course, the dissent chastised the majority for ignoring its 1974 *Gardner-Denver* ruling and thumbing its nose at the notion of *stare decisis*.

Second, the California Supreme Court in *Spielbauer* announced that public employees can be forced to respond to work-related inquiries as long as they receive a *Lybarger* warning. And third, in *Arbuckle*, the state Supreme Court breathed life back into the Whistleblower Act, keeping the door open to suits for damages.

Also transpiring on our planet, President Obama signed the Lilly Ledbetter Fair Pay Act of 2009, thereby limiting the statute of limitations defense in discrimination actions that involve compensation. As Lilly Ledbetter tried to assert, each paycheck based on a discriminatory compensation decision restarts the limitations period.

Judicial review of PERB's decision not to issue a complaint? Check out the Local Government section. The state controller and the governor go head-to-head over minimum wages, while unions and the governor battle it out over furloughs. U.C. nurses and AFSCME-represented service employees have new contracts. Details in the Higher Education section.

In today's economic climate, the application of seniority during layoffs has become a most important issue in public schools. Two stories in the Public Schools section focus on this critical concern. Of course, you can learn a lot more about the laws affecting both certificated and classified layoffs in our two new pocket guides. Read more — and order a bunch — on our website, <http://cper.berkeley.edu>.

Sincerely,

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

Carol Vendrillo  
Editor

# The Staying Power of Pensions in the Public Sector

*Beth Almeida and Ilana Boivie*



**Beth Almeida** is executive director of the National Institute on Retirement Security, a non-profit research and education organization based in Washington, D.C. She serves on the executive board of the Labor and Employment Relations Association and on the editorial board of the *Labor Studies Journal*. **Ilana Boivie** is the policy analyst for the National Institute on Retirement Security. She conducts research and analysis regarding U.S. retirement issues.

THE RECESSION that has gripped California's economy has created intense pressures on public sector budgets, where officials are forced to meet demands for greater services in the face of declining tax revenues. Pressure on employee compensation, especially retirement benefits, is growing. The falling stock market has damaged the value of assets set aside in state and local pension funds. In turn, this may intensify efforts by taxpayer groups to dismantle traditional "defined benefit" (DB) pension programs for public employees.

But policymakers would be wise to proceed with caution. Employers — whether in the public or private sectors — use retirement plans to create incentives that enhance their human resources objectives. DB pensions are an effective retention tool, and government employers are well-suited to offer them. At the same time, DB pensions are highly valued by public sector employees. Moreover, as other states have learned, replacing a DB plan with a system of individual retirement savings accounts can have unintended consequences.

This article explores why DB plans have "staying power" in the public sector, from the perspective of employers, employees, and taxpayers. It concludes that pensions are an effective way to meet the objectives of all three stakeholder groups, suggesting that the public sector ought not to mimic the private sector trend away from DB pensions.<sup>1</sup>

## ***Employer Motivations to Offer Retirement Benefits***

The principal goal of a retirement plan is simple: to provide benefits that will enable employees to cease working at some point and have a source of support for the remainder of their lives. In the public sector, an adequate retirement income is important because the state, as the provider of social assistance for

those in need, ultimately will be responsible for those who can no longer work and meet basic needs. Thus government employers (and thus, taxpayers) can either “pay now” through an adequate retirement plan for their workers or “pay later” in the form of public assistance. This concern — for the well-being of elderly state and local employees — was a primary factor in the establishment of public retirement systems. During the Great Depression, Social Security was established for most private sector workers. But the act did not cover government employees so many states developed their own retirement systems for their public servants.<sup>2</sup>

But the social goal of providing for retirement security is not the sole factor in designing retirement benefits. Workplace retirement plans are a “fringe benefit” that enhance the overall value of employee compensation. They differ from other fringe benefits in an important respect: they are deferred compensation. Unlike wages, paid vacation, or health care, retirement benefits are not enjoyed until years or even decades later.

Because of their deferred nature, retirement benefits encourage employee commitment to the employer. For instance, where long-tenured workers earn benefits more rapidly the longer they stay on the job, retention can be higher. For example, in the traditional “final pay” DB pension plan, the employee’s retirement benefit is typically determined by a simple formula: the employee’s final salary (usually averaged over the final 3–5 years of employment) is multiplied by their number of years of service, and then by a set factor or “benefit multiplier.” In 2006, the median benefit multiplier for statewide pension plans was 1.85 percent.<sup>3</sup> In that case, an employee with a final average salary of \$50,000 and 30 years of service will receive an annual benefit of  $\$50,000 \times 30 \times 1.85$  percent, or \$27,750.

The longer one stays on the job, the more benefits one earns. In addition, the value of the pension grows with each pay increase. This is the dominant type of plan in the public sector — and 92 percent of public sector workers are covered by a DB plan.<sup>4</sup>

It is expected that employers would opt for this type of plan where retention is most valued, for example, where workers’ productivity increases with their tenure or where recruitment costs are high and the employer wishes to keep turnover rates low. This type of plan also is desirable where workers make human capital investments that are not transferable to other employers or occupations. In those cases, the pension provides

a “compensating differential” to make up for the fact that workers would incur labor market penalties by leaving their job. These descriptions fit jobs that make up the public sector workforce — from teachers, to public safety officers, to judges.

There also are settings where employers do not value retention as highly. These include jobs where productivity does not increase along with tenure, where turnover does not impose a large financial burden, or where employers value retention but have other ways to encourage it (e.g., job ladders, promotions, stock-based compensation). In those instances, an employer may not offer a retirement program, or provide a more “bare-bones” plan, or a plan where benefits steadily accrue over time (with no acceleration toward the end of one’s career). Cash-balance defined benefit plans or defined contribution (DC) plans typically have more steady benefit accrual patterns and recently have become more common in the private sector.

Economists find strong evidence that DB pensions help retain workers. Turnover rates for workers with pensions are about half of those without pensions. One study showed that workers with pension coverage had an average tenure of 8.8 years at a single job; those without pension coverage stayed just 4.1 years.<sup>5</sup> There is a similar link between DB pension coverage and intent to stay with an employer — workers with a DB plan expect to remain on the job 5.5 to 7.5 years longer than workers with no pension.<sup>6</sup> DB pension plans exert significant retention effects, even controlling for worker demographics and employer characteristics.<sup>7</sup> This lower turnover is partially attributed to the “capital losses” incurred on exit — by leaving before retirement, workers

*Because of their  
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retirement benefits  
encourage employee  
commitment to the  
employer.*

sacrifice a portion of the benefits they would have earned had they stayed on the job.<sup>8</sup>

In addition to a retention effect, there appears to be an attraction/selection effect involved. Workers who are more likely to stick with a job are more apt to take one that offers a DB pension plan in the first place. This could be because workers who are looking for a career (rather than just a short-term job) seek out employers who offer pensions. It also could be because employers who offer pensions are more careful in their hiring.

One study focuses on the attraction effect of pensions and considers how employers use retirement plan tools to select workers who are more forward looking. Workers who delay gratification and are less focused on immediate rewards are better, more attractive workers. Traditional DB pension plans, which hold out greater future rewards based on tenure, would be more attractive to these types of employees than to those who are more focused on current rewards.<sup>9</sup>

Another study finds that both DB and DC plans have a positive effect on retention, but that the effect is significantly greater for DB plans.<sup>10</sup> DB pension plans “significantly increase employees’ commitment to their organizations,” while a DC plan has no effect on commitment. Interestingly, these results are strongest among younger workers, who often are assumed to favor DC plans. Employers looking for the best value for their compensation dollar should consider DB pension plans. The enhanced commitment effect of DB plans could translate to the bottom line through enhanced productivity.

DB pensions are an important tool for government employers, who have unique human resources objectives. Unlike private companies that exist to make a profit for shareholders, governments exist to provide essential services — safe streets, clean drinking water, good schools — to citizens and residents. Because government entities are more permanent than private sector firms, long-term attachments between employers and employees may be more feasible and more desirable.

*Workers who delay gratification and are less focused on immediate rewards are better, more attractive workers.*

Employment is much more stable in the public sector. In the private sector, layoffs and quits are three to four times higher than in the public sector.<sup>11</sup> Research shows that public sector employees are more attached to their jobs than private sector workers. The tenure of public sector employees actually has increased over the past 30 years, while tenure of private sector employees has decreased. By 2004, the median job tenure was 7.7 years for public sector employees, compared to 5 years for private sector employees.<sup>12</sup>

DB pensions provide incentives for highly skilled workers like researchers, computer programmers, or lawyers, to stick with public service instead of seeking better-paid positions in the private sector. Moreover, because many occupations in the public sector have few private sector counterparts (e.g. public safety, criminal justice), DB pensions provide incentives for non-transferable human capital investments. Thus, DB pension plans that effectively foster attachments between workers and their jobs are consistent with public sector

employers’ human resources goals.

### *How Public Employees View Pensions*

A major difference between public and private sector workers is the relative importance placed on monetary and non-monetary rewards. Public employees are more likely to place a higher value on intrinsic rewards — feelings that their work is important and a sense of accomplishment — whereas private sector workers prioritize higher pay and fewer hours.<sup>13</sup> These differences in job preferences reveal the inherent nature of public sector organizations that are established to fulfill “complex social functions,” supplying goods and services that cannot be bought and sold in a private market. For that reason, those who take public sector jobs place a higher value on acting for the good of their community, and the internal satisfaction these acts provide, than their private sector counterparts.<sup>14</sup>



That does not mean that compensation is unimportant. Public sector workers seem to care more about their retirement benefits than private sector workers, largely preferring DB plans to other forms of retirement income.<sup>15</sup> This is consistent with research that DB pension plans are more highly valued by certain kinds of workers — specifically, older workers and union members.<sup>16</sup> Public sector workers fit this description. In 2005, 52 percent of state and local workers were over age 45, as compared to just 43 percent of public sector workers. And public sector workers are more than three times as likely as private sector workers to be union members.<sup>17</sup>

Recent public opinion research reinforces that DB plans are highly valued by public employees and are an important consideration for those who choose a career in public service. For example, a 2006 nationally representative survey indicated that public employees were much more favorable to traditional DB pensions and much less likely than other workers to express a preference for 401(k)-type plans.<sup>18</sup> When asked about proposals to switch public employees out of DB plans and into 401(k)-type plans, public employees were strongly opposed.<sup>19</sup> A 2003 survey also found that public employees place a very high value on their pension programs.<sup>20</sup> Almost two-thirds of public sector employees stated a preference in favor of DB pensions as compared with DC plans.

But how do we know that these stated preferences are not just the result of employees being more familiar with the type of plan they already have? This “framing” effect can be real. Employers and retirement plan providers educate employees about the benefits they offer, so employees have more information about the available program than about alternatives. One survey found that workers and retirees expressed a preference for the type of plan they already had, be it a DB plan or a 401(k). Those who had both a DB and a DC plan were evenly split in their preferences.<sup>21</sup>

Another explanation is that public employees’ preferences for DB pensions are “revealed” preferences — that is, they reflect a preference realized by deliberately seeking out an

employer that offers this type of plan. Real world tests of this explanation indicate that it has merit. Time after time, when public sector employees are given a choice between a traditional DB pension and DC plan, they overwhelmingly choose the DB plan. In a small number of states, such as Ohio, Florida, South Carolina, Colorado, and Washington, public employees can choose whether to participate in a DB plan or a DC plan. Only 3.3 percent of employees in the Ohio Public Employee Retirement System elected the DC plan. In Florida and in South Carolina, DC take-up rates have been

higher, with about one in five newly hired employees choosing the DC plan. However, there are distinct patterns along occupational lines. In South Carolina, those employed by the state’s colleges and universities were three times more likely to opt for the DC plan. This may be because university employees are more likely to leave their jobs, or that they feel more comfortable managing their retirement plan money. In most states, employees who do not elect one plan or another default into the DB plan. The 80-90 percent DB take-up rates could be largely driven by

inertia on the part of employees, a large number of whom do not make an affirmative choice. But the experience in Washington suggests otherwise. There the default option is a combined DB and DC plan, and almost two-thirds opted out of the default program in favor of an all-DB plan.<sup>22</sup>

The situation in West Virginia is even more interesting. In 1991, the Teachers Retirement System, a DB plan, was “frozen” to new hires — all teachers hired after 1991 were enrolled in a DC retirement plan, the Teachers Defined Contribution Retirement System.<sup>23</sup> Over time, it appeared the DC plan did not enable teachers to accumulate sufficient savings for retirement.<sup>24</sup> In 2005, the state closed the DC plan, and all newly hired teachers were enrolled in the “old” DB plan.<sup>25</sup> Then came the question of what to do about the teachers hired between 1991 and 2005 who had been enrolled in the DC plan. Initially, the idea was to transition all these teachers into the DB plan, but in the face of legal challenges, this route was abandoned. Subsequently, the state determined

*Public sector workers seem to care more about their retirement benefits than private sector work-*



that teachers would make individual elections whether to remain in the DC plan or transfer to the DB plan. At least 65 percent of the group needed to vote to switch for any switches to occur.<sup>26</sup>

In July 2008, West Virginia certified the results of a vote — 79 percent of teachers voted to switch to the DB plan. An overwhelming number of younger teachers — over 75 percent of those under the age of 40 — decided to make the same switch.<sup>27</sup> This result was a surprise, since it is often assumed (incorrectly, as it turns out) that younger workers prefer DC plans over DB plans.

### *Pensions and Fiscal Responsibility*

Because public employers answer to the taxpayer, fiscal responsibility is of primary importance. Public retirement plans must be cost-effective and make efficient use of tax dollars. Because of their group nature, DB plans stretch each dollar further than DC plans, which are based on individual accounts. Due to the economies of scale that a group DB plan can achieve, the cost differential can be dramatic. A recent analysis showed that to provide a given level of retirement benefit, a typical DB plan could do the job at about half the cost of a DC plan.<sup>28</sup>

Another fiscal consideration is the effectiveness of DB plans in achieving adequate retirement goals. After all, if a retirement plan does not fulfill its mandate — allowing employees to retire — it is not an effective use of taxpayer funds. A growing body of research indicates that employees with DB pension plans are better positioned to achieve a secure retirement than those in a DC plan alone.<sup>29</sup> And the experience of two states — Nebraska and West Virginia — suggest this is also true with respect to public sector workforces. Both states offered DC plans to some public employees but abandoned the programs when it was revealed that the benefits provided did not allow employees to retire with an adequate income.<sup>30</sup>

Considering how efficiently DB plans convert current contributions into future pension benefits, it is ironic that

these plans have attached withering criticism by taxpayer organizations. Groups like the Howard Jarvis Taxpayer Association have been vocal critics of pensions. They were key supporters of Governor Schwarzenegger's efforts in 2005 to close the state's traditional pension plans to newly hired employees and offer individual retirement accounts instead. A consistent claim of taxpayer groups is that pension funds are creating unsustainable burdens for current and future taxpayers. Indeed, Governor Schwarzenegger in 2005 described the state's pension plans as "a looming train wreck."

But *The New York Times* reported that "even advocates of privatization in his own administration say the system is currently sound" with a ratio of assets to benefit obligations of about 90 percent.<sup>31</sup> In 2005, the initiative failed to garner support among California voters. But in light of the new economic circumstances, taxpayer groups may raise the issue anew.

### *Looking Ahead*

Over the past three decades, private sector employers have become less likely to offer traditional defined benefit pensions, and have turned to defined contribution retirement savings accounts, like 401(k) plans. Three decades ago, DB pension coverage in the private sector was similar to that in the public sector. Today only about one-third of private sector employees with a retirement plan are covered by a DB plan.<sup>32</sup> This shift has had enormous consequences. According to Congressman George Miller, chairman of the House Education and Labor Committee, "The current economic crisis has exposed deep flaws in our nation's retirement system. For too many Americans, 401(k) plans have become little more than a high stakes crap shoot." This state of affairs has prompted a far-reaching re-evaluation of retirement policy at the national level.

The divergence in pension coverage in the private and public sectors has prompted some policymakers to explore whether to follow the private sector trend and recraft their retirement programs. In light of recent stock market losses

*Public retirement  
plans must be  
cost-effective and  
make efficient use of  
tax dollars.*

that have hit investors of all stripes, including public pension plans, more public employers may consider this question. States that have carefully investigated the matter have concluded that closing down their DB pension programs is the wrong direction for public policy.

First, abandoning DB plans would mean relinquishing demonstrated benefits on retention. Second, since public employees value these programs so highly, switching to DC programs for newly hired employees could harm recruitment efforts. And third, the cautionary examples of West Virginia and Nebraska indicate that public employers should “look before they leap.” Redesigning retirement benefit plans might squander valuable taxpayer dollars on less-efficient programs that fail to meet their stated objectives.

Because DB pension plans have a track record of simultaneously meeting the goals of employers, employees, and taxpayers, they will continue to be a durable feature of compensation arrangements in the public sector. Current economic conditions notwithstanding, the impending retirement of the Baby Boom generation will force government employers to hire their replacements.<sup>33</sup> When the economy recovers, government entities will have to compete for talent with private sector employers — who may be able to offer higher salaries, stock options, or profit sharing programs — while meeting their fiscal responsibilities to make the most of taxpayer dollars.

The good news is that DB pension plans help to attract and retain skilled workers. The widely publicized trend away from these plans in the private sector may even help public sector employers compete more effectively by offering a unique benefit that is highly valued by skilled employees. \*

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Save the date

Monday July 20, 2009 ■ ALRA Advocates Day  
At the Oakland Marriot City Center

## Labor Management Relations and the Global Economic Crisis

Cohosted by

**The California State Mediation and Conciliation Service,**  
The Federal Mediation and Conciliation Service,  
**The National Labor Relations Board (Regions 20 and 32),**  
and the California Public Employment Relations Board

This one-day conference for management and labor advocates is being held in conjunction with the annual conference of the **Association of Labor Relations Agencies (ALRA)**, the organization in the U.S and Canada that represents neutral governmental labor relations agencies.

Advocates' Day is geared toward bringing Northern California's labor-management community together with Canadian and U.S. neutrals around hot topics. Conference highlights include:

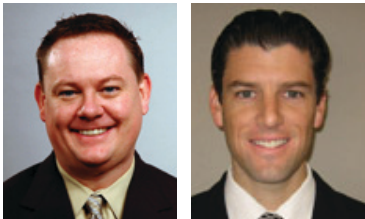
- Renowned academic speakers such as MIT's Thomas Kochan and U.C. Berkeley's Katie Quan
- Distinguished panel on "Labor's Role in the Economic Recovery," featuring Kate Gordon from the Apollo Alliance and Barry Sedlik, chair of the California governor-appointed Green Collar Jobs Council
- Keynote luncheon presentation from labor and management on the worker sit-in at Republic Windows in Chicago, and subsequent purchase and reopening of the plant by a green California company
- Discussion of key issues such as the Employee Free Choice Act, the effects of the economic crisis on collective bargaining, and the effect of the stock market collapse on worker pensions
- Reception immediately following the program at the beautifully restored Rotunda Building, site of the 1946 Oakland General Strike

ALRA is the premier professional association in the U.S. and Canada representing labor-management adjudication and mediation agencies. The annual conference is held every July in locations rotating between the US and Canada. This is the first ALRA conference in the San Francisco Bay Area since the 1980s.

For conference and registration information, go to [www.alra.org](http://www.alra.org)

# The Lilly Ledbetter Fair Pay Act: The Death of the Statute of Limitations Defense?

*Geoffrey S. Sheldon and James E. Oldendorph, Jr.*



*Geoffrey S. Sheldon is a partner and James E. Oldendorph Jr. an associate with the management law firm of Liebert Cassidy Whitmore.*

*The firm, which maintains offices in Los Angeles, Fresno, and San Francisco, represents public agency management in all aspects of labor and employment law, including labor relations, civil litigation, and education law.*

ON JANUARY 29, 2009, President Barack Obama signed into law the Lilly Ledbetter Fair Pay Act of 2009 (FPA). The act overturned the U.S. Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*<sup>1</sup>

With the enactment of the FPA, the statute of limitations defense is dead, or at least dying, in employment discrimination claims. The FPA resets the limitations period with each paycheck issued to the employee, and whenever benefits or other compensation are paid. Employees may now resuscitate discrimination claims that involve decisions that are years or decades old so long as a plaintiff can tie that decision to the employee's compensation. The FPA likely will lead to an enormous increase in pay discrimination claims that previously were time barred but now have been revived due to the retroactive application of the act.

## ***How Did We Get Here?***

Lilly Ledbetter worked for Goodyear Tire & Rubber Company in Alabama from 1979 until she retired in 1998. During much of this time, salaried employees at the plant were given or denied raises based on their supervisors' evaluations. In March 1998, Ledbetter submitted a questionnaire to the Equal Employment Opportunity Commission alleging certain acts of sex discrimination by her employer. In July 1998, she filed a formal EEOC charge. After her retirement, Ledbetter filed a lawsuit against Goodyear, in which she asserted, among other claims, a Title VII pay discrimination claim and a claim under the Equal Pay Act of 1963.

The district court granted summary judgment in favor of Goodyear on several of Ledbetter's claims but allowed her Title VII pay discrimination claim to proceed to trial. In support of this cause of action, Ledbetter established that, during the

course of her employment, several supervisors had given her poor evaluations because of her sex. As a result of these evaluations, her pay was not increased as much as it would have been had she been evaluated fairly. These past pay decisions continued to affect her compensation throughout her employment.

Prior to her retirement, she was paid significantly less than any of her male colleagues. Ledbetter was the only woman working as an area manager, and the pay discrepancy between her and her 15 male counterparts was stark: She was paid \$3,727 a month; the lowest-paid male area-manager received \$4,286 a month; and the highest-paid male manager received \$5,236 a month. Goodyear maintained that Ledbetter's performance evaluations had been nondiscriminatory, but the jury found otherwise and awarded \$223,000 in back pay, and punitive damages of more than \$3 million.

Goodyear appealed, contending that Ledbetter's pay discrimination claim was time barred with respect to all pay decisions made prior to September 26, 1997 — that is, 180 days before she filed her EEOC questionnaire. Title VII provides that a charge of discrimination must be filed with the EEOC within 180 days of any alleged unlawful employment practice, or 300 days where there is a state or local agency with authority to grant or seek relief from such practice.<sup>2</sup> Goodyear argued that no discriminatory act relating to Ledbetter's pay occurred after September 26, 1997. Thus, Ledbetter's pay discrimination claim was untimely.

The Eleventh Circuit Court of Appeals agreed with Goodyear that Ledbetter's claim was untimely, and reversed the jury's verdict. The Court of Appeals did not find sufficient evidence that Goodyear discriminated against Ledbetter in the two pay decisions which occurred after September 1997.

Ledbetter sought review by the U.S. Supreme Court, and it agreed to hear her case. But, the Supreme Court affirmed the Eleventh Circuit's decision holding that the 180-day limitation period prohibited Ledbetter from filing

her Title VII discrimination charge after 180 days from the occurrence of the alleged discrete discriminatory act. In a majority opinion written by Justice Alito, the Supreme Court rejected Ledbetter's argument that, by issuing paychecks based on past discriminatory practices, Goodyear had violated Title VII anew each time the company issued her a paycheck. Rather, the majority held, "[t]he EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does

not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination."<sup>3</sup>

Justice Ginsburg, with whom Justices Stevens, Souter, and Breyer joined, wrote a strong dissenting opinion in which she maintained that each paycheck Ledbetter received from Goodyear that reflected the pay discrepancy represented pay discrimination based on sex. Therefore, calculation of the 180-day period commences on the date of the most recent paycheck, not the date of an

obvious act of discrimination, such as a poor performance evaluation. The dissenting justices called on Congress to correct the majority's "parsimonious reading of Title VII."<sup>4</sup> (For a complete discussion of the Supreme Court's decision, see *CPER* No. 185, pp. 61-66.)

### ***Congress and President Obama Respond***

Congress answered the call of the dissenters shortly after the Supreme Court issued its decision. In June 2007, the House Committee on Labor and Education first introduced the Lilly Ledbetter Fair Pay Act at the 110th Congress. On July 31, 2007, the bill passed in the House of Representatives, but it did not pass in the Senate.

At the 111th Congress, the FPA was reintroduced by House Committee on Labor and Education Chair George Miller (D-Cal.) on January 6, 2009, and Senator Barbara Mikulski (D-Md.) on January 8. The House passed the measure (H.R. 11) on January 9 by a vote of 247 to 171.

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The Senate approved the bill (S.B. 181) on January 22, by a vote of 61 to 36. On January 29, President Obama signed the FPA into law.

The act essentially overturns *Ledbetter*. Section 2 of the act sets forth the findings of Congress in its analysis of the *Ledbetter* decision. Congress found that the U.S. Supreme Court decision in *Ledbetter* significantly impaired statutory protections against discrimination in compensation that have been bedrock principles of American law for decades. In its view, the *Ledbetter* decision unduly restricted the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices. Congress further found that “the limitation imposed by the Court in the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws.”

In *Ledbetter*, the plaintiff’s claims of discrimination were time barred because the U.S. Supreme Court did not consider issuance of a paycheck to be a form of continuing discrimination. The act reverses this decision by establishing that “an unlawful employment practice” occurs:

- when a discriminatory compensation decision or other practice is adopted;
- when an individual becomes subject to a discriminatory compensation decision or other practice; or
- when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

In essence, the act provides that each new paycheck that an employee receives resets the statute of limitations period where the plaintiff alleges that a discriminatory decision affects the employee’s pay or compensation. The employee

has 180 days (or 300 days depending on the state in which the EEOC charge is filed) from the date that a discriminatory compensation decision is adopted, the employee becomes subject to a discriminatory compensation decision, or is affected by such a discriminatory compensation decision or practice to file a claim with the EEOC. Section 3(B) of the act provides that, “liability may accrue and an aggrieved person may recover back pay for up to two years preceding the filing of [an EEOC] charge, where the unlawful employment

practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.”

The act is retroactive to May 28, 2007, the day before the U.S. Supreme Court rendered its decision in the *Ledbetter* case. Therefore, any potential or existing claims that would have been time barred under *Ledbetter* may be pursued as they relate to any claims on or after May 28, 2007.

Note that the FPA not only applies to claims under Title VII of the Civil

Rights Act of 1964, but also to claims under the Age Discrimination in Employment Act of 1967, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990. Therefore, the FPA applies to claims of discrimination based on sex, race, national origin, religion, age, and disability that affect pay or compensation.

### *Impact on California Employers*

Title VII, the ADEA, the Rehabilitation Act, and the ADA all apply to California employers. In addition, an employee in California has the option of suing under a similar state statute, the Fair Employment and Housing Act.

In 2007, California Assembly Member Dave Jones introduced A.B. 437 in response to the *Ledbetter* decision. On August 30, 2008, the California Assembly voted on and passed the bill, and sent it to Governor Schwarzenegger. A.B. 437 was submitted as a rejection of the *Ledbetter* decision and was

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modeled after the FPA. The bill clarified that the time period for alleging pay discrimination under California law runs from the date of each discriminatory wage payment.

On September 30, 2008, Governor Schwarzenegger vetoed the bill along with a number of other bills awaiting his signature during the state's budget stalemate. For this reason, the governor's true position on A.B. 437 is unknown, and it is expected that the bill will be renewed. At the very least, A.B. 437 reveals the California legislature's opinion of the statute of limitations issue. Even if the bill does not pass, it is likely the courts will adopt the FPA's rationale since California has a "continuing violation" doctrine, and unlike Title VII, the FEHA statute of limitations provision expressly states that it must be "construed liberally."<sup>5</sup>

#### ***Application of the Ledbetter Act in Recent Federal Court Decisions***

Several federal courts already have implemented the FPA since its enactment on January 29. As these cases demonstrate, the act has opened the door for more pay discrimination claims than at issue in the *Ledbetter* decision itself.

***Bush v. Orange County Corrections Dept.***<sup>6</sup> In *Bush*, African-American female employees brought an action under Title VII and the Equal Pay Act alleging racial and gender discrimination. They alleged that while they were working as nurses for the corrections department in 1990, they were told they would lose their corrections certification, as well as their 3 percent special-risk retirement status, if they remained in their nursing positions. The plaintiffs then transferred to corrections officer positions, believing that this was a promotion.

In February 2006, however, the plaintiffs noticed payroll discrepancies and learned that the 1990 transfers "had been recorded as a voluntary demotion and their pay had been reduced without their knowledge." The plaintiffs filed complaints with the EEOC and filed their lawsuit in April 2007. They alleged that they were being paid less than

similarly situated males and less than similarly situated white employees, and they were the victims of pay discrimination since 1990. In February 2009, the district court held that the plaintiffs' claims regarding demotions and pay reductions that occurred in 1990 — 16 years before their suit was initiated — were not time barred because of the FPA.<sup>7</sup>

***Gilmore v. Macy's Retail Holdings.***<sup>8</sup> Here, the plaintiff asserted that the defendant discriminated against her by denying her promotion. She also raised a disparate treatment

claim premised on numerous instances where she allegedly was treated differently from her white colleagues on account of her race. The plaintiff filed a charge with the EEOC on the basis of alleged racial discrimination in 2005 and, after the EEOC was "unable to conclude" that the defendant violated Title VII, she commenced an action in federal court in May 2006.

On its own motion, on February 4, 2009, the district court reconsidered its partial grant of summary judgment. It ruled that the FPA applies to the plaintiff's EEOC claim that was filed in 2005, and that back pay may be awarded for compensation discrimination that took place as early as July 2003, so long

as the alleged discrimination is "similar or related to unlawful employment practices" at issue in the EEOC charge.

***Rebman v. State University of New York at Stony Brook.***<sup>9</sup> In this case, the plaintiff, a physician whose appointment as assistant professor was non-renewed, brought an action against the university and others, alleging age, race, and religious discrimination in violation of Title VII and other statutes. In March 2007, the plaintiff received an unfavorable performance evaluation, which the plaintiff contends included false allegations. The evaluation recommended that the plaintiff's year-to-year employment with the university not be renewed. A month later, the plaintiff received a letter of non-renewal. On April 13, 2007, the plaintiff filed a claim with the EEOC asserting discrimination and retaliation, and filed a lawsuit in January 2008.<sup>10</sup>

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The defendants argued that Title VII discrimination claims arising prior to June 16, 2006, were barred by New York's statute of limitations. On February 6, 2009, relying on the FPA, the court held that the plaintiff's wage discrimination claims based on actions occurring on or after April 13, 2005, two years prior to his EEOC charge, were timely.<sup>11</sup>

*Vuong v. New York Life Insurance Co.*<sup>12</sup> Here, the plaintiff brought an action alleging discrimination based on race and national origin. The plaintiff alleged that the company failed to fairly promote and compensate him beginning in 1998 when he received a lesser percentage of its San Francisco office's performance-related compensation than did his co-managing partner. Vuong claimed the paychecks he received thereafter would have been greater if the company had not made the discriminatory decisions in 1998. The plaintiff filed a charge with the EEOC in 2002, and filed the lawsuit against his employer on February 18, 2003. On February 6, 2009, the district court held that the plaintiff's claim of discrimination was timely by virtue of the FPA, even though the alleged discriminatory pay decision was made in 1998.

### Conclusion

Since the FPA extends the limitations period for compensation discrimination claims and is retroactive in nature, its impact will be far reaching. Stale claims brought under a host of federal anti-discrimination statutes are now

timely so long as a plaintiff can tie the discrimination claim at issue to compensation. Indeed, within a few weeks of President Obama's signing, federal courts already have addressed and implemented the FPA in their decisions. Employers now have one less weapon at their disposal to combat discrimination claims, and the FPA undoubtedly will drive up the cost of doing business for the nation's employers. \*

1 (2007) 550 U.S. 618, 127 S.Ct. 2162, 185 CPER 61.

2 42 USC Sec. 2000e-5(e)(1).

3 *Ledbetter*, 127 S.Ct. at 2169, 185 CPER 61.

4 *Id.* at 2188.

5 See *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 150 CPER 70; *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 174 CPER 23; Cal. Gov. Code Sec. 12993(a).

6 (M.D.Fla.) 2009 WL 248230.

7 The plaintiffs in *Bush* lost on other grounds, however.

8 (D.N.J. 2009) 2009 WL 305045.

9 (E.D.N.Y.) 2009 WL 303830.

10 *Id.* at 3.

11 *Id.* at 5.

12 (S.D.N.Y.) 2009 WL 306391.

# *Spielbauer*: The Status Quo Affirmed

*Lori E. Pegg and Marcy L. Berkman*



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In *Spielbauer v. County of Santa Clara*<sup>1</sup> — a much anticipated and closely followed case — the California Supreme Court recently upheld the well-established principle that a public employee does not have a constitutional right to avoid dismissal by refusing to answer potentially incriminating questions about his or her job performance.

For more than two decades California public employers have relied on the principle that they could compel employees to answer questions posed during administrative investigations — even when those employees faced potential criminal liability. This principle has been firmly established since the California Supreme Court's 1985 decision in *Lybarger v. City of Los Angeles*.<sup>2</sup> Since *Lybarger*, when a public employee has asserted his or her Fifth Amendment rights during an administrative interview, public employers have given the employee what is commonly referred to as a “*Lybarger*” admonishment, advising the employee that his or her answers could not be used against them in a criminal case and that if the employee refused to answer truthfully, he or she could be disciplined or even terminated for insubordination.<sup>3</sup> Although *Lybarger* involved peace officers and their rights under the Public Safety Officers Procedural Bill of Rights Act,<sup>4</sup> since that time California public employers have given a *Lybarger* warning to all public employees. Relying on the well-established duty of frankness and candor, public employers were thus able to conduct timely investigations into allegations of public employee misconduct.

In *Spielbauer*, the public employee was given the same *Lybarger*-type admonition that would have been procedurally required under the PSOPBRA if he had been a peace officer. Even so, the Sixth District Court of Appeal felt that the employee's Fifth Amendment rights had not been adequately protected. It ruled that the Fifth Amendment to the U.S. Constitution requires public employers to obtain

a formal grant of immunity before compelling potentially incriminating answers.<sup>5</sup> On review, the California Supreme Court addressed the following issue:

When a public employee invokes his or her Fifth Amendment right against self-incrimination in a public employer's investigation of the employee's conduct, must the public employer offer immunity from any criminal use of the employee's statements before it can dismiss the employee for refusing to answer questions in connection with the investigation?<sup>6</sup>

On February 9, 2009, the Supreme Court unanimously answered "no." The court held that the constitution does not afford a public employee the right to refuse to answer questions about his or her job performance and avoid dismissal as punishment for such refusal.<sup>7</sup> Instead, the Fifth Amendment simply forbids use of the compelled statements and the fruits of those statements in a criminal prosecution against the employee.<sup>8</sup> The court held that where a public employee invokes the right against self-incrimination during an internal investigation, the public employer is not required to obtain a formal grant of immunity for that employee before it may dismiss the employee for refusing to answer questions posed in the investigation.<sup>9</sup>

### ***The Facts***

In 2003, Deputy Public Defender Thomas Spielbauer represented criminal defendant Michael Dignan, who was charged with illegally possessing ammunition. A witness in the case, Troy Boyd, told police that the house where the ammunition was found was owned by Boyd's parents and that Boyd had rented that house from his parents for many years. During the trial, Spielbauer proposed to offer Boyd's hearsay statement<sup>10</sup> to raise a reasonable doubt about whether Spielbauer's client controlled the area where the

ammunition was discovered. The proffered hearsay statement was ambiguous and incomplete at best — although Boyd rented the home from his parents, he had sublet the room where ammunition was found to Dignan.

The prosecutor sought to exclude Boyd's hearsay statement, arguing there had been no showing that Boyd was unavailable to testify as a witness. In response, Spielbauer told the court that there was a warrant out for Boyd's arrest and "if the San Jose Police are not going to be able to find

Mr. Boyd, I think my investigator is going to be very hard put to find an individual who is avoiding contact with anybody that has to do with the judicial system."<sup>11</sup> So that jurors would not wonder why Spielbauer did not call Boyd to the stand as a witness — and instead would understand that there was "a warrant for [Boyd's] arrest and he's ducking" — Spielbauer requested permission to move the arrest warrant into evidence.<sup>12</sup>

Contrary to Spielbauer's in-court representations, the prosecutor soon discovered (and reported to the court) that Boyd had been anything but difficult to locate. In fact, just one day before Spielbauer told the trial judge

about Boyd's unavailability, Spielbauer went to Boyd's home, found Boyd watching the Super Bowl on TV, and spoke with Boyd about the case.<sup>13</sup>

After learning of Spielbauer's conduct and representations to the court, the Public Defender's Office conducted an internal investigation into the allegations that Spielbauer had deliberately made deceptive statements to the trial judge. As part of that investigation, the Public Defender's Office made several attempts to interview Spielbauer. Through his lawyer, Spielbauer asserted his Fifth Amendment right to remain silent and refused to answer. The county's investigator repeatedly and accurately advised Spielbauer (1) that any statements he made during the interview would be for internal use only, would not be turned over to the district attorney, and could not be used against Spielbauer in any subsequent criminal proceeding; and, (2) that Spielbauer's silence would

## *The Fifth Amendment forbids use of the compelled statements and the fruits of those statements in criminal prosecution against the employee.*

be deemed insubordination leading to administrative discipline, up to and including termination. Despite this proper admonition, Spielbauer continued to assert his constitutional rights and refused to answer. The county then terminated Spielbauer for misconduct, ethical violations, and insubordination.

In his lawsuit, Spielbauer argued, among other things, that he could not be terminated for insubordination because the Public Defender's Office had not obtained a formal grant of immunity for him before insisting that he answer potentially incriminating questions. The trial court rejected that argument and affirmed Spielbauer's termination.<sup>14</sup> Spielbauer appealed.

The Court of Appeal overturned the insubordination finding because it agreed with Spielbauer's claim that the county had violated his constitutional rights by not obtaining a grant of formal immunity prior to requiring him to answer potentially incriminating questions during the disciplinary investigation. In so holding, the Court of Appeal reasoned that the exclusionary rule is intended to prevent criminal use of illegally compelled statements, not to legalize otherwise unconstitutional compulsions of self-incriminatory utterances.<sup>15</sup> The county petitioned for review.

### ***California Supreme Court's Decision***

Under the Fifth Amendment, no person shall be compelled *in any criminal case* to be a witness against himself.<sup>16</sup> The California Constitution provides a similar guarantee.<sup>17</sup> These constitutional proscriptions against compelled self-incrimination protect individuals from being forced to testify against themselves in criminal proceedings. They also protect individuals from having to answer official questions in other proceedings where they reasonably believe that their answers might implicate them in a criminal case.<sup>18</sup> The California Supreme Court's unanimous decision

surveyed the lengthy history of federal and state cases holding that statements compelled over a public employee's assertion of his Fifth Amendment rights cannot be used in subsequent criminal proceedings. It reaffirmed that the Fifth Amendment does not give public employees the right to "remain silent free of administrative sanction."<sup>19</sup>

Distinguishing *Spielbauer* from cases outside the public employment context, the court noted that public employees owe unique duties of loyalty, trust, and candor to their employers and to the public at large. The court recognized that public agencies must be able to promptly investigate

and discipline their employees for betrayal of that trust.<sup>20</sup> Unlike private employees whose employment is "at will," permanent public employees have property and due process rights in their position; therefore, public employers must conduct investigations into misconduct allegations and provide due process rights to their employees before imposing discipline. Accordingly, the Supreme Court recognized the long-standing constitutional principle that a public employer may compel employees to answer job-related questions under threat of discipline as long as those compelled answers cannot be used against them in criminal

*The court noted that public employees owe unique duties of loyalty, trust, and candor to their employers and to the public at large.*

proceedings.

Next, the Supreme Court considered whether an employer must obtain a formal grant of immunity before it may compel a public employee to respond. The court recognized that the U.S. Supreme Court and lower courts nationwide have long held that no formal grant of immunity is required before public employees can be dismissed for refusing to answer official questions about the performance of their duties, so long as those employees are not required to *waive* their constitutional privilege against having their compelled statements and the fruits of those statements used against them in future criminal proceedings.<sup>21</sup> Further validating a concern expressed by many public employers following the Sixth District's decision, the Supreme Court noted that "[i]ndeed, as the instant court of appeal conceded,



it is not clear how the public employer could ever obtain such formal grant of immunity.”<sup>22</sup>

Reiterating a well-settled rule, the Supreme Court explained that “absent a contrary statute, a public employer, acting for noncriminal reasons, may demand answers from its own employee about the employee’s job conduct and may discipline the employee’s refusal to cooperate, without first involving the prosecuting authorities in a decision about granting formal immunity.”<sup>23</sup> The court emphasized that Spielbauer had not been ordered to choose between his constitutional rights and his job; rather, he had been truthfully told that no criminal use could be made of any compelled answers he might give.<sup>24</sup>

### *Wrinkle Under FBOR*

In January 2008, the Firefighters Procedural Bill of Rights Act<sup>25</sup> took effect. Like the PSOPBRA, the FBOR adds a layer of procedural protections to those public employees it covers.<sup>26</sup> But while the PSOPBRA was silent about the right to formal immunity during an administrative investigation, the FBOR was drafted while *Spielbauer* was pending before the Supreme Court and attempts to address the issues raised by the Sixth District. The legislature’s attempt at remedying these issues is problematic at best. The FBOR provides: “The employer shall provide to, and obtain from, an employee a formal grant of immunity from criminal prosecution, in writing, before the employee may be compelled to respond to incriminating questions in an interrogation.”<sup>27</sup> This language appears to give an employer the ability to provide employees with a formal grant of immunity and, interestingly, appears to mandate that an employee similarly give the employer a grant of immunity. Despite this problematic language, the Supreme Court did not specifically address the FBOR; accordingly, the *Spielbauer* decision does not help California fire departments, which still must grapple with the ill-defined new procedural requirements imposed by the FBOR mandate. This mandate

suffers from the same problems that the Supreme Court pointed out in overturning the Sixth District’s decision — and is further compounded by the poorly drafted statutory language.

### *Admonishment*

A question that remains after the Supreme Court’s *Spielbauer* decision is whether — if squarely presented with facts giving rise to the issue — the Supreme Court might

hold that a public employee cannot be terminated for standing silent unless his employer has first explained to him that statements compelled over his assertion of the Fifth Amendment privilege could not be used against him in criminal proceedings. During oral argument, a number of Supreme Court justices expressed substantial interest in whether an admonishment is constitutionally required and, if not, whether imposing such a requirement would be administratively burdensome. However, because that question was not squarely before the court, it did not rule on this issue.

Nevertheless, the court’s decision repeatedly emphasizes that the county gave Spielbauer the *Lybarger*-type admonishment.<sup>28</sup> And the court held, “at least where, as here, the employee is specifically advised that he or she retains that right,” the public employer may discipline, and even dismiss, a public employee for refusing, on grounds of the constitutional privilege, to answer the employer’s job-related questions.<sup>29</sup> The court’s interest in whether an admonishment is or should be required is particularly interesting in light of *Aguilera v. Baca*,<sup>30</sup> in which the Ninth Circuit majority held that it is not.<sup>31</sup> The Supreme Court appears to signal that it might possibly break with the Ninth Circuit and hold that the admonition is either constitutionally required or should be imposed for public policy reasons.

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### Conclusion and Recommendation

When conducting administrative investigations into allegations of employee misconduct, public employers may continue to compel employees to answer job-related questions so long as they do not require the employee to surrender his or her constitutional rights. And public employers should give the *Lybarger*-type admonishment in all cases involving possible criminal misconduct. Specifically, public employers should advise the employee suspected of misconduct that (1) the employee has the right to remain silent and the right to the presence and assistance of counsel; (2) his or her silence could be deemed insubordination, leading to administrative discipline; and (3) any compelled statement will not be used against the employee in any subsequent criminal proceeding. \*

1 *Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704.

2 In *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822, 67X CPER 1, the California Supreme Court held that a public employee has no absolute right to refuse to answer potentially incriminating questions posed by his or her employer. Instead, the court found the employee's self-incrimination rights are adequately protected by precluding any use of the statements at a subsequent criminal proceeding. (Citing *Garrity v. New Jersey* [1967] 385 U.S. 493, 496-497.)

3 Although *Lybarger, supra*, arose in the law enforcement context and under the Public Safety Officers Procedural Bill of Rights Act (Gov. Code Secs. 3300 et seq.), public employers have long relied on the United States Supreme Court's prior decision in *Garrity v. State of New Jersey, supra*, upholding a public employer's ability to compel non-sworn employees to answer potentially incriminating questions during an administrative investigation.

4 Gov. Code Secs. 3300 et seq.

5 *Spielbauer, supra*, 45 Cal.4th at p. 718.

6 *Id.* at p. 714.

7 *Id.* at p. 727.

8 *Ibid.*

9 *Id.* at pp. 704, 725, 729.

10 Hearsay is an out of court statement offered to prove the truth of the matter asserted.

11 *Id.* at p. 711.

12 *Ibid.*

13 *Ibid.*

14 *Spielbauer, supra*, 45 Cal.4th at p. 713.

15 *Id.* at p. 727.

16 U.S. Const., 5th Amend.

17 Cal. Const., Art. I, Sec. 15.

18 *Spielbauer, supra*, 45 Cal.4th at p. 714; *Lefkowitz v. Turley* (1973) 414 U.S. 70, 77; *Kastigar v. United States* (1972) 406 U.S. 441, 444-445.

19 *Spielbauer, supra*, 45 Cal.4th at p. 724; citing *Lybarger, supra*, 40 Cal.3d at p. 827.

20 *Spielbauer, supra*, 45 Cal.4th at p. 725.

21 *Aguilera v. Baca* (9th Cir. 2007) 510 F.3d 1161, 1171-1172 (2008) cert. denied \_\_\_ U.S. \_\_\_, 129 S.Ct. 487; *Hill v. Johnson* (8th Cir. 1998) 160 F.3d 469, 471; *Wiley v. Mayor and City Council of Baltimore* (4th Cir. 1995) 48 F.3d 773; *Hester v. City of Milledgeville* (11th Cir. 1985) 777 F.2d 1492, 1496; *Weston v. U.S. Dept. of Housing & Urban Dev.* (Fed. Cir. 1983) 724 F.2d 943, 947-948; *Confederation of Police v. Conlisk* (7th Cir. 1973) 489 F.2d 891, 894-895, cert. denied *sub. nom. Rochford v. Confederation of Police* (1974) 416 U.S. 956.

22 *Spielbauer, supra*, 45 Cal.4th at p. 726.

23 *Id.* at p. 729.

24 *Id.* at p. 710.

25 Gov. Code Secs. 3250 et. seq.

26 The FBOR applies to firefighters employed by a public agency including paramedics and emergency medical technicians.

27 Gov. Code Sec. 3253(e)(1).

28 *Id.* at pp. 724, 725.

29 *Id.* at p. 725.

30 *Aguilera, supra*, 510 F.3d 1161.

31 *Id.* at p. 1173, fn. 6. There is a split of authority among the circuits on this issue as reflected within the *Aguilera* decision.



# Supreme Court Restores Promise of Whistleblower Act for State Employees

*Katherine Thomson, CPER Associate Editor*

*The Arbuckle decision  
increases protection for state  
employee whistleblowers  
by reducing the number  
of hurdles that a person  
must clear before suing for  
damages.*

SECTION 8547.8(c) “means what it says,” the California Supreme Court held in *State Board of Chiropractic Examiners v. Arbuckle*. With that simple explanation, a unanimous court overruled numerous lower court rulings that have forced state employee whistleblowers to run an obstacle course before suing the agencies that acted against them. Now a state employee who believes she has been the target of retaliation for reporting wrongdoing need only file a complaint with the State Personnel Board and wait until the board issues, or fails to issue, findings before its deadline. After approximately 70 days, the employee may file a complaint for damages in court without asking for further hearings at the SPB or challenging the board’s findings in court.

The California Whistleblower Protection Act was enacted to safeguard the right of employees “to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution.” The court held that procedural prerequisites to filing suit that appellate courts had read into the statute impeded the protective goal of the act and were not intended by the legislature. Separate sections of the act apply to state employees, employees of the California State University, and employees of the University of California, a circumstance that makes the *Arbuckle* holding inapplicable to cases filed by university employees.

## *Administrative Remedies Provided*

Carole Arbuckle, an employee of the State Board of Chiropractic Examiners, claimed that her employer retaliated against her for reporting that the chiropractic license of the board chair had expired. As provided by the Whistleblower Act, she filed a complaint with the State Personnel Board in 2002. The SPB executive officer reviewed over 400 pages of documents submitted by her and by her employer,

and issued a 16-page notice of findings rejecting her claim. The officer acknowledged that Arbuckle had made a few “protected disclosures” under the California Whistleblower’s Protection Act and had suffered adverse actions, but saw no connection between the disclosures and the adverse actions. The officer found that her employer would have taken the actions regardless of whistleblowing and recommended that her complaint be dismissed.

The act authorizes an employee to file a lawsuit for damages in court, but only if the employee “has first filed a complaint with the State Personnel Board...and the board has issued, or failed to issue, findings pursuant to Section 19683.” The statute makes no mention of further SPB hearings, but the SPB regulations in 2002 stated, “If the Notice of Findings concludes no retaliation occurred, the complainant may file a Petition for Rehearing before the [SPB].” Arbuckle’s notice of findings warned that the recommendation would become the board’s final decision if neither party requested a hearing before the SPB or if a party’s request for a hearing was denied.

Arbuckle did not petition for a hearing. She also did not seek to overturn the unfavorable findings by filing a petition for writ of administrative mandate in court. Instead, she filed a lawsuit for damages alleging violations of the California Whistleblower Protection Act and Labor Code Sec. 1102.5.

The Court of Appeal held that she could not proceed with her lawsuit because she had not completed the administrative procedures and had not overturned the adverse SPB findings in court. The board’s finding that her employer had not retaliated against her was therefore final and barred Arbuckle from claiming retaliation in court. The appellate court based its decision on the judicially created doctrines of exhaustion of administrative remedies and exhaustion of judicial remedies. Generally, employees must complete internal procedures that exist within an employing agency before resorting to the courts and must overturn the agency’s decision in court before filing a lawsuit for damages. If the agency makes a

quasi-judicial decision against the employee, the lower court ruled, the employee must ask a court to review and overturn that decision. If successful, she can go back to court to file a separate complaint for damages. Otherwise, the employee cannot relitigate the unfavorable facts and conclusions the SPB made.

### *Administrative Exhaustion Satisfied*

The Supreme Court reversed that decision. It quoted Sec. 8547.8(c) at length to illustrate that “the plain meaning of the statutory language supports Arbuckle’s argument that

there was no legal impediment to her filing an action in...court immediately after receiving the State Personnel Board’s adverse findings.” Neither Sec. 8547.8 nor Sec. 19683, which governs the SPB’s process of issuing findings, authorizes the employee to ask for a hearing before the board, even though the statute does permit a supervisor or manager who is found guilty of retaliation to request a hearing. Since the board’s regulations cannot amend the statute, the court said, there was no basis for concluding that the legislature intended to require whistleblower complainants to ask for a hearing after

receiving unfavorable findings.

The court reaffirmed that, in the usual case, a claimant must complete administrative procedures before going to court. But that doctrine does not apply, explained the Supreme Court, when a statute establishes a separate right to go to court for damages and prescribes the specific administrative steps a claimant must take. Therefore, the court held, it was sufficient for Arbuckle to receive the findings and wait for them to become final under the SPB’s regulations before filing a lawsuit.

### *Judicial Exhaustion Not Required*

Using similar reasoning, the court also rejected the lower court’s holding that Arbuckle was bound by the unfavorable

*It was sufficient for  
Arbuckle to receive  
the findings and wait  
for them to become  
final before filing a  
lawsuit.*

findings of the SPB — which precluded any claim of retaliation — unless she overturned them by going to court for a writ of mandate. The Supreme Court criticized the lower court's erroneous assumption that the act's requirement for a "hearing or investigation" and issuance of findings meant that an employee must go to court for a writ to overturn the SPB executive officer's findings, and that those findings would have the same status as a civil court judgment rendered after a full hearing, if not overturned in the writ proceeding.

As a general matter, writ review of an adverse administrative action is required before pursuing other remedies. If the administrative hearing had "the requisite judicial character," the decision would be binding in a later court claim, the Supreme Court said. However, the whistleblower legislation expressly authorized a damages action in court and addressed how the administrative process and the damages action coexist. The court pointed out that the legislature's only precondition to the damages action was that a complaint be filed with the board and that the board issue or fail to issue findings:

The bareness of this statutory language suggests that the Legislature did not intend the State Personnel Board's findings to have a preclusive effect against the complaining employee.

The court compared the whistleblower statute to Title VII and invoked the reasoning of the United States Supreme Court in *University of Tennessee v. Elliott* (1986) 478 U.S. 788, 71 CPER 77. Because Title VII contains specific language allowing an employee to file a civil court claim after meeting certain administrative claim prerequisites, the high court found that Congress had expressed an intent that unreviewed state administrative findings not preclude Title VII lawsuits. The whistleblower statute's language is like that in Title VII, the California Supreme Court said in *Arbuckle*, not like the city personnel procedures at issue in *Johnson v. City of Loma*

*Linda* (2000) 24 Cal.4th 61, 144 CPER 33, on which the California appellate court had relied.

The Supreme Court was not persuaded by the argument that allowing employees to file lawsuits without asking for court review of administrative findings would make administrative hearings meaningless and a waste of time. It pointed out that the legislature has provided for non-binding administrative hearings in other situations, such as wage and hour claims before the labor commissioner. "The Legislature may consider such nonbinding proceedings to be useful as a means of promoting settlement," the court surmised.

The more important consideration to the court was

*Making SPB findings binding would not serve the legislature's purpose of protecting the right to report wrongdoing without fear or retaliation.*

that making SPB findings binding in court would not serve the legislature's purpose of protecting the right to report wrongdoing without fear of retaliation. Review in writ proceedings is very deferential to the agency, the court emphasized. Since it is so difficult to overturn administrative findings, an employee who received adverse findings would have no damages remedy. In *Arbuckle's* case, that meant there was never a hearing, only a review of documentary evidence. Nothing in the act demonstrates that the legislature intended the damages remedy be that restricted, the court said.

The lower court's ruling also did not make sense when viewing the statutory structure as a whole.

Unfavorable findings would bar a later damages action, under the lower court's theory, while favorable findings would entitle an employee to sue for damages in court. But the whistleblower statute authorizes the SPB to order any appropriate relief, including damages. An employee who received favorable findings would not need to go to court, whereas the employee who received anything less than a full recovery at the SPB would be precluded from suing on the claims that remained uncompensated. The court action for damages "would be, to a large extent, superfluous. That result cannot be what the Legislature intended," the Supreme Court

reasoned. It concluded:

So long as the board has issued findings (or the deadline for issuing findings has passed), the employee may proceed with a damages action in superior court regardless of whether the board's findings are favorable or unfavorable to the employee. Moreover, once the board has issued findings, the employee need not pursue additional administrative remedies and need not challenge the findings by way of a petition for a writ of administrative mandate.

The court explicitly disapproved *California Public Employees' Retirement System v. Superior Court* (2008) 160 Cal. App.4th 174, 189 CPER 72, another case in which the Court of Appeal held that unchallenged SPB findings could not be relitigated in a whistleblower lawsuit. Arbuckle may now litigate her Whistleblower Act and Labor Code claims in court.

Left open is the question of whether a whistleblower can sue for damages if she received favorable SPB executive officer findings that caused the alleged retaliator to appeal the findings to the board. The *Arbuckle* court advised that it was not deciding whether a whistleblower could engage in the parallel processes at the same time.

### ***SPB Regulations Unaffected***

The *Arbuckle* case will not affect the procedures or regulations of the SPB for employees who wish to go to court, Acting Chief Counsel Bruce Monfross has advised. The 2006 regulations provide that a whistleblower complaint can be referred to an investigator or to an administrative law judge for an informal hearing. No longer are findings made solely on the basis of documentary evidence. The regulations also provide that a complainant who has received adverse executive officer findings has exhausted his administrative remedies and may file suit under the whistleblower act. This provision

complies with the *Arbuckle* decision.

### ***Broader Application?***

While the ruling is good news for state employees, it does not signal a change in procedure for whistleblowers at California's public universities in light of the Supreme Court's decision in *Miklosy v. Regents of the University of California* (2008) 44 Cal.4th 876, 192 CPER 56. Although the sections of the whistleblower law that govern university workers provide for an action for damages in court, the preconditions for going to court are different. The section applicable to the University of California allows a lawsuit when the employee has filed a complaint with the designated university official "and the university has failed to reach a decision regarding that complaint within the time limits established for that purpose by the regents." The section applicable to the California State University

contains nearly identical language, but adds, "Nothing in this section is intended to prohibit the injured party from seeking a remedy if the university has not satisfactorily addressed the complaint within 18 months."

Invoking the "plain meaning" approach, the court in *Miklosy* held that two whistleblowers could not file a lawsuit for damages because U.C. issued a timely decision on their complaint. The decision would appear to relegate CSU whistleblowers to internal university remedies without being able to sue for damages unless the university fails to act within the prescribed time limits or the employee is able to overturn university findings by petitioning a court for a writ. However, the *Arbuckle* decision should clear the way for community college employees to file a whistleblower lawsuit as long as they "have first filed a complaint with the local law enforcement agency," as required by Education Code Sec. 87614(h). (*State Board of Chiropractic Examiners v. Superior Court [Arbuckle]* [2009] 45 Cal.4th 963. ✱

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# Supreme Court: Collective Bargaining Agreement Can Require Union Members to Arbitrate Discrimination Claims

*Carol Vendrillo, CPER Editor*

*The majority reads  
Gardner-Denver narrowly.  
The dissent views it as stare  
decisis and controlling. Will  
this 5-4 conflict induce a Lilly  
Ledbetter fix?*

IN A MUCH ANTICIPATED decision, the Supreme Court announced that a provision in a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate employment discrimination claims is enforceable under federal law. In the opinion authored by Justice Clarence Thomas, the court found nothing in the federal Age Discrimination in Employment Act of 1967 that precludes arbitration of claims brought under the statute. Relying on *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 89 CPER 59, the majority found no legal basis to strike down the arbitration clause in the parties' negotiated agreement.

The 5-4 decision reverses the Second Circuit Court of Appeals decision that it could not compel arbitration under the parties' agreement because of its reading of *Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 61 CPER 61. In that case, the Supreme Court announced that a collective bargaining agreement could not waive workers' rights to a judicial forum for causes of action created by federal civil rights statutes. The Circuit Court attempted to reconcile *Gardner-Denver* with the Supreme Court's more recent decision in *Gilmer*, which concluded that an individual employee who had agreed to waive his or her right to a federal forum could be compelled to arbitrate a federal age discrimination claim. The Court of Appeals noted that the Supreme Court had sidestepped the "tension" between *Gardner-Denver* and *Gilmer* in *Wright v. Universal Maritime Service Corp.* (1998) 525 U.S. 70, 129 CPER 75, finding that the waiver in that case had not been "clear and unmistakable."

In the present case of *Pyett*, the Supreme Court was required to face this "tension" head on. The arbitration clause between the parties provided that ADEA and other statutory discrimination claims "shall be subject to the grievance and arbitration procedures...as the sole and exclusive remedy for violations."



Justice Thomas first described the fundamental principles on which federal private sector labor law is based. The National Labor Relations Act authorizes a union to serve as the exclusive representative of employees in the designated bargaining unit for purposes of collective bargaining over wages, hours, and other conditions of employment. Prior case law has held that arbitration is a condition of employment within the scope of bargaining.

The court rebuffed the argument that the parties' arbitration clause was outside the permissible scope of the collective bargaining process because it affected the employees' individual, non-economic, statutory rights. Parties favor arbitration because of the economics of dispute resolution, the court observed, and, as in any contractual negotiation, a union can agree to include an arbitration provision in its contract in return for other concessions from the employer. "Courts generally may not interfere in this bargained-for exchange," the court said. Judicial nullification of contractual concessions is at odds with "one of the fundamental policies of the National Labor Relations Act — freedom of contract." Therefore, Thomas reasoned, the contract in *Pyett* must be honored unless the age discrimination statute "removes this particular class of grievances from the NLRA's broad sweep." "It does not," he concluded.

In *Gilmer*, Justice Thomas explained, the court said that, while all statutory claims may not be suited for arbitration, "having made the bargain to arbitrate, the party should be held to it unless Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." Nothing in the text of the age discrimination statute expressly precludes arbitration, or supports the conclusion that arbitrating those claims would undermine the anti-discrimination statute's remedial and deterrent function, the *Gilmer* court found.

The *Gilmer* court's interpretation of the age discrimination law "fully applies in the collective-bargaining process," said Thomas. "Nothing in the law suggests a distinction between

the status of arbitration agreements signed by an individual employee and those agreed to by a union representative." The only requirement, the court instructed, is that the agreement to arbitrate statutory discrimination claims must be "explicitly stated" in the collective bargaining agreement. The negotiated agreement in this case "meets that obligation," the majority concluded:

*In any contractual negotiation, a union can agree to include an arbitration provision in return for other concessions from the employer.*

Examination of the two federal statutes at issue in this case, therefore, yields a straightforward answer to the question presented: The NLRA provided the Union and [the employer] with statutory authority to collectively bargain for arbitration of workplace discrimination claims, and Congress did not terminate that authority with respect to federal age-discrimination claims in the ADEA. Accordingly, there is no legal basis for the Court to strike down the arbitration clause in this [collective bargaining agreement], which was freely negotiated by the Union and [the employer], and which clearly and unmistakably requires [union members] to arbitrate the age-discrimination claims at issue in this appeal. Congress has chosen to allow arbitration of ADEA claims. The Judiciary must respect that choice.

The court also explained that the contract arbitration provision is fully enforceable under the conclusions set forth in the *Alexander v. Gardner-Denver* line of cases.

First, the majority said, *Gardner-Denver* did not hold that an agreement to arbitrate a discrimination claim contained in a collective bargaining agreement cannot waive an individual employee's right to a judicial forum provided under federal anti-discrimination statutes. The legal rule announced in that case and its progeny is narrow, said Justice Thomas. Those cases did not involve the enforceability of an agreement to arbitrate statutory claims, he observed, but the issue of whether arbitration of contract-based discrimination claims precludes subsequent judicial resolution of statutory claims. The *Gardner-Denver* line of cases is not controlling in this

case, the court reasoned, because the arbitration provision in this collective bargaining agreement expressly covers both statutory and contractual discrimination claims.

The court also took note that the *Gardner-Denver* line of cases included “dicta” that was highly critical of using the arbitration process to adjudicate anti-discrimination rights. The court has since abandoned its misconceived view of arbitration, Thomas announced.

*Gardner-Denver* did state that there could be “no prospective waiver of an employee’s rights under Title VII.” But contrary to *Gardner-Denver*’s erroneous assumption, said the court, the decision to resolve age discrimination claims through the arbitration process does not waive the statutory right to be free from age discrimination in the workplace. Rather, it only waives the right to seek relief from a court in the first instance.

The *Pyett* majority also criticized *Gardner-Denver*’s mistaken suggestion that the informal features of arbitration “are well suited to the resolution of contractual disputes,” but a “comparatively inappropriate forum for the final resolution” of employment rights. An arbitrator’s capacity to resolve complex questions of fact and law extends “with equal force” to discrimination claims, said the court. And, the fact that the arbitration forum is more streamlined than federal litigation is not a basis for finding that arbitration is inadequate. “The relative informality of arbitration is one of the chief reasons that parties select arbitration,” wrote the justice.

The court also dispensed with a concern expressed in *Gardner-Denver* — that, in arbitration, a union may subordinate the interests of an individual employee to the collective interests of all the employees in the bargaining unit. The court cannot rely on this judicial policy concern as a source of authority for introducing a qualification that is not found in the text of the age discrimination statute, reasoned the majority. “Until Congress amends the ADEA to meet the conflict-of-interest concern identified in *Gardner-*

*Denver*,” said the court, “there is no reason to color the lens through which the arbitration clause is read simply because of an alleged conflict of interest between a union and its members.”

Moreover, said the court, the conflict of interest argument is an unsustainable collateral attack on the National Labor Relations Act, the central premise of which is the principle

of majority rule, Justice Thomas wrote. Congress sought to give collective strength and bargaining power to the majority, even though it was aware that the interests of individuals might be subordinated. “It was Congress’ verdict,” the majority stressed, “that the benefits of organized labor outweigh the sacrifice of individual liberty that this system necessarily demands.”

In any event, said the court, Congress has accounted for this conflict of interest by imposing on labor unions the duty of fair representation, which is breached when conduct toward a member is arbitrary, discriminatory, or in bad faith. A union may itself face liability if it discriminates against its members on the basis of age or, as in

*Pyett*, if it withdraws support for an age discrimination claim. Given this avenue of redress, Justice Thomas concluded, it would be inappropriate for the court to impose an artificial limitation on the collective bargaining process.

Union members also may bring age discrimination claims to the Equal Employment Opportunity Commission and the National Labor Relations Board, the majority asserted, which may then seek judicial intervention under Supreme Court precedent.

Finally, the court declined to address the argument that the collective bargaining agreement operates as a substantive waiver of ADEA rights because it precludes a federal lawsuit and allows the union to block arbitration of these claims. In light of evidentiary assertions that the union *allowed* the employees to continue to proceed with arbitration even though the union declined to participate, the court said it was “not positioned” to resolve whether the collective bargaining

*The majority criticized the suggestion that the informal features of arbitration are inappropriate for the final resolution of employment rights.*



agreement allows the union to prevent effective vindication of protected civil rights in the arbitral forum.

In his dissent, Justice David Souter, joined by Justices John Paul Stevens, Ruth Bader Ginsburg, and Stephen Breyer, emphasized the holding of *Gardner-Denver* that the civil rights conferred by Title VII cannot be waived as part of the collective bargaining process. In that case, said Souter, the court stressed the difference between statutory rights related to collective activity, which may be relinquished by the union as the exclusive bargaining representative to obtain economic benefits for its members, and an individual employee's right to equal opportunities. "In *Gardner-Denver*," wrote Souter, the court held "that an individual's statutory right of freedom from discrimination and access to court for enforcement were beyond a union's power to waive." Because the court's interpretation of Title VII in *Gardner-Denver* applies with equal force in the context of age discrimination, "principles of *stare decisis*" demand that the court's decision in *Gardner-Denver* must be respected, Souter said. "There is no argument for abandoning precedent here," he wrote, "and *Gardner-Denver* controls." (14 Penn Plaza v. Pyett [4-1-09] Supreme Ct. No. 07-581, 556 U.S. \_\_\_, 2009 DJDAR 4861.)

How unions will react to the *Pyett* decision remains to be seen. Labor organizations may be disinclined to include the right to arbitrate anti-discrimination laws in their future collective bargaining agreements so as not to force their members to take civil rights claims to arbitration and forego full judicial review in federal court. The ability of arbitrators to adjudicate complex employment discrimination cases also may be a concern. Many arbitrators who have extensive experience as labor arbitrators may find themselves on less-firm footing when the dispute involves a complex employment discrimination lawsuit.

Given that the majority and dissenting opinions both rely heavily on their views of congressional intent, it may be, as in the Lilly Ledbetter situation, that lawmakers will weigh in and directly address whether Congress wishes to preserve access to the federal courts for individual anti-discrimination claims based on federal statutes like Title VII and ADEA — arbitration clauses notwithstanding. \*

## Recent Developments

# Local Government

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### Limited Review of PERB's Decision Not to Issue Complaint

A PARTY AGGRIEVED by a Public Employment Relations Board decision not to issue an unfair practice charge has recourse to challenge that decision in court. So said the Court of Appeal for the First Appellate District in *International Association of Fire Fighters, Loc. 188 v. PERB and the City of Richmond*. The threshold issue facing the

complaint constitutes a dismissal of the charge. The MMBA provides in Sec. 3509.5(a) that a party "aggrieved by a final decision or order of [PERB] in an unfair practice case, except a decision of the board not to issue a complaint in such case" can challenge that decision in the appropriate appellate court.

Similar language appears in all of the other collective bargaining statutes over which PERB exercises jurisdiction. These statutory exemptions from the judicial review afforded PERB's decision derives from similar exemptions in the state Agricultural Labor Relations Act and the federal National Labor Relations Act. This statutory framework aims to defer to the discretion and special expertise of the labor boards charged with administering the collective bargaining statute. However, said the court, there is an exception to the general rule precluding judicial review of such decisions.

The court relied on *Belridge Farms v. ALRB* (1978) 21 Cal.3d 551, and concluded that its authority to review a decision not to issue a complaint "is limited to a determination of whether the decision violates a constitutional right, exceeds a specific grant of authority, or is based on an erroneous construction of an applicable statute."

These are purely questions of law, said the court, and PERB's interpretation of its statutory authority "will generally be followed unless it is clearly erroneous."

The court underscored that it is not empowered to review the factual basis for a decision, even under an abuse of discretion standard, because, like the general counsel of the NLRB, PERB has "unreviewable discretion to refuse to institute an unfair labor practice complaint." And, said the court, "an erroneous decision that the facts alleged by a complaining party fail to rise to the level of an unfair labor practice does not warrant the issuance

*There is an exception  
to the general  
rule precluding  
judicial review.*

court was whether it could consider a party's challenge to PERB's decision dismissing an unfair practice charge and refusing to issue a complaint under the Meyers-Milias-Brown Act.

The court first established that PERB has exclusive jurisdiction over violations of the MMBA and is given exclusive jurisdiction to determine whether an unfair practice charge is justified. According to PERB's regulations, a PERB agent is authorized to make inquiries and review the charge to determine if the allegations state a prima facie case. A refusal to issue a

*The court is not  
empowered to review  
the factual basis for  
a decision.*

of an extraordinary writ because the issue presents a factual question within the general counsel's broad discretion and not a matter of statutory construction."

The court clarified that any judicial challenge to a PERB decision not to issue a complaint must be filed in the trial court, not the Court of Appeal. The court reasoned that the provision of Sec. 3509.5, which states that a petition for a writ of review must be filed in an appropriate Court of Appeal, is inapplicable to a petition challenging a decision not to issue an unfair practice complaint.

**The Rule Applied.** With those limited grounds of judicial review in mind, the court restricted its inquiry to whether PERB's decision is based on an erroneous construction of the statute. Since Sec. 3509(b) requires PERB to make rulings "consistent with existing judicial interpretations of [the MMBA], the court focused on the Supreme Court's ruling in *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 23 CPER 54. In that case, the court held that a local government's decision to lay off firefighters is not negotiable.

*The court observed an important distinction between shift staffing levels and equipment staffing levels.*

The court turned aside the union's interpretation of *Vallejo* as establishing that staffing levels, which primarily involve employee workload and safety, not the agency's fire prevention policy, are mandatory subjects of bargaining. "Recharacterizing a layoff decision as one that merely impacts shift staffing levels does not transform the decision into a mandatory subject of collective bargaining." And, the court noted, the union's reliance on *Building Material & Construction Teamsters Union v. Farrell* (1986) 41 Cal.3d 651, 69 CPER 23, and *Rialto Police Benefit Assn. v. City of Rialto* (2007) 155 Cal.App.4th 1295,

187 CPER 34, is misplaced because those cases involved the transfer of bargaining work to different employees. Here, said the court, the layoffs did not result from a transfer of firefighting work to an entity outside the city fire department. Instead, the city chose to reduce the number of firefighters.

After a careful examination of the *Vallejo* decision, the court declined to accept the union's view that PERB is required to hold a hearing and make a decision based on factual evidence as to whether the changes primarily involve firefighter workload and safety or the city's policy on fire prevention. Under the union's argument, the court said, "PERB would be required to issue a complaint in any firefighter layoff case in which it is alleged that the layoffs affect the workload and safety of the remaining firefighters."

The court also observed an important distinction between shift staffing levels and equipment staffing levels. The change in the number of personnel assigned to each engine or

truck "has a much greater impact on workload and safety than the number of firefighters on duty throughout the City," the court asserted. A reduction in the number of firefighters primarily impacts the fire protection provided to city residents. "It goes without saying that firefighters have an extremely dangerous job," said the court, "and we do not mean to suggest that workload and safety issues are inconsequential when shift staffing levels are reduced." But, these charges have a less significant impact on workload and safety than changes in equipment staffing.

The court concluded that PERB's interpretation of *Vallejo* is correct: "The decision to lay off firefighters is not subject to negotiation. However the effects of that decision, including workload and safety of the remaining firefighters, are properly the subjects of collective bargaining." (*International Association of Fire Fighters, Loc. 188, AFL-CIO v. PERB; City of Richmond RPI*; [2009] 172 Cal.App.4th 265.)

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## Disclosure Not Mandated by Speculation That Requested Material Might Contain Adverse Comments

THE CITY OF LOS ANGELES acted in conformity with the Public Safety Officers Procedural Bill of Rights Act when it withheld from a police officer certain investigative materials — such as interview tapes and transcripts — that pertained to allegations of misconduct. In *McMahon v. City of Los Angeles*, the

Court of Appeal reasoned that, where the police department disclosed all adverse comments made against the officer, the officer's speculation that the underlying investigative materials *might contain additional adverse comments* does not mandate disclosure under Sec. 3306.5(a) of the Bill of Rights Act.

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By J. Scott Teidemann  
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And, the court added, the undisclosed material is maintained by the police department in a way that precludes its use in personnel decisions.

Officer Walter McMahon worked as part of a team responsible for investigating illegal gang activity. In 2004, McMahon's work led to numerous arrests, seizures of contraband, and evictions. Residents of the targeted community filed formal complaints against McMahon, alleging criminal and administrative misconduct. These accusations were referred to the department's internal affairs division for investigation.

Internal affairs determined that the complaints against McMahon were "spurious" and had been filed to drive

McMahon from the assignment where he had been so effective.

The department provided McMahon with a copy of each complaint, the complaint fact sheet and complaint adjudication forms, the employee interview form, and the commanding

*Personnel decisions  
can be based only on  
materials in the  
official personnel file.*

officer's letter of transmittal. However, McMahon asked for additional written and recorded materials generated

by the internal affairs investigation. Specifically, McMahon wanted the audiotapes and transcripts of witness interviews, surveillance and case notes, chronological files, summaries, and other memos. The department refused McMahon's request, informing him that he had been provided with copies of all materials used by the commanding officers who adjudicated the complaints, including a fact sheet that provided a comprehensive summary of the complaints and the identities of the complainants. The department also advised McMahon that, since none of the complaints was sustained, there were no adverse comments placed in his personnel file requiring a responsive

*cper*

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>

comment. McMahon filed a petition to compel the department to release the requested material, asserting that, without the documentation, he was unable to ascertain whether his personnel records contained allegations of misconduct or adverse comments that potentially could impair his career advancement or future employment opportunities. The trial court refused to order release of the material, and McMahon appealed.

Section 3306.5(a) of the act conveys to a peace officer the right to inspect “personnel files that are used or have been used to determine that officer’s qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.”

The court underscored that the citizen complaints as well as the underlying investigative materials were not kept in McMahon’s official personnel file, but in the department’s internal affairs files. And, according to the department’s regulations, personnel decisions can be based only on materials in the officer’s official personnel file.

Moreover, the department’s obligation to disclose the underlying investigative materials turns on the language of Sec. 3306.5(a) and whether these documents qualify as “personnel files that *are used* or *have been used*” to affect the enumerated determinations. McMahon’s speculation that other adverse comments might be contained in the undisclosed materials was insufficient to meet this test. In sum, said

the court, by providing McMahon with the citizen complaints and related documents, the department complied with the legislative intent to ensure that an officer is made aware of adverse

comments and given an opportunity to file a written response. (*McMahon v. City of Los Angeles* [4-8-09] B206254 [2d Dist.] \_\_\_Cal.App.4th\_\_\_, 2009 DJDAR 5177.)

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## Commission Abused Its Discretion When It Reversed Sheriff’s Demotion

THE SANTA CRUZ County Civil Service Commission abused its discretion when it overrode the sheriff’s decision to demote an officer because of his inappropriate behavior. The commission elected, instead, to impose a 30-day suspension. On review, the Court of Appeal found that the commission had abused its discretion because it failed to put forward any reasonable basis to support a reduction in the penalty given the nature of the misconduct.

Santa Cruz County Correctional Officer Diana Holland complained to Chief Deputy Sheriff Don Bradley that her supervisor, Sergeant George Jack, was publicly and privately belittling and intimidating her and treating her more harshly than he did her male colleagues.

Bradley told Jack he intended to conduct an investigation into Holland’s allegations and instructed Jack not to talk to Holland. Jack disregarded Bradley’s admonition and visited Holland in her office. At Jack’s request, he and Holland had a conversation during which Jack criticized Holland for “going behind his back” to raise

her complaints with Bradley. When Jack told Bradley about the meeting, he said the conversation had been initiated by Holland and that they had “worked things out.” When Bradley shared this information with Holland, she told him that Jack’s account was a “flat out lie.”

Following an investigation, an internal affairs report found that Jack had made false statements, was insubordinate, and had engaged in willful disobedience and conduct unbecoming an officer. Based on these findings, the sheriff ordered Jack demoted from sergeant to deputy sheriff.

Jack appealed his demotion to the civil service commission, which held an administrative hearing and found that “the preponderance of the evidence does not establish just cause for Sergeant Jack’s demotion...but does justify a 30-day suspension.” The county requested that the commission issue findings in support of its decision, but the written statement that followed did not include any findings or basis for its decision.



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

-- Vernon Sanders Law, baseball player

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## **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>

The county then filed a lawsuit, and the superior court ordered the commission to set aside its decision and conduct a new administrative hearing.

The commission issued a second decision; it found that Jack had made false statements and was insubordinate and disobedient. It did not, however, explain why it had reduced the penalty.

The county then asked the court to reverse the commission's decision to reinstate Jack, but it declined to do so, finding that the commission did not abuse its discretion.

In reviewing the commission's ruling, the appellate court noted, "While the agency has discretion to act, that discretion is not unfettered." When considering whether abuse of discretion occurred in the context of public employee discipline, the court in-

structed, the overriding consideration is the extent to which the employee's conduct harmed or, if repeated, would harm the public service. The county is entitled to protection from unprofessional employees, the court said.

Relying on *Kolender v. San Diego County Civil Service Commission* (2005) 132 Cal.App.4th 716, 174 CPER 38, the court said: "A deputy sheriff's job is a position of trust, and the public has a right to the highest standard of behavior from those they invest with the power and authority of a law enforcement officer. Honesty, credibility and temperament are crucial to the proper performance of an officer's duties. Dishonesty is incompatible with the public trust."

Turning to the facts, the Court of Appeal found that Jack created a hostile work environment for his female subordinate, disobeyed a direct order

not to contact her, intimidated her during the meeting, and lied about what had occurred.

"The honesty and integrity of a Sergeant in the Sheriff's Department is paramount to the public safety and trust, and breach of that trust is cause for grave concern." And, the court added, "The fact that the dishonesty in this case related to an internal employment investigation rather than an investigation of inmate abuse does not make the misconduct any less troubling."

The court also looked to *Hankla v. Long Beach Civil Service Commission* (1995) 34 Cal.App.4th 1216, 112 CPER 33, where the court reversed a decision by the civil service commission to reinstate a police officer, commenting that the system of law and order depends on officers being faithful to the trust imposed on them.



As a sergeant, the court said, Jack's dishonesty "affected his ability to effectively lead as a supervisor, causing harm to the public trust."

Referencing the requirement imposed by the Fair Employment and Housing Act that employers take reasonable steps to prevent harassment from occurring, the court concluded

*Santa Cruz v. Civil Service Commission of Santa Cruz* [2009] 171 Cal.App.4th 1577.)

*The county is entitled to protection from unprofessional employees.*

that Jack's interference in the internal investigation of gender bias and his continued harassment of Holland placed the county at risk of liability.

The commission's findings — that Jack made false statements, was insubordinate, and was willfully disobedient — did not support a reduction of the penalty, the court said. "Rather, they provide a basis for the original demotion ordered by the Sheriff." "We find no reasonable mind could conclude, based on these findings, a reduction of Jack's penalty was warranted. While the Commission had discretion to reinstate Jack, and to reduce the penalty ordered by the Sheriff, that discretion had to be based on reason."

While it is within the commission's province to measure the seriousness of the misconduct, said the court, Jack's lies "were among the most serious a peace officer could utter." (*County of*

## Public Schools

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### Layoff of Teacher With More Seniority Upheld

A SCHOOL DISTRICT that laid off a certificated employee for budgetary reasons while retaining other employees with less seniority did not violate the Education Code, concluded the Third District Court of Appeal in *Bledsoe v. Biggs Unified School Dist.* The district met its burden under Education Code Sec. 44955(d) and was allowed to deviate from the strict order of seniority by showing that the junior employees had specialized training and experience which the more-senior teacher lacked.

#### Factual Background

Vernon Lane Bledsoe, a certificated teacher, was notified that he would not be reemployed for the following school year due to budgetary shortfalls. At an administrative hearing, Bledsoe argued that the district should have laid off one of the two teachers with less seniority, Scott Gates or Vince Sormano. Gates and Sormano taught at the community day school, a school reserved for students who were expelled or who had behavior problems that prevented them from being in a regular classroom.

At the hearing, District Superintendent Rick Light testified that teachers at the community day school

should have a background in psychology or sociology and in behavior modification, be credentialed in as many subjects as possible, and be highly qualified for purposes of the No Child Left Behind Act in more than one subject.

*Bledsoe argued that the district should have laid off one of the two teachers with less seniority.*

Bledsoe had a single history credential and introductory supplementary credentials in social science and English. He had a Specially Designed Academic Instruction in English certificate and was highly qualified under the NCLB in English and social science. He had taught at a juvenile hall and in a community day school for a short time approximately 12 years prior to the hearing, and worked two summers during college at a camp for troubled boys. He had no course work in psychology or sociology since college. He had not received any training

in crisis intervention within the last five years and had no training in drug abuse recognition. Nor had he taught in a self-contained classroom in the last five years.

Gates, on the other hand, had a clear multiple-subject credential and was highly qualified for purposes of the NCLB in multiple subjects. He had 12 years of teaching experience, eight of which involved working with disabled populations. He had a bachelor's degree in applied psychology and extensive training in mediation, aggression management, abuse recognition, and other training related to working with difficult student populations.

Sormano had a clear, single social science credential and was highly qualified under the NCLB in the same subject. He had sufficient courses to cover most of the areas of high school instruction and a number of units in sociology. He had extensive background and training in specialized areas related to teaching at a community day school, including management of assaultive behavior and drug abuse recognition. He had experience working with special needs children and utilizing behavioral modification techniques.

The ALJ upheld Bledsoe's layoff, and his proposed decision was adopted by the board of trustees. Bledsoe and his union, the Biggs Unified Teachers Association, filed a petition for administrative mandamus, which was denied by the trial court. Bledsoe and the union appealed.

### Court of Appeal Decision

The court noted that Ed. Code Sec. 44955(b), at the center of this case, is known as the “economic layoff” statute. It reads, “Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while...any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.” This language gives “bumping” rights

*The court found that the district qualified for an exception under Sec. 44955(d).*

to senior certificated and competent employees, and gives the district “skip-ping” rights to retain more-junior employees who are certificated and competent to render services that more-senior employees are not. Section 44955(d) “provides an exception to subdivision (b) where the District demonstrates specific need for personnel to teach a specific course of study, that a junior certificated employee has special training and experience necessary to teach that course and that the senior certificated employee does not possess such necessary special training and experience.”

The court agreed that Bledsoe is qualified to teach at a community day

school “so as to trigger” Sec. 44955(b), but found that the district qualified for an exception under Sec. 44955(d).

The court rejected the district’s argument that Bledsoe was not qualified because he did not ask to teach at the community day school before the March 15 deadline. The court found it was not Bledsoe’s obligation “to anticipate his inclusion in the District’s economic layoff and to offer his consent to such an assignment in order to establish his qualification for it. No; it was the District’s obligation under section 44955, subdivision (b), to determine whether any permanent employee whose employment is to be terminated in an economic layoff possessed the seniority and qualifications which would entitle him/her to be assigned to another position.”

However, the court continued, notwithstanding subdivision (b), Sec. 44955(d)(1) allows a school district to deviate from order of seniority when it demonstrates “a specific need for personnel to teach a specific course or courses of study, or to provide services authorized by a services credential... in either pupil personnel services or health for a school nurse, and that the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services, which others with more seniority do not possess.”

Bledsoe and the union argued that only formal, written requirements for a teaching position at the community day school were relevant and that

Light’s *opinion* of the district’s needs was irrelevant to whether Bledsoe was competent to teach at the school. The court did not agree, finding that “there

*The court concluded the evidence showed a need for specific teachers in its community day school.*

is nothing in the statute that requires such needs to be evidenced by formal, written policies, course or job descriptions, or program requirements.”

Contrary to Bledsoe’s claim, the court concluded that Light presented evidence showing a need for specific teachers in its community day school:

While teachers qualified under section 44865 may have the base qualifications necessary to be certificated and competent to render services at a community day school for purposes of section 44955, subdivision (b), subdivision (d)(1) recognizes a district may have special needs for personnel to teach a specific course of study that go beyond base qualifications. Light testified [the] community day school serves a distinct and difficult student population — those who have been expelled or who have extreme behavioral difficulties. To deal appropriately with such students, teachers need specialized background, training and experience. This evidence sufficiently established a specific need by the District for such teachers.

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-- Robert Frost, poet

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## Pocket Guide to the Educational Employment Relations Act

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

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Bledsoe also argued that the district failed to show that the certificated teachers it retained had the "special training and experience necessary to teach that course or course of study or to provide those services," as required by Sec. 44955(d)(1). "Not so," said the court. It found that Light's testimony regarding the temperament, experience, and credentials of Gates and Sormano was sufficient.

The court also was persuaded by an earlier administrative decision involving a prior reduction in force where other teachers more senior than Gates and Sormano were laid off. The ALJ in that case concluded that the district had shown that Gates

and Sormano had the special training and experience to meet the district's specific needs for its community day school. Bledsoe objected to reliance on the prior decision, claiming it is "evidence only of what the ALJ in that case found at that time as to the teachers involved in that case." But the court found that, because the case involved the identical legal issue presented, the same district needs, and the same teachers' qualifications, admission of the prior decision was permissible.

Bledsoe contended that it was illegal for the district to give him notice before assessing his competence to teach at the community day school. While acknowledging that the district

should have done so, the court found that its failure to do so was not because Bledsoe requested a hearing. The district timely served an accusation, notice of hearing, and notice of defense form on Bledsoe, who timely filed a notice of defense, and a full hearing on the merits followed. Subsequently, the ALJ issued a decision that was adopted by the board before Bledsoe was sent a final notice. The court concluded that Bledsoe's discharge "occurred after the Board considered his competency to remain." (*Bledsoe v. Biggs Unified School Dist.* [2009] 170 Cal.App.4th 127.)

## Part-Timer Cannot Displace Less-Senior Full-Time Employee

WHEN A school district lays off certificated employees because of a reduction of services pursuant to Education Code Sec. 44955, part-time employees with greater seniority cannot “bump” less-senior full-time employees, according to a recent decision of the First District Court of Appeal.

In *Hildebrandt v. St. Helena Unified School Dist.*, the appellate court upheld the trial court’s denial of a petition for writ of mandamus filed by two part-time school psychologists, Margaret Hildebrandt and Susan Wood-DeGuilio. The two sought to overturn an administrative law judge’s decision, adopted by the board, holding that they could be laid off while Ramah Commanday, a full-time school psychologist with less seniority, was retained. According to the ALJ, “Wood-DeGuilio and Hildebrandt do not have the right to force the District to divide a full-time position to accommodate their desire for part-time employment.”

The Court of Appeal recognized that a literal reading of the statute “gives considerable force” to Hildebrandt and Wood-DeGuilio’s position. Section 44955(d) reads, in part, “Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any

other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.”

However, the court was persuaded otherwise by *Murray v. Sonoma County Office of Education* (1989) 208 Cal. App.3d 456, 81 CPER 41. In that case, the court considered the claim

*‘School districts have broad discretion in defining positions and establishing requirements for employment.’*

of a part-time nurse whose position had been discontinued for budgetary reasons. When the employer created a full-time nursing position the following year, it refused to reemploy her and instead employed another person with less seniority. The part-time nurse claimed she was entitled to the position under Ed. Code Sec. 44956, which includes the same language as in Sec. 44955.

The court found that Secs. 44955 and 44956 “should be read together and applied consistently if reasonably possible to do so.” The purpose of

both provisions was to give preference to qualified employees based on their relative seniority. “If this preference does not entitle an employee with seniority to compel a school district to split a full-time position held by an employee with less seniority in the case of a reinstatement, we see no reason why a district should be compelled to split the position in the event of a layoff,” said the court.

The *Murray* court held that a part-time position to perform a particular assignment is not the same “service” as a full-time position to perform that same assignment. The court in *Hildebrandt* agreed, stating, “School districts have broad discretion in defining positions within the district and establishing requirements for employment,” including determining the training and experience necessary for particular positions. “Similarly, school districts have the discretion to determine particular kinds of services that will be eliminated, even though a service continues to be performed or provided in a different manner by the district,” it added. Turning to the specific situation before it, the court said:

Within the scope of a school district’s discretion, there is little reason why a district should be unable to define a position as full time if the district concludes that the assignment cannot be as well performed on a part-time basis. No less than in determining the qualifications necessary to render a person competent to perform a particular assignment, this determination falls within the



“special competence” of school district officials. As the court held in *Murray*, a district may define a “service” in terms of the hours required to perform it, so that two part-time employees performing the same responsibilities do not necessarily perform the same “service” as one full-time employee....[S]o long as the determination is reasonable and made in good faith, neither section 49455 nor any other provision of the Education Code precludes a school district from defining a position, or a “service,” as full time.

The court also noted that at the administrative hearing, the assistant

superintendent testified that the district considers the full-time psychologist to be “programmatically” what is needed for continuity. Commanday, the full-time psychologist, also testified to the district’s need for a full-time position.

Because neither of the part-time psychologists asserted she was entitled to the full-time position, the court “had no occasion to consider what the appellant’s rights would have been had such a demand been made.” (*Hildebrandt v. St. Helena Unified School Dist.* [2009] 172 Cal.App.4th 334.)

The Court of Appeal framed the issue as “whether a school district’s allegedly retaliatory decision not to reelect a probationary teacher may be subject to contractual arbitration procedures.” It found *Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269, 113 CPER 41, to be dispositive. In that case, the district decided not to reelect a probationary employee, but failed to give notice, a statement of reasons for its decision, and the right to appeal, all of which were required by the collective bargaining agreement. The arbitrator determined the district had violated the agreement and ordered it to reconsider its decision.

The Supreme Court found that the Educational Employment Relations Act implicitly exempted the non-re-election decision from collective bargaining by not listing it as one of the matters subject to bargaining under Government Code Sec. 3543.2(a). The high court determined that parties could not negotiate greater protections for probationary teachers than those afforded by statute, referencing Gov. Code Sec. 3540. A collective bargaining provision that conflicted with Education Code Sec. 44929.21(b), which does not provide probationary teachers the same due process protections as those conveyed to permanent teachers, also conflicted with Gov. Code Sec. 3540, said the court. It held that Sec. 44929.21(b) preempts collective bargaining agreements regarding the reelection of probationary teachers.

## Decision Not to Reelect Probationary Teacher Not Subject to Arbitration

A SCHOOL DISTRICT’S decision not to reelect a probationary teacher is not subject to arbitration under a collective bargaining agreement even where it is alleged that the decision was in retaliation for the teacher’s protected activities, according to the Sixth District Court of Appeal. In *Sunnyvale Unified School Dist. v. Jacobs*, the court determined that jurisdiction in such a situation lies exclusively with the Public Employment Relations Board.

During his second year as a probationary teacher, Michael Jacobs was notified that he would not be reelected for the following year and therefore would not become a permanent teacher. Jacobs’ union, the Sunnyvale Education Association, filed

a grievance alleging the decision was in retaliation for Jacobs’ participation in association activities in violation of the collective bargaining agreement. The district denied the allegation and challenged the arbitrator’s power to order reinstatement, arguing that the subject of reelection is preempted by state law and cannot be the subject of collective bargaining. The arbitrator rejected the challenge, found the decision was retaliatory, and ordered Jacobs reinstated. The union petitioned the superior court to confirm the award, and the district petitioned to vacate the order of reinstatement. After the trial court vacated the order, finding it was not within the arbitrator’s authority, the association appealed.



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The association argued that *Round Valley* was inapplicable because the collective bargaining agreement in this case imposed no procedural requirements; it merely imported substantive rights from EERA. The court said that the union was reading *Round Valley* “too narrowly.” It noted the Supreme Court’s holding was that the “decision not to reelect could not be the subject

*A school district’s decision not to reelect a probationary teacher cannot be the subject of collective bargaining.*

of collective bargaining” and that it was not limited to procedural requirements. “Indeed, the court specified that the Education Code preempted collective bargaining agreements ‘as to causes and procedures’ governing the reelection decision,” it said.

“In sum, as *Round Valley* specifically held, a school district’s decision not to reelect a probationary teacher cannot be the subject of collective bargaining,” concluded the court. “It follows that the decision cannot be challenged as a breach of the collective bargaining agreement. The decision is

outside the scope of the agreement, as a matter of law.”

Under EERA, PERB has exclusive jurisdiction to determine unfair practice charges, said the court, citing *McFarland Unified School Dist. v. Public Employment Relations Board* (1991) 228 Cal.App.3d 166, 89 CPER 42. The union argued that PERB’s authority extends to the arbitrator under the deferral doctrine. Under Gov. Code Sec. 3541(a)(2), where an unfair practice charge is also alleged to be a breach of the collective bargaining agreement, PERB must defer issuing a complaint until the parties have exhausted the grievance process. The doctrine does not apply here, instructed the court. “Since the non-reelection decision may not be the subject of collective bargaining, the collective bargaining agreement may not be read to apply to that decision; there is no contractual provision to which PERB can defer.”

The court was not persuaded otherwise by the association’s reliance on *Baker Valley Teachers Assn. v. Baker Valley Unified School Dist.* (2008) PERB Dec. No. 1993, where the district argued that the Education Code provided the exclusive procedure for evaluating its proffered reasons for not renewing a teacher’s contract and that PERB had no power to second guess those reasons. In its decision, PERB clarified that it “does not determine whether the employer had cause to discipline or terminate the employee.” Rather, it “weighs the employer’s justifications for the adverse action against

the evidence of the retaliatory motive.” Thus, it concluded, “PERB’s inquiry is not whether the employer had a lawful reason for the action but whether it took the action for an unlawful reason.” The association in this case argued that this passage makes clear there is a difference between cause for non-reelection and dismissal for an illegal reason. The court agreed that

*Under EERA, PERB has exclusive jurisdiction to determine unfair practice charges.*

there may be a difference. “But that difference is what allows PERB to adjudicate an unfair practice claim in the non-reelection context,” it continued. “It says nothing about the arbitrator’s power, which is derived solely from the collective bargaining agreement. Since the non-reelection decision may not be the subject of collective bargaining, the arbitrator has no jurisdiction over a non-reelection dispute.”

The court affirmed the order vacating the award. (*Sunnyvale Unified School Dist. v. Jacobs* [2009] 171 Cal. App.4th 168.)

## Teacher Not Entitled to Notice Prior to Closed Board Meeting Regarding Possible Dismissal

THE SECOND District Court of Appeal ruled that a school board is not required to provide 24-hour notice prior to convening a closed session to consider the dismissal of a permanent certificated teacher. In *Kolter v. Commission on Professional Competence of the Los Angeles Unified School Dist.*, the court concluded that Government Code Sec. 54957 provides an exception to the 24-hour prior notice requirement of the Ralph M. Brown Act.

The district's governing board met in a closed session to consider the dismissal of Colleen Kolter. Kolter was not given notice of the meeting or of the charges against her. After the meeting, the board gave her written notice

of its intent to dismiss and her right to a public hearing.

Kolter exercised her right to a hearing before the Commission on Professional Competence. Her motion to dismiss the proceedings based on a violation of the Brown Act was denied. The hearing was held, and the commission voted to dismiss her. The trial court upheld the dismissal, and Kolter appealed.

The Court of Appeal recognized that Gov. Code Sec. 54953 of the Brown Act requires that "all meetings of the legislative body of a local agency shall be open and public...." The Sec. 54957 "personnel exception" allows an agency to hold closed sessions "to consider the appointment, employment,

evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee by another person or employee unless the employee requests a public session." However, "as a condition to holding a closed session on specific complaints or charges brought against an employee by another person or employee, the employee shall be given written notice of his or her right to have the complaints or charges heard in an open session rather than a closed session, which notice shall be delivered personally or by mail at least 24 hours before the time for holding the session."

The same section specifies that if the notice is not given, any disciplinary or other action taken against the employee "shall be null and void."

Kolter contended the board's consideration of the charges against

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-- Pete Seeger, folksinger

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her triggered the 24-hour notice requirement and the board's failure to provide the notice voided the dismissal. The court disagreed, adopting the holding in *Bollinger v. San Diego Civil Service Commission* (1999) 71 Cal. App.4th 568, 136 CPER 35. The *Bollinger* court found that Sec. 54957 does not entitle an employee "to a 24-hour written notice when the closed session is for the sole purpose of considering, or deliberating, whether complaints or charges brought against the employee justify dismissal or disciplinary action." In reading the code section, *Bollinger* distinguished between the phrase "to consider the appointment, employment, evaluation of performance, discipline, or dismissal," and the following phrase which reads "to hear complaints or charges brought against the employee." The term "to consider" means to deliberate upon, while "to hear" is to listen in an official capacity, said the court. And, "a hearing" is defined as "a proceeding of relative formality...generally public, with definite issues of fact or law to be tried...."

The court also found support for this interpretation in the statute's legislative history, noting that original drafts of the legislation specifically provided that "as a condition to holding a closed session *on the complaints or charges to consider disciplinary action, or to consider dismissal*," 24-hour notice must be provided. Tellingly, this language was removed before Sec. 54957 was enacted.

In this case, "the governing board did not conduct an evidentiary hearing on the verified statement of charges against Kolter; rather, it considered whether those charges justified the initiation of dismissal proceedings," said the court. "The personnel exception to the Brown Act applied to the governing board's action, and 24-hour written notice was not required."

The court was not persuaded by amicus California Teachers Association's argument that, under *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 27 CPER 37, Kolter has "an absolute right to address the governing board *before* it makes a decision to terminate." CTA misstated the *Skelly* holding, said the court. In that case, the

Supreme Court ruled that "due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action. However... due process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective." Here, the court noted, Ed. Code Sec. 44934, enacted the year after the *Skelly* decision, provided Kolter with the right to a hearing before the termination was effective. (*Kolter v. Commission on Professional Competence of the Los Angeles Unified School Dist.* [2009] 170 Cal.App.4th 1346, 2009 DJDAR 1791.

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## 'Nolo Contendere' Plea to Controlled Substance Offense Not Cause for Termination

THE SECOND District Court of Appeal ruled that a school district cannot terminate an employee because he pled nolo contendere to a misdemeanor controlled substance offense in *Cahoon v. Governing Board of Ventura Unified School Dist.*

Edward Cahoon, a school custodian, pled nolo contendere, or no contest, to a misdemeanor for forging, altering, and/or issuing a prescription for a controlled substance. The district believed the offense required automatic termination under Education Code Sec. 44009(b), which states that

a conviction following a plea of nolo contendere "is deemed to be a conviction within the meaning of Section 44836 and 45123...." The trial court found the plea was not a conviction under Sec. 45123(b) and ordered Cahoon reinstated. The district appealed.

Agreeing with the trial court's analysis, the appellate court noted that Penal Code Sec. 1016(3) provides that a nolo contendere plea to a misdemeanor "may not be used against the defendant in any civil suit based upon or growing out of the act upon which the criminal prosecution is based,"

including an administrative proceeding under the Education Code. And, in *Cartwright v. Board of Chiropractic Examiners* (1976) 16 Cal.3d 762, the California Supreme Court held that a conviction by a nolo contendere plea may not be used in an administrative proceeding to impose discipline without legislative authorization.

*A classified employee who enters a plea of nolo contendere to a misdemeanor controlled substance offense may not be automatically terminated.*

After *Cartwright*, the legislature amended Sec. 45123 to add subsection (a), which states that a nolo contendere plea to a sex offense “shall be deemed to be a conviction”; it made no substantive changes regarding convictions for controlled substance offenses. Section 45123(b) states, “No person shall be employed or retained in employment by a school district, who has been convicted of a controlled substance offense....”

The court rejected the district’s argument that Sec. 44009, which

defines “conviction” to include nolo contendere pleas, implicitly amends Sec. 45123(b). It found that Sec. 44009 was part of a Senate bill only intended to change the law regarding nolo contendere pleas to sex offenses, not controlled substance offenses. Further, Sec. 45123, as amended, “does not treat convictions for sex offenses and convictions for controlled substance offenses the same way,” the court said. A district employee convicted of a sex offense is automatically terminated and may not be reemployed, whereas, under subsection (d), an employee convicted of a controlled substance offense may be reemployed if the governing board determines that the person has been rehabilitated for at least five years.

The same Senate bill amended Sec. 44836 to distinguish nolo contendere pleas by certificated employees to sex offenses from those to controlled substance offenses. Under the amended code section, a district may not employ or retain a teacher who has been convicted of a sex offense, specifically including convictions by nolo contendere pleas. A district may not employ or retain a teacher who has been convicted of a controlled substance offense, but the section makes no mention of nolo contendere pleas to such offenses. Further, it provides that a teacher convicted of a controlled substance offense may be hired if he or she holds an appropriate credential.

Accordingly, the court held that “unless and until the Legislature

amends Education Code Section 45123, subdivision (b), a permanent classified district employee who enters a plea of nolo contendere to a misdemeanor controlled substance offense may not be automatically terminated.” (*Caboon v. Governing Board of Ventura Unified School Dist.* [2009] 171 Cal. App.4th 381.)



## Higher Education

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### Five-Year Contract Guarantees 10 Percent Raises Over Three Years

AFTER 18 MONTHS of negotiations, factfinding, and a strike in violation of a court order, the American Federation of State, County and Municipal Employees, Local 3299, finally reached an agreement with the University of California in February for the 8,500 janitors, cafeteria workers, and other members of its service unit. At a time when U.C. President Mark Yudof has asked staff to study furloughs and pay cuts, the union achieved three annual raises and a minimum wage of \$14 by October 2012. The parties will not reopen the five-year contract for wage negotiations until 2011. In the meantime, however, bargaining over how to implement an agreement to move employees from an open-range structure to a step system may have hit a snag.

#### Waiting for the State Budget

The parties began negotiations on a new contract in October 2007. By April 2008, after one meeting with a state mediator, they were in factfinding. The university was offering a 1.4 percent salary increase for 2007-08 and a five-month extension of the contract. AFSCME was demanding a 10 percent raise for 2007-08, and 6.5 percent increases in the following

two years, as well as a \$15 minimum wage and a conversion from the open-range salary system to a step system. The university did not want to discuss future salaries or health and retirement benefits because of uncertainty over what the state budget would provide. The factfinder concluded, however, that university priorities, rather than

*The factfinder concluded that university priorities, rather than state funding, motivated its offer.*

a lack of state funding, motivated the university's offer. U.C. receives less than 22 percent of its funding from the state, and more than 78 percent of the funding for service worker salaries is from a source other than the state.

The factfinder recommended raises of 2 percent in the initial year of the contract and 4 percent the following two years, as well as a minimum wage of \$12 an hour, increasing by \$.50 every six months. She also urged the parties to adopt a step structure for salaries because too many long-term

employees remained at the bottom of the pay range for their classification.

After the factfinding report was issued, the parties reentered negotiations. By June, however, talks broke off and the union announced a strike. U.C. convinced the Public Employment Relations Board to go to court for an injunction. Even though a San Francisco court ordered AFSCME not to walk out, service workers struck at all ten campuses, five medical centers, and the Lawrence Berkeley National Laboratory. (See story in *CPER* No. 191, pp. 42-46.) Unfair practice charges by both U.C. and AFSCME are still pending at PERB.

The strike failed to produce an agreement, but U.C. made some movement on the concepts of a minimum wage and a step-based salary schedule. Meanwhile, AFSCME was on a parallel path in negotiations for the 11,500 employees in the patient-care technical unit. While factfinding did not result in an agreement last spring, AFSCME settled its contract for patient-care technical employees last October. (See story in *CPER* No. 193, pp. 48-52.) AFSCME optimistically predicted that the patient-care technical unit contract would set the pattern for the service workers' agreement.

#### Wage and Hour Gains

Some improvements in the new agreement track provisions of the patient-care technical contract. In the prior pacts, U.C. had greater freedom in assigning overtime work, paying overtime wages only when required by



the Fair Labor Standards Act, since the university is exempt from California overtime rules. In both units, U.C. must now assign the most-senior volunteer to overtime work before requiring non-volunteers to put in extra time. Mandatory overtime will be assigned in reverse order of seniority. A change in overtime pay will be effective in the service unit in October 2012. Employees will be paid one-and-a-half times regular pay after their 8- or 10-hour shift or after 80 hours of work in two weeks, and twice the regular rate of pay after 12 hours of work in one day. AFSCME also won a provision in the service unit requiring U.C. to give 20 days notice for any change in work schedule that will last longer than four weeks.

The service unit has the same health benefit provisions as the patient-care technical pact. While unions have not negotiated over health benefit plans or premium contributions in the past, they now will have the right to bargain if the university increases employee costs by more than 12 percent over two years or if the university proposes to eliminate either of the two most-popular health plans. AFSCME retained the right to strike over benefits negotiations.

AFSCME agreed that employees' mandatory contributions of approximately 2 percent of payroll to a defined contribution plan will be made instead to the U.C. Retirement System when contributions are resumed, which is currently set for April 2010. (See story in *CPER*, No. 193, pp. 46-48.) Future

increases in service employee retirement contributions will be the same as those negotiated by the patient-care technical unit.

AFSCME scored smaller raises for its service unit than for the larger, more powerful patient-care technical unit, but both contracts establish a minimum wage and a longevity-based step system for pay. Service employees received a 3 percent increase retroactive to October 1, 2008. On July 1, they will receive an additional 1 percent pay boost, and the minimum hourly wage

*The initial step system placement will be an interim measure to ease the economic effect on the university.*

in all pay ranges will be pegged at \$12. On October 1, 2009, they will be placed on the new step system, and the minimum wage will rise to \$12.50.

The initial step system placement will be an interim measure for many employees. To ease the economic effect on the university, the employees will gain one step for every two years in the job title initially, but may not reach the appropriate step until July 2013. The contract provides that, eventually, an employee will move one step for each year of service. Starting July 1, 2011, employees who are not at the appropriate step will be bumped up an

additional step each year until they are at the step that matches their years of service or at the top step.

The last guaranteed general salary increase will be a 3 percent raise on October 1, 2010. The minimum wage will rise another \$.50 on that date and each of the next two years until it reaches \$14 an hour on October 1, 2012. The university agreed to 3 percent raises in 2011 and 2012, contingent on state funding.

A hotly disputed provision of the contract that allowed U.C. to bring in new workers at pay up to 5 percent higher than existing employees with the same experience was altered to reduce the university's prerogative to pay no more than 2 percent above the wage of equally qualified current employees. By February 2012, the university will lose its right to pay new employees higher than existing equally qualified employees.

#### **Non-Economic Improvements**

The union negotiated a provision to protect workers during inquiries into their immigration-related work status. The university agreed to give the employees a right to union representation when they are questioned. The agreement protects those employees who wish to update their name and Social Security number, and provides that U.C. shall not make any improper contact with the Social Security Administration about an employee's work permit status.

AFSCME achieved career-building improvements for the service

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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>

workers. Educational leave was increased from 24 hours to 40 hours a year. In addition, the contract gives preference to an internal applicant for a vacant position if the applicant is substantially equally qualified as an external applicant. Between two equally qualified internal applicants, seniority will be the tie-breaker. These transfer and promotion rights are now grievable and arbitrable.

### Ongoing Distrust

After the agreement was ratified by AFSCME members, local AFSCME president Lakesha Harrison wrote in the *Daily Californian*:

For the first time, the university will be providing wage increases that rec-

ognize that we are not dependent on state funds. In addition, we have won a historic restructuring of UC employees' pay scale with the adoption of a clear path of advancement that rewards the years of service a worker provides the university.

A month later, the union was questioning whether U.C. was backing off its promise to establish a step-based salary system. AFSCME claimed the university was proposing that several classifications have only one step and that its proposals did not provide higher pay ranges for higher classifications in a series. The union pointed out that U.C. signed a contract that guarantees workers will be placed on a step system with 2 percent pay differences between steps.

U.C. President Mark Yudof fired back, "Higher minimum salaries squeeze those in brackets above the new entry levels." He emphasized that the parties knew they would need to work on implementation details for the salary step system and delayed the system's implementation until October.

Assuming the parties are able to work out an agreement how to structure the step system by October, the parties will not be back in bargaining again until 2011. At that time, they may reopen on wages and health benefits. The duration of the contract through September 20, 2013, means that the university will not be bargaining simultaneously with the service unit and the patient-care unit, whose contract expires in September 2012.

## U.C. Nurses Make Gains in Staffing and Compensation

THE MEDICAL centers of the University of California have funds for employee raises, even though state funding for the university system was cut another \$115 million in the budget enacted in February. While U.C. President Mark Yudof has instructed his staff to develop policies and procedures to furlough employees or implement salary reductions at the campuses, the California Nurses Association won raises of 4 percent for most of its 10,000 unit members.

Bargaining of the full contract has just concluded in March, with an agreement for 6 percent raises effective October 2007. (See story in *CPER* No. 189, pp. 62-64.) The parties reopened the contract in July 2008 to negotiate salaries, benefits, staffing, and association rights. The university demanded elimination of released time for CNA representatives for monthly meetings at which they coordinate attempts to resolve grievances.

### New Staffing Language

An important issue for the nurses was staffing sufficient to cover meal and rest breaks. State law and regulations establish the nurse-patient ratios that hospitals must implement, but the union believes that U.C.'s hospitals often do not hire enough nurses to relieve employees on lunch and rest breaks. It claims that medical center nurses skip

meals and breaks to avoid understaffing that can affect patient care.

At the Westwood campus of the medical center in Los Angeles, the nursing administration implemented a break relief program in 2007. The hospital added a break relief nurse in each department on each shift at an annual cost of approximately \$1.8 mil-

*U.C. agreed to 'include meals and breaks when assessing and determining staffing.'*

lion. CNA hoped to achieve an agreement that would protect the Westwood program and establish break relief programs at the other four medical centers. The medical centers' profit for 2008 was \$228 million.

The union settled for an improvement in staffing language. U.C. agreed to "include meals and breaks when assessing and determining staffing needs." CNA plans to push again for dedicated break relief nurses when the contract is next reopened in the fall. It also gained language that would prevent nurses who practice in adult care from being assigned as float nurses in newborn or pediatric areas that require special expertise.

### Raises Vary

Raises that CNA won are not uniform across the unit. Salaries of clinical nurses at four medical centers were hiked 4 percent at the time of ratification. Those at U.C. Irvine received 2 percent increases on ratification and a change in the salary step structure that guarantees a difference of 2 percent between steps. They will receive another 2 percent salary boost on June 28. Nurse practitioners will receive the same raises except that those at U.C. Davis had their pay increased another 3 percent in April. Nurse anesthetists gained the most. While many received the same as other nurses at their center, those in San Francisco got a 6 percent raise, and those in Davis will see 18 to 40 percent higher pay this coming year.

Even nurses at the student health centers whose salaries are funded from state revenues received raises. They ranged from 2 percent at U.C. Santa Barbara to 7 percent for nurses in Merced. A few selected nurses in Santa Barbara gained 22 percent. Including step increases in July 2009, the wage package will cost the university \$32 million.

### Benefits Continued

U.C. did not prevail on its push to eliminate the union representatives' grievance resolution meetings. However, it was able to convince the union to allow the university to establish health benefit levels and employee contribution levels after consultation with employee representatives, an ar-

## Two New *cper* Guides for Public School Employers and Employees

At a time when school districts are planning unprecedented numbers of layoffs, two new CPER Pocket Guides will be beneficial to public school employers, employees — both certificated and classified, union reps, and labor relations specialists.

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### **Pocket Guide to Layoff Rules Affecting CLASSIFIED Employees**

(2009, 1st edition; 29 pp.) \$6

A must for classified employees and public school employers, this guide covers legitimate reasons for layoff; notice requirements; collective bargaining rights; seniority; computing and exercising seniority; reemployment rights; and options in lieu of layoff. Also included are pertinent Education Code citations.

### **Pocket Guide to Layoff Rules Affecting CERTIFICATED Employees**

(2009, 1st edition; 20 pp.) \$6

This guide contains important information for certificated employees and their employers who are facing or contemplating layoffs. Chapters cover permissive grounds for layoff; employees subject to layoff procedures; timing and process; selections for layoff; preferred right of reemployment; status during layoff; return to work after layoff; and dismissal and non-reelection during layoff. Also included are pertinent Education Code citations.

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<http://cper.berkeley.edu>

rangement that has endured for years. This ensures that all employee groups will have the same health plans at the same costs. For 2009, U.C. absorbed most of the increases in premiums so that employees' costs would not rise beyond 2008 amounts.

A huge point of contention for U.C. and its employees has been restarting contributions to the U.C. Retirement System, which has had a funding surplus for almost two decades. The board of regents initially resolved to begin employee and uni-

versity contributions in 2007. (See story in *CPER* 181, pp. 42-44.) Unions demanded to bargain the issue in 2006, but have not yet agreed to employee contributions. In February, the regents decided to begin employer and employee contributions in April 2010, "subject to collective bargaining." The reopener agreement provides, however, that no employee contributions will be required without further negotiations. U.C. is planning to be back at the bargaining table in August.

ber. Mediation began in late October. While tentative agreements have been reached on about six articles, the parties are still wrangling over the most hotly contested items — salary, benefits, and contracting out.

Meanwhile, SETC-United has demanded that the university begin paying prevailing wages as determined by the state Department of Industrial Relations, Division of Labor Statistics and Research. The union believes that the expiration of its agreement means there is no controlling contract to supersede the prevailing wage statute. The lawsuit, filed in March, asks the court to order CSU and Controller John Chiang, who pays CSU salaries, to pay unit members in accordance with the DIR/DLSR rates retroactive to July 1, 2008, with interest.

CSU believes the lawsuit has no merit, Senior Director of Collective Bargaining Bill Candela told *CPER*. The terms of the expired contract continue until the parties exhaust impasse procedures, and therefore supersede the law, the university claims. In addition, the university is researching whether Sec. 89517 applies to regular and probationary employees paid on a monthly basis. "These are employees with a time-base, not like casual or intermittent employees from a hiring hall," Candela explains.

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## Trades Union Sues CSU for Prevailing Wage Rates

WHEN THE LAW is better than your collective bargaining agreement, contract expiration has a silver lining. So goes the theory of the State Employee Trades Council-United. The union, which represents about 1,100 carpenters, electricians, painters, and other tradesworkers at the California State University, says its unit members are paid 13 percent below market rates in violation of Education Code Sec. 89517.

Section 89517 requires the board of trustees to ascertain the prevailing wage rates for "laborers, workmen, and mechanics employed on an hourly or per diem basis" in the locality of each of its 23 campuses. It also prohibits the trustees from setting the minimum salary for each position below the prevailing rate. However, it provides that conflicting provisions of a collec-

tive bargaining agreement supersede the law.

The parties began negotiations for a successor to their 2005-08 agreement in early 2008. In May, CSU disclosed a study of skilled trades compensation it had commissioned from Mercer, a human resources consulting firm. The study showed that unit members' salaries were 13 percent below market rates on average. Some classifications lagged the market by 23 percent. Unfortunately, the governor had just released a revised budget cutting \$215 million from CSU's state funding. Needless to say, SETC-United has been unable to convince the university to improve salaries or benefits.

The parties' contract expired June 30, 2008. After meeting another six times in two-day sessions, the union declared impasse in Septem-



## State Employment

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### Furlough Order Legal, But Local 1000 Bargains for Half-Measures

THE GOVERNOR has statutory authority to order furloughs, and state employee union contracts permit the administration to impose furloughs during a fiscal emergency, a trial court ruled in January. Since then, however, the Service Employees International Union, Local 1000, has negotiated changes to the governor's initial plans to furlough employees two days a month, cut two state holidays, and cease counting leave hours when calculating eligibility for overtime pay. Employees covered by Local 1000's contracts will be furloughed only one day a month. Because the union represents over 90,000 employees, the administration decided that "Furlough Fridays" would not be workable, and switched to a plan for self-directed furloughs. Officers represented by the California Association of Highway Patrolmen will not be furloughed because their contract is in effect through June 2010.

#### Executive Authority

As the first Furlough Friday approached in January, several unions argued in court that the governor's executive order violated the constitutional separation of powers by setting compensation, a legislative

function. (See story in *CPER* No. 194, pp. 40-43.) Since the legislature authorized the administration to set salaries for represented employees only through negotiations, the unions argued, the governor had no authority to act without fulfilling its bargaining obligations.

Essential to the unions' argument was their view that a furlough cuts

*The court viewed the furlough as a change in work hours.*

salaries. The court, however, viewed the furlough as a change in work hours. Reading parts of Gov. Code Secs. 19851 and 19849 very broadly, it found that the legislature had delegated to the executive branch the authority to set work hours. The unions argued that Sec. 19851 established a 40-hour workweek. But the court focused on an exception that allows workweeks "of a different number of hours" to be established "to meet the varying needs of the different state agencies." Taken together with a statute that authorizes

the Department of Personnel Administration to "adopt rules governing hours of work," the court reasoned that the governor has "authority to reduce the workweek of state employees to meet the needs of state agencies, and to do so by adopting a rule." The need for a new rule — the furlough order — was rooted in the fiscal crisis that would cause state agencies to run out of money if furloughs were not imposed, the court found.

#### Emergency Exception

The memoranda of understanding between the state and its unions also provide authority to reduce work hours, the court held. The MOUs incorporate both Secs. 19851 and 19849. They also permit the state, in case of lack of funds, to "take all necessary actions to carry out its mission in emergencies." One contract allows the state to relieve employees from duty. Another permits a reduction in hours as an alternative to layoff. The court ruled that the current fiscal emergency made furloughs reasonable and necessary, and allowed the governor to impose them without bargaining.

#### No Prohibitions

The unions argued that Gov. Code Sec. 19826(b) prohibits the governor from adjusting a salary range for a represented employee. But the court found no change in salary ranges, only a reduction in work hours that resulted in reduced pay. It thereby distinguished *Department of Personnel Administration*



*v. Superior Court (Greene)* (1992) 5 Cal.App.4th 155, 94 CPER 8, where an appellate court had ruled that a 5 percent pay cut with no reduction in hours violated the statute.

The court turned aside the challenges that the California Attorneys, Administrative Law Judges and Hearing Officers in State Employment and SEIU Local 1000 had made under the Fair Labor Standards Act. The unions warned that exempt employees would become non-exempt from overtime provisions of the act in the weeks they are furloughed, but would be required to work uncompensated overtime. The court ruled, however, that the unions had not provided evidence, only speculation, that the employees would be required to work without overtime pay. Even if their FLSA rights were

violated, that would not be reason to invalidate the furlough order, the court decided, since the violations could be remedied under the act.

Because it found the furlough order valid, the court directed the state controller to implement the furlough and resulting pay reduction provisions of the executive order. The court clarified a few days later that its ruling did not apply to employees of elected officers other than the governor. That question was decided in March. (See story on p. 58.)

### CCPOA Challenge

Still left for decision was the case filed by the California Correctional Peace Officers Association. CCPOA argued that the furlough order for correctional officers really is a reduction

in salary, not just a reduction in hours, because officers will not be able to take off any time in the months their pay is cut, and likely will not be able to take off all accrued furlough days before they expire in 2012. The furlough program as implemented for correctional officers provides for accrual of two days of furlough a month, to be taken when feasible, but not after June 2012. The days have no cash value.

The court acknowledged that, if CCPOA's factual claims were true, it might have a valid argument that the furlough plan for correctional officers is an adjustment of salary ranges in violation of Gov. Code Sec. 19826(b). But, there was no proof that officers would not be able to take time off. Although the declaration of CCPOA Executive Vice President Charles Alexander

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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>

indicated that staffing needs in the prisons will prevent officers from being able to take off two days a month, the court relied on the declaration of a correctional administrator, Joseph Moss. Moss asserted that furlough days could be taken, even with staffing constraints. He suggested, for example, that staff could use furlough days instead of vacation or holiday leave.

### Contract Protection

As Local 1000 filed legal challenges, it continued to negotiate with DPA for nine units it represents to replace contracts that expired last June. The parties bargained around the clock during the last week of January to no avail. Finally, on February 14, they announced a tentative master agreement that was ratified by the membership in March.

The agreement limits employee furloughs to eight hours each month from February 2009 through June 30, 2010, with a corresponding 4.62 percent reduction in pay. Employees' requests to use furlough time are subject to supervisor approval, but the contract gives employees "maximum discretion to use the [furlough] time subject to severe operational considerations," and requires that employees be allowed to take all furlough time prior to July 1, 2012. The reduction in time and pay will not affect benefits or other rights that depend on length of service. Employees may use furlough time instead of sick leave. They will be unable to cash out unused furlough time.

Local 1000 was able to limit layoffs to unit members employed in a department that is eliminated or a facility or office that is closed. To avoid layoff, however, an employee may be required to accept a position in another department or one located within 50 miles from the current job and within 10 percent of the current pay.

The two holidays that were eliminated in bargaining have been replaced by paid personal leave days. This provision will allow the state to keep

*Two holidays have  
been replaced by  
personal leave days.*

its offices open on Lincoln's Birthday and Columbus Day without owing premium pay to employees who work. This provision is an improvement over the budget trailer bill that eliminated the two holidays without any paid leave days. (See box on p. 57.)

The state agreed to pay increases in health care premiums in 2009 and 2010, so that employee contributions remain at 2008 levels. The state is boosting the amount it pays per diem for employee travel from \$40 to \$55 for meals and incidental expenses, an amount that matches per diem rates federal employees receive. The rate had not risen since 1999. State employees who must live in state-owned

housing as a condition of employment will pay no rent increases.

New provisions on career development are designed to benefit employees and address the state's concern that its most-experienced workers will soon retire. The master agreement establishes an Institute for Quality Public Services Training Trust Fund and a joint labor-management committee on training. The state will place \$1 million in the fund, track use of the funds for employee training and professional development, and report their expenditure to the legislature.

### Dispute Brewing

A dispute is already brewing about a provision that changed the definition of "hours worked" used to calculate eligibility for overtime. The governor had pushed to disallow any leave time to be counted as time worked when determining whether an employee has worked enough hours in a day or week to earn overtime pay. Local 1000 bargained to exclude only sick leave from the definition of "time worked," but the agreement states that this provision will be superseded if the legislature passes inconsistent legislation.

The budget act, which became effective on February 20, amends the Government Code to provide that leave time will not be counted in calculating eligibility for overtime pay, unless an MOU is reached later and its economic provisions are approved in the budget act. (See box on p. 57.) The MOU, claims the union,

was tentative until it was ratified in March, and therefore should supersede the legislation. DPA disagrees. The contract states that its overtime eligibility provision will be superseded by inconsistent legislation, it asserts. DPA's summary for the legislature clearly lays out its reasoning.

### Furloughs in Flux

The February budget legislation assumed a savings of just over \$1 billion from the one-day-a-month furlough of employees represented by Local

1000 and two-day-a-month furloughs of all other employees. There is no final word, however, on who will be furloughed how much.

The California Association of Professional Scientists, the Professional Engineers in California Government, and Local 1000 have appealed the ruling allowing employee furloughs. No decision is expected for several months.

CCPOA has filed a second lawsuit alleging facts that would prove that its members will be unable to use all their

furlough days prior to July 2012. Alexander told *CPER* that, in an institution employing 600 officers, 19 officers would need to be off on furlough each day to enable all to take their accrued furlough days. There is no way to cover staffing needs that occur when officers are furloughed, Alexander explained, because the executive order prohibits paying overtime to cover furloughed staff. CCPOA claims that hundreds of officers already have been denied requests to use self-directed furlough days due to understaffing and

## BUDGET TRAILER BILLS MAKE COMPENSATION CHANGES WITHOUT NEGOTIATIONS

In the quest to enact a budget as the state ran out of cash, lawmakers overcame their reluctance to legislate items normally left to the bargaining table. To save about \$132 million in compensation costs, the legislature cut two state employee holidays, reduced holiday pay, and changed overtime calculation rules. Unions will be trying to mitigate these losses in negotiations.

The legislature added a section to the Government Code, listing only 12 holidays, not the 14 that state employees have been enjoying. Left out were Lincoln's Birthday and Columbus Day. These holidays have been written into the state's collective bargaining agreements, most of which have expired while the parties try to negotiate over a shrinking pot of money.

Another change was made to holiday pay. In the past, most union contracts called for one-and-a-half times regular pay if an employee worked on a holiday, as well as accrual of a paid-leave day. Government Code Sec. 19853 now states that an employee who works on a holiday receives straight pay and eight hours of holiday credit.

The legislature also altered the definition of "time worked" for purposes of calculating eligibility for overtime pay or compensatory time off. Many union contracts provided that the hours an employee was on leave counted as "time worked." The Government Code now excludes all paid and unpaid leave from

the definition of time worked. Employees represented by the California Association of Highway Patrolmen are not affected because their memorandum of understanding, which contains the right to have leave count as time worked, is still in effect.

Both new statutes provide that an MOU reached after the law became effective is controlling, except that MOU provisions which require the expenditure of funds must be approved in the annual budget act. SEIU Local 1000 negotiated two personal leave days in place of the holidays and maintained premium holiday pay. But it has a dispute with the Department of Personnel Administration over its assertion that leave other than sick leave will not count as time worked. (See story on p. 56.) CDF Firefighters has negotiated a temporary delay in application of the new overtime eligibility laws while it bargains for a permanent agreement.

The California Association of Psychiatric Technicians and the International Union of Operating Engineers already have filed unfair practices over the changes. Since the terms of their expired contracts are still in effect under the Dills Act, they claim that the governor's decision not to veto the overtime and holiday changes constitutes a unilateral change. Negotiations with DPA had not reached impasse when the governor imposed the changes.

the overtime restriction. The union asserts that the pay reduction without a possibility of taking accrued furlough days amounts to a decrease in salary ranges in violation of the Government Code and the constitutional separation of powers. It also claims the state failed to pay earned wages or make payments according to a designated wage scale in violation of the Labor Code, and failed to pay the minimum wage two workdays a month.

The Department of Corrections and Rehabilitation has announced that employees must use accrued furlough days before using any other leave except sick leave. If an officer takes a week off in March, the first four days off will be counted as furlough days and only one will be deemed vacation leave. CCPOA asserts that, not only will this new policy fail to use all furlough days, but it will cost the state more in the long run. Holiday credits and vacation leave will continue to accrue, and will be paid out at higher wage rates in the future.

CASE has filed another lawsuit on behalf of lawyers at the State Compensation Insurance Fund, arguing that they are exempt from the governor's executive order. CASE contends that the legislature has delegated authority to the SCIF board of directors to operate the fund and that its finances are entirely separate from state funds. CASE points out that the Insurance Code exempts SCIF from hiring freezes and staff cutbacks. DPA counters that the union lost its opportunity

to make this argument when it lost the prior furlough challenge. A furlough is neither a hiring freeze nor a staff cutback, DPA argues, and the Dills Act's emergency exception to the bargaining obligation does apply to SCIF.

Other unions continue to bargain to minimize cutbacks to their unit members, but with little success. As

CPER went to press, CAPS and other unions announced that DPA is insisting that the "SEIU deal" will not be offered. The governor seems intent on changing the overtime eligibility rules for all state unions other than the California Association of Highway Patrolmen, but may be open to reducing furloughs to one day a month.

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## Civil Service Employees of Constitutional Officers Furloughed

AS SOON AS THE court issued its decision that the governor had the power to order state worker furloughs, a flurry of letters arrived in State Controller John Chiang's office from constitutional officers and other elected statewide officials, such as the State Treasurer and the Superintendent of Public Instruction. All asked Chiang to exempt their employees from the furlough and not reduce paychecks. The officials had not joined the legal challenges against the furlough order, they said, because the governor had told them in January that their offices would be exempt from the December executive order. But after the court's ruling, the governor changed his mind.

Chiang requested clarification from the court, pointing out that no party had presented the issue of constitutional officers in the first case. When the court agreed that its ruling did not extend to the employees of statewide elected officials, the gover-

nor asked the court to order Chiang to implement the furlough program for the 15,600 employees of the eight independent offices, including Chiang's own employees. All of the officials, except Insurance Commissioner Steve Poizner, intervened and argued against furloughs for their workers.

Chiang and state employees lost again. The court rejected the officials' contention that the executive order violated the state constitutional system of divided executive power and interfered with their independent powers. The civil service employees in their offices are "subject to the jurisdiction of the State Personnel Board with respect to the merit [system] aspects of their employment and to the Department of Personnel Administration with respect to the nonmerit aspects of employment," the court reminded the officers, quoting *Schabarum v. California Legislature* (1998) 60 Cal. App.4th 1205. *Schabarum* involved

legislative counsel employees rather than constitutional employees, but the court pointed out that they were all “civil executive officers” according to the Government Code.

The court turned aside the officers’ argument that the executive order impinged on the independence of their offices, even though the separately elected officers are not under the direct authority of the governor. The court implied that, if the governor’s power to order furloughs were unlimited, the

*The court turned aside the officers’ argument that the executive order impinged on their independence.*

order would interfere with officials’ independent powers. But the governor has the authority to furlough only in the limited circumstances allowed by the Government Code and acted in an emergency, the court reasoned. Therefore, the governor’s order “was not arbitrary or capricious, and does not impermissibly interfere with the powers and duties of other elected civil executive officers.”

The officers protested that the order was based on an emergency that no longer exists — the failure of the legislature to pass a budget. The order is still necessary, the court found,

since the cost savings from furloughs are figured into the budget passed in February. The officers complained that the governor already cut their budgets in line-item vetoes after the budget was passed. They pointed out that the governor asserted the funding vetoes were to “reflect equity among all executive branch agencies for the state employee compensation reductions with the budget through furloughs;” and that the officers “will have flexibility to implement the savings within their own offices.” The court, however, was not convinced that the funding vetoes were substitutes for furloughs rather than additional budget cuts for 2009-10. The furloughs were neither

unnecessary nor improper, it ruled.

The court also rejected the officers’ contention that the governor should be estopped from implementing the furlough of their employees because DPA had misled them about the reach of the order. The court found that they should not have relied on the governor’s acknowledgment that the officers were not under his authority because they should have known they would have to make budget cuts. And, the court emphasized, ordering the officers to furlough their employees “is not intolerably unfair.” (*Schwarzenegger v. Chiang* [3-12-09] Sacto.Co.Sup. Ct. 2009-80000158.)

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## Controller Must Pay Only Federal Minimum Wages During Budget Impasse

A SACRAMENTO trial court decided in March that State Controller John Chiang does not have authority to second-guess the legality of a pay letter issued by the Department of Personnel Administration. The pay letter in *Gill v. Chiang* reduced paychecks to the minimum required by federal law when the legislature failed to pass a budget before the state constitutional deadline of July 1. The instructions in the pay letter were lawful under the Supreme Court’s decision in *White v. Davis* (2003) 30 Cal.4th 528, 160 CPER 14, the court ruled. The court

refused to excuse the controller from complying with the letter because the controller provided insufficient evidence that the aged computer payroll system could not be programmed to implement the instructions. The court did side with the California Attorneys, Administrative Law Judges and Hearing Officers in California Employment when it excluded from its ruling those state employees whose salaries are paid by programs subject to continuing appropriations or self-executing constitutional mandates.



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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>

### Pay Cuts Ordered

In *White*, the Supreme Court held that state employees have a right under the contract clause of the state Constitution to receive pay they have earned, but that the right is conditioned on a legislative appropriation for their salaries. Under Art. XVI, Sec. 7, of the Constitution, the controller cannot make any payments unless there is an appropriation, instructed the court, and there is no statutory authority for paying state employees after July 1 until a budget act for the coming fiscal year has been signed. Since California cannot disobey federal law, however, the court advised that the controller must pay minimum wage to all employees not exempt under the Fair

Labor Standards Act, and pay regular wages and overtime pay to all who are anticipated to work overtime. Employees exempt from the FLSA may not be paid at all until a budget is enacted.

As the pay date for July salaries approached in 2008, the governor issued an executive order directing DPA and the controller to comply with *White*. The executive order banned overtime work except for employees in critical services. DPA sent the controller a pay letter reducing hourly wages to \$6.55 for nonexempt employees, other than employees who were anticipated to work overtime. The letter also cut the pay of executive, administrative, and professional employees to \$455 weekly, the minimum pay to maintain

their exempt status under the FLSA's salary basis test. The controller was not authorized to pay anything to lawyers, teachers, and doctors, or to elected officials and their appointees. (See story in *CPER* No. 192, pp. 43-47.)

Chiang refused to implement the instructions on the grounds that he had authority to disregard pay letters that he concludes are not authorized by law. He believed that implementation of the pay letter would violate the FLSA and that the state's aging computer payroll system would not be able to process the changes necessary to restore lost pay until six months after a budget was signed. A six-month delay would not be timely under the FLSA, he asserted, and would subject



the state to expensive wage and hour litigation. After unsuccessful attempts to persuade the controller to implement the executive order, the governor went to court for writ of mandate to force Chiang to comply.

### Controller Authority

The court sided with the governor. The court agreed that the controller's office is independent of the legislature, which cannot alter its core functions. But the legislature can and has defined the controller's duties, the court explained, relying on *Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 103 CPER 31. Although the Government Code provides that the controller should audit claims for "correctness, legality and for sufficient provisions of

law for payment," the court held that "the Controller has no discretion to refuse the issuance of warrants when the amount of an expenditure is set by law or entrusted to the discretion of another agency or branch of government." DPA has jurisdiction over

### *The controller has no power to supervise DPA.*

employee compensation. Issuance of the pay letter was therefore within the scope of DPA's fundamental authority, in addition to being authorized by an executive order. Since the controller has no power to supervise DPA, he

must leave review of DPA's decisions to the courts or the legislature, the court decided.

The fact that Chiang believed that federal law, rather than state law, rendered the pay letter illegal made no difference to the court. While Congress may preempt state law, it has not assigned state officers responsibility to enforce federal laws, the court said.

In addition, the pay letter in this case was lawful. The controller did not point to a provision of the FLSA that required payments higher than in DPA's pay letter. The court rejected the controller's argument that a section of the act which allows higher state minimum wages required payment of California's minimum wage.

*cper*

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>

### Impossibility Not Proven

The controller argued that the court should excuse him from complying with the pay letter because reprogramming the controller's computers would be impossible and/or too expensive. While the court found that the law allows such a defense when performance of an obligation "is impracticable because of *extreme and unreasonable difficulty or expense*," the controller did not provide enough evidence of impossibility. The declaration of Don Scheppmann, chief of the Personnel/Payroll Service Division,

*The controller did not provide enough evidence of impossibility.*

contained too many conclusions and not enough facts, the court scolded. Scheppmann concluded compliance would not be possible after 10 months of studying and testing the feasibility of reducing and then reinstating full pay, but his studies were not attached or described and his conclusion was not explained. "The Declaration does not describe the potential 'system performance issues' and does not indicate why it would take months to undo the changes or describe the estimated difficulty and/or expense that would be required to make the changes in less time," the court pointed out.

Besides, the defense of impossibility does not apply unless the controller shows that performance of the obligation is impossible despite a "diligent and good faith effort to comply." Here, the controller had studied only one of three options that DPA suggested to help the controller implement the minimum wage order. And the controller offered insufficient evidence that it would be infeasible to comply in time for the next budget impasse, the court said. The controller's office already had completed the first two stages of the 21st Century Project, which aims to upgrade and modernize the payroll systems. Although the controller complained that his office would have to pay modernization expenses from its own operating budget, he did not show his budget was insuffi-

cient or that he had requested and been denied funding.

Agreeing with the contentions of CASE, the court limited the reach of its order to the pay of employees who work in agencies for which there are no continuing appropriations. Even if an employee is paid with special funds, rather than general funds, the order applies, observed the court. But employees who work in programs that have continuing appropriations or are protected by a self-executing state constitutional mandate are entitled to full pay. "Once a legislative appropriation is approved and signed by the Governor, it is law, and the Governor lacks the power to change it." (*Gilb v. Chiang* [3-18-09] Sacto. Co. Sup.Ct. 34-2008-80000026.)

### Pay Limit Proposals

FOLKS ARE FED UP with high pay for public servants during low economic times, particularly if the recipients are legislators who will not work together to pass a budget. Now it looks like legislators are noticing.

#### Proposition 1F

The constitutional amendment on the ballot later this month, Proposition 1F, would prohibit salary increases in lean times for legislators and other elected officials whose pay is set by the California Citizens Compensation

Commission. The commission meets annually to decide whether and how much to raise officials' salaries. Last year, the commission created a stir when two members floated a plan to cut salaries rather than raise them. (See story in *CPER* No. 191, pp. 57-59.) Ultimately the commission decided to freeze salaries, partly because the law is not clear whether they can decrease them. Senator Abel Maldonado (R-San Luis Obispo) proposed an amendment then that would have clarified that the commission could decrease salaries

and banned increases during years an operating deficit was declared. The legislature rejected it.

The criteria that govern salary-setting are (1) the amount of time spent performing the duties, functions, and services of a state officer; (2) the annual salary and benefits of the judiciary and other appointed and elected officials with comparable responsibilities, with some attention to private sector compensation; and (3) the responsibility and scope of authority of the entity in which the state officer serves. Labor relations professionals who have been involved in factfinding and interest arbitration might notice the “comparability” criterion and wonder where the “ability to pay” criterion common in factfinding statutes appears.

Proposition 1F supplies a financial component. In exchange for his vote for the budget in February, Senator Maldonado convinced the legislature to place on the May 19 ballot a proposed amendment that bans raises for officials when “the Director of Finance estimates that there will be a negative balance in the Special Fund for Economic Uncertainties in an amount equal to or greater than 1 percent of estimated General Fund revenues in the current fiscal year.” A provision authorizing the commission to decrease salaries was stricken before the measure passed.

#### **A.B. 1411**

Those really angry with the legislature should enjoy reading A.B. 1411

(Torrico, D-Fremont). This measure would cut off legislators’ per diem payments if they do not pass a budget bill by the constitutional deadline of June 15. Per diem payments of \$170 for costs such as travel and living expenses would not resume until a budget bill has been sent to the governor. Any per diem not paid because of a late budget would be forfeited. The bill also would ban campaign fundraising from June 16 until a budget bill is sent to the governor.

#### **A.B. 53**

A more extensive bill would freeze temporarily the base pay of public workers earning over \$150,000. A.B. 53 (Portantino, D-Pasadena) would prohibit raises and “pay for overtime work” for employees and appointees of the state and the California State University. It urges the regents of the University of California and the board

of directors of Hastings College of the Law to adopt a similar policy. But the measure is not aimed at rank-and-file workers who amass tens of thousands of dollars in overtime pay. It exempts employees in safety classifications, those whose salary is set by the constitution, and those whose wages are governed by a collective bargaining agreement. The measure would expire in January 2012.

Judges, however, are unscathed by the imploding state finances. In fact, they gained in the budget passed in February. A court found last year that various benefits and extra pay that some counties provide to judges on top of their \$179,000 state salaries are unconstitutional. Concerned that they each would lose \$46,000, judges in Los Angeles County convinced the legislature to pass a bill that allows, but does not require, counties to phase out benefits.

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## **CDCR Investigation Statements and Affidavit for Search Warrant Protected by Anti-SLAPP Statute**

AN EMPLOYEE MAY not base his whistleblower retaliation case on statements coworkers made during an internal investigation, even if they were made in bad faith, the Court of Appeal held in *Hansen v. California Department of Corrections and Rehabilitation*. Since the accusations were made after he retired, he was not an employee entitled to protection under Labor Code Sec. 1102.5. And the litigation privilege

and public agency immunity barred his claim of intentional infliction of emotional distress.

### **Investigation After Retirement**

While Douglas Hansen was employed as a vocational instructor at a correctional institution, the CDCR Office of Internal Affairs began an investigation into allegations that he had engaged in unauthorized com-

munications and sexual activity with inmates. He retired, but the investigation continued.

Hansen claimed in court that CDCR's continued investigation after his retirement constituted retaliation for complaints he had made throughout his employment with the department. He alleged that some coworkers conspired to create a web of lies that he had illegally smuggled items to inmates and engaged in sexual

*He alleged that coworkers conspired to create a web of lies.*

activity with them. He complained that the lies led a CDCR representative to file an affidavit for a search warrant of his home.

The department filed a motion to strike Hansen's complaint as a "strategic lawsuit against public participation." The trial court struck the complaint. It ruled that the statements made to investigators and in support of a search warrant were protected under the anti-SLAPP statute. The court also determined that Hansen did not show that his claims were sufficiently strong that he should be allowed to continue his lawsuit. Hansen appealed.

#### **Anti-SLAPP Protection**

In 1992, California enacted a statute to weed out meritless lawsuits

that are designed to harass individuals who have exercised their constitutional rights to petition the government or to engage in free speech. Defendants who have been sued can ask the court to strike a complaint if they can show that they have engaged in protected activity and the plaintiff cannot show that he is likely to win at trial.

The statements Hansen complained about were protected by the anti-SLAPP statute. Protected activity includes (1) a statement made in a judicial, legislative, or other proceeding authorized by law; (2) a statement that relates to the public interest made in a public forum; and (3) any other exercise of the constitutional rights of free speech and petition related to an issue of public interest. The affidavit to obtain the search warrant was made for a judicial proceeding, the court pointed out. The statements made to investigators were also protected, the court ruled, because a CDCR internal investigation is an authorized official proceeding under *Green v. Cortez* (1984) 151 Cal.App.3d 1068.

Since the CDCR employees made protected statements, the court examined whether Hansen likely would win his case at trial. Under Labor Code Sec. 1102.5, an employee is protected from retaliation for whistleblowing. Hansen already had retired and was no longer an employee when the allegedly false statements were made to internal investigators, the court pointed out, so he was not eligible to sue under the Labor Code.

Hansen also made a claim for intentional infliction of emotional distress. The court ruled that CDCR staff accusations were protected by the litigation privilege. The privilege extends to statements made in an official proceeding authorized by law, even if the statements are made in bad faith and made before the investigation in order to prompt an investigation.

CDCR and its personnel also were protected from liability under statutes that provide immunity for conduct of

*A CDCR internal investigation is an authorized official proceeding.*

public employees who "institute or prosecute any judicial or administrative proceeding within the scope of... employment, even if [an employee] acts maliciously and without probable cause." Since the accusations were part of CDCR's internal investigation, "a precursor to a formal judicial or administrative proceeding," the court held that both the employees and CDCR were immune.

Since Hansen's claims had no merit, the court ordered his complaint stricken. (*Hansen v. California Dept. of Corrections and Rehabilitation* [2009] 171 Cal.App.4th 1537.)

# Discrimination

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## Supreme Court Makes Short Shift of Sixth Circuit Limits on Retaliation Claims

THE UNITED STATES Supreme Court, in its long-awaited opinion in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, unanimously rejected the Sixth Circuit Court of Appeals' narrow reading of Title VII's anti-retaliation provisions. Overruling the appellate court, the high court held that Title VII's prohibition against retaliation by employers *does* extend to employees who report workplace race or gender discrimination not on their own initiative but in answering questions during an employer's internal investigation.

During a county investigation of rumors of sexual harassment by Gene Hughes, the school district's employee relations director, 30-year county employee Vicky Crawford was asked whether she had witnessed inappropriate behavior on the part of Hughes. In response, Crawford described several instances of sexual harassment. On one occasion, after greeting Hughes by saying, "Hey, Dr. Hughes, what's up?," he grabbed his crotch and said, "You know what's up." He repeatedly put his crotch up to her window. He once "grabbed her head and pulled it to his crotch." Two other employees also reported being sexually harassed by Hughes. The county fired all three

reporting employees shortly after the conclusion of the investigation, but took no action against Hughes.

Crawford filed a charge of retaliation with the Equal Employment Opportunity Commission, and then brought her case to court. The district court granted summary judgment for the county, and the Sixth Circuit affirmed the judgment on appeal.

### Supreme Court Decision

The court explained that Title VII's anti-retaliation provision "has two clauses, making it 'an unlawful employment practice for an employer to discriminate against any of its employees...[1] because he has opposed any practice made an unlawful employment practice by this subchapter, or [2] because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.' 42 U.S.C. Sec. 2000e-3(a). The one is known as the 'opposition clause,' the other as the 'participation clause,' and Crawford accused Metro of violating both."

The Sixth Circuit held that Crawford could not satisfy the opposition clause because it "demands active, consistent 'opposing' activities to

warrant...protection against retaliation," and Crawford did "not claim to have instigated or initiated any complaint prior to her participation in the investigation, nor did she take any further action following the investigation and prior to her firing." It also found that she failed to meet her burden under the participation clause because the county's investigation was not conducted "pursuant to a pending EEOC charge."

Writing for the court, Justice David Souter determined that the term "oppose," left undefined by Title VII, should be given its ordinary meaning, which is "to resist or antagonize...; to contend against; to confront; resist; withstand," according to Webster's *New International Dictionary*. Applying this definition, Souter had no problem concluding that Crawford's statement was covered by the opposition clause. "Crawford's description of the louche goings-on would certainly qualify in the minds of reasonable jurors as 'resistant' or 'antagonistic' to Hughes treatment, if for no other reason than the point argued by the Government and explained by an EEOC guideline: 'When an employee communicates to her employer a belief that the employer has engaged in...a form of employment discrimination, that communication' virtually always 'constitutes the employee's *opposition* to the activity,'" he explained.

Souter clarified that the Sixth District's requirements did not go far enough, stating:

# **Pocket Guide to Disability Discrimination in the California Workplace**

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

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

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

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



“Oppose” goes beyond “active, consistent” behavior in ordinary discourse, where we would naturally use the word to speak of someone who has taken no action at all to advance a position beyond disclosing it. Countless people were known to “oppose” slavery before Emancipation, or are said to “oppose” capital punishment today, without writing public letters, taking to the streets, or resisting the government. And we would call it “opposition” if an employee took a stand against an employer’s discriminatory practices by not “instigating” action, but by standing pat, say, by refusing to follow a supervisor’s order to fire a junior worker for discriminatory reasons. There is, then, no reason to doubt that a person can “oppose” by responding to someone else’s question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.

The court was not persuaded by the county’s argument that the lower the bar for retaliation claims, the less likely it is that employers will investigate possible discrimination. The court noted that this argument “underestimates the incentive to enquire” that follows from *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S.742, 131 CPER 14, and *Faragher v. Boca Raton* (1998) 524 U.S. 775, 131 CPER 14, which held that an employer can be vicariously liable for a hostile environment created by a supervisor. Under those cases, an employer has a defense when no tangible employment

action is taken, if it exercised reasonable care to prevent and promptly correct discriminatory conduct, and the employee “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.” On the contrary, said the court, the Sixth Circuit’s rule would “largely undermine” *Ellerth* and *Faragher* along with Title VII’s primary objective of avoiding harm to employees. “If it were clear law that an employee who reported discrimination in answering an employer’s questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others,” Souter explained.

Further, the appeals court’s rule would create a “real dilemma” for the employee, said the court. If the employer could penalize an employee for responding about enquiries about discriminatory conduct, he or she would keep quiet. However, if the employee later filed a charge of discrimination, the employer could escape liability by arguing that it had taken steps to correct and prevent discrimination by conducting the enquiry and that the employee unreasonably failed to take advantage of the opportunity. “Nothing in the statute’s text or our precedent supports this catch-22,” said Souter.

Because Crawford had met the requirements of the opposition clause, the court found no reason to consider her claims under the participation

clause. It sent the case back to the trial court for further consideration.

Justice Samuel Alito, joined by Justice Clarence Thomas, concurred in the court’s decision but wrote a separate opinion “to emphasize my understanding that the Court’s holding does not and should not extend beyond employees who testify in internal investigations or engage in analogous purposive conduct.” To protect conduct that is not active and purposive “would have important practical implications,” he said. “It would open the door to retaliation claims by employees who never expressed a word of opposition to their employers,” he warned. “Suppose, for example, that an employee alleges that he or she expressed opposition while informally chatting with a co-worker at the proverbial water cooler or in a workplace telephone conversation that was overheard by a co-worker. Or suppose that an employee alleges that such a conversation occurred after work at a restaurant or tavern frequented by co-workers or at a neighborhood picnic attended by a friend or relative of a supervisor.”

Alito noted that the number of retaliation claims has “proliferated” in recent years and that “an expansive interpretation of protected opposition conduct would likely cause this trend to accelerate.” (*Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee* [1-26-09] No. 06-1595, \_\_\_ U.S. \_\_\_, 2009 DJ-DAR 1172.)

## Type 2 Diabetic May Be Disabled and a Qualified Individual Under the ADA

THE NINTH Circuit Court of Appeals has determined that an insulin-dependent type 2 diabetic raised a genuine issue of material fact as to whether he is disabled and a qualified individual entitled to the protections of the Americans with Disabilities Act. In *Rohr v. Salt River Project Agricultural Improvement and Power Dist.*, the court overruled the district court's grant of summary judgment to the employer, finding that the lower court had "oversimplified" the plaintiff's condition.

Larry Rohr worked as a welder and often traveled to power plants to perform inspections and training. Occasionally, he worked as a "borrowed hand" to help restore outages at other plants, where he worked up to 12 hours a day, seven days a week, for a prolonged period.

In 2000, Rohr was diagnosed as an insulin-dependent, type-2 diabetic. Thereafter, he followed a demanding regimen of injections, medication, and blood tests, and adhered to a strict diet. He suffered from high blood pressure, deteriorating vision, and occasional loss of feeling in his hands and feet. He tired more quickly, especially when driving long distances or exposed to high heat. Because of his high blood pressure, he was unable to renew his required respirator certification.

As accommodations, Rohr requested that he not be required to

drive more than four hours, engage in strenuous activities, work more than a nine-hour shift, work in extreme heat, climb scaffolding or ladders, work around moving machinery, or travel overnight. His doctor and the employer's doctor concurred, and the employer implemented all requested accommodations.

Six months later, Rohr was told that his restrictions prevented him from performing the essential job functions, such as overnight travel. He was given three options: remain in his position for 90 days while pursuing other positions with the employer; apply for disability benefits; or, take early retirement.

Rohr's doctor then advised the employer that it was no longer necessary to restrict Rohr's travel, "providing he adheres to the other restrictions currently imposed on him." Rohr maintained that he could travel to perform inspections and training, but could not work as a "borrowed hand" for power outages; he asserted the employer could assign someone else to do this job. The employer disagreed. Rohr chose to apply for disability benefits.

Rohr filed a charge with the Equal Employment Opportunity Commission alleging age and disability discrimination, and then filed a lawsuit.

The district court dismissed the case, and Rohr appealed.

### Ninth Circuit Opinion

**Disability.** The district court concluded that Rohr failed to raise a material fact as to whether he was disabled within the meaning of the ADA and that his inability to complete the respirator certification test rendered him unqualified for his position. The appellate court disagreed on both counts.

There is no question but that diabetes is a "physical impairment" under the ADA because it affects the digestive, hemic, and endocrine systems, and eating is a "major life activity," explained the court, referencing *Fraser v. Goodale* (9th Cir. 2003) 342 F.3d 1032. The question is whether, in Rohr's case, his diabetes substantially limits this activity. The district court erred in finding it did not, said the Ninth Circuit.

To determine whether Rohr is substantially limited in his eating, the court must consider the nature and severity of the impairment and also whether the symptoms of Rohr's diabetes substantially limit one of his major life activities, including "whether his efforts to mitigate the disease constitute a substantial limitation."

The court found that the record was clear that "Rohr is required to strictly monitor what, and when, he eats." He cannot eat large meals, or skip meals, and must eat something every few hours. Further, "if he fails to

follow his diet regimen for more than a meal or two, his blood sugar rises to a level that aggravates his disease.”

The Ninth Circuit found the district court had oversimplified Rohr’s condition. “While it may seem easy to take a pill or shot of insulin, the reality of diabetes, a chronic and incurable disease, is not so simple. For people like Rohr, who must treat their diabetes with insulin, the failure to take insulin will result in severe problems and eventually death.” The court in-

### *The district court had oversimplified Rohr’s condition.*

structed that, while “generally, food raises blood glucose levels while exercise and insulin reduce them...other factors play a role, too.” To obtain the proper balance, “Rohr must test his blood glucose levels through a finger stick test numerous times a day, and adjust insulin, food and activity level according to the results.” Chiding the district court, the Court of Appeals said, “It is simply no answer to say that ‘if he strictly controls his diet’ he is not substantially limited; for Rohr, the effort required to control his diet is itself substantially limiting.”

**The ADAAA.** The court noted that, while this decision was pending, the ADA Amendments Act of 2008

was enacted, with the stated purpose of restoring the intent and protections of the ADA. The ADAAA rejected the Supreme Court’s narrow interpretation of the term “disability” in *Sutton v. United Airlines, Inc.* (1999) 527 U.S. 471, 137 CPER 21, and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* (2002) 534 U.S. 184, 152 CPER 30, and expanded the class of individuals who are protected by the ADA. (For a full discussion of the ADAAA, see CPER No. 194, pp. 5–9.)

Because it reached its conclusions under the ADA separate and apart from the ADAAA, the court found no reason to determine whether the amendment applied retroactively. “Nevertheless,” it said, “because the ADAAA sheds light on Congress’ original intent when it enacted the ADA, a brief discussion of the amendment is appropriate.”

The ADAAA clarifies congressional intent with respect to the term “disability” in three ways that could affect persons with diabetes, said the court. First, it makes clear that eating is a major life activity. Second, the ADAAA states that the *Toyota* holding that “substantially limits” means “prevents or severely restricts,” is too narrow and instructs the EEOC to revise its definition. Third, the ADAAA makes clear that the “substantially limits” determination “shall be made without regard to the ameliorative effects of mitigating measures...” This means that “impairments are to be evaluated in their unmitigated states.”

“For example,” the court advised, “diabetes will be assessed in terms of its limitations on major life activities when the diabetic does not take insulin injections or medicine and does not require behavioral adaptations such as a strict diet.”

**Qualified individual.** To state a claim under the ADA, a plaintiff must show that he or she is a “qualified individual,” defined as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position....”

### *‘Impairments are to be evaluated in their unmitigated states.’*

The appellate court disagreed with the district court’s conclusion that Rohr was not a qualified individual because he could not obtain the respirator certification. The employer failed to show the particular breathilator test that it used was a business necessity, or that there was no alternative method of evaluation for those with high blood pressure. In addition, it failed to show that the certification test was related to Rohr’s job, said the court.

The court also concluded that Rohr raised a genuine issue of material fact as to whether he could perform the essential functions of his position with

accommodation. “Essential functions are fundamental job duties of the employment position...not including the marginal functions of the position,” the court explained. The only duties that Rohr’s disease prevented him from performing were out-of-town field assignments. Whether these were “essential functions” of his position is a question to be determined at trial, said the court. (*Rohr v. Salt River Project Agricultural Improvement and Power Dist.* [9th Cir. 2009] 555 F. 3d 850.)

## General

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### Idaho Statute Upheld Despite Ban on Political Payroll Deductions

RELYING ON ITS decision in *Davenport v. Washington Education Assn.*, the U.S. Supreme Court concluded that a union's First Amendment rights are not abridged by the state's ban on payroll deductions which fund union political activities. In *Ysursa v. Pocatello Education Assn.*, the court examined Idaho's "Right to Work Act," which permits public sector employees to authorize payroll deductions for general union

*The ban furthers  
a separation  
of government  
from politics.*

dues but disallows deductions for political purposes. The Ninth Circuit held that the statute was unconstitutional as applied to local government agencies, but the Supreme Court reversed. In a decision crafted by Chief Justice John Roberts, the high court concluded that the ban furthers Idaho's interest in separating the operation of government from politics.

A group of unions representing Idaho public employees challenged the

prohibition on deductions remitted to the unions' political action committees. They conceded that the ban was valid as applied to the state level of government, but argued that it violated their First Amendment rights as applied to county, municipal, school districts, and other public employers.

Chief Justice Roberts first dispelled any assertion that a different First Amendment analysis applies depending on the level of government affected. The government's interest in separating itself from partisan politics "extends to all public employers at whatever level of government."

Roberts next affirmed that, while publicly administered payroll deductions can enhance the unions' exercise of First Amendment rights, "Idaho is under no obligation to aid the unions in their political activities."

The majority relied on *Davenport* to guide its analysis of the unions' argument that the statute is impermissibly based on the content of the speech in violation of constitutional proscriptions. In *Davenport*, the law in question required that non-union members provide specific consent before their agency fees could be used for activities related to elections, but not for other purposes. Rather than

suppressing union speech, the court in *Davenport* said, the law simply declined to assist the union in dissemination of political speech. That distinction was reasonable given the state's interest in preserving the integrity of the election process, the court said. The state did not have to enact an across-the-board limitation to vindicate its more narrow concern.

The same analysis governs the Idaho law, Roberts announced. The statute does not suppress political speech but simply declines to promote it through public employer checkoffs

*The statute does not  
suppress political  
speech but simply  
declines to promote it.*

for political activities. "The ban on such deductions plainly serves the State's interest in separating public employment from political activities," wrote the chief justice.

Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito joined in Roberts' opinion. Justice Ruth Bader Ginsburg wrote separately, but concurred in the court's judgment.

Justice Stephen Breyer questioned the usefulness of the distinction between "promoting" and "abridging" speech, particularly because the payroll deduction system already exists for union dues. Breyer proposed an



examination of the seriousness of the speech-related harm the provision will likely cause, the importance of the provision's countervailing objectives, the extent to which the statute will tend to achieve those objectives, and whether there are other less-restrictive ways of doing so. Breyer said he would find the statute constitutional if it is applied even-handedly among similar politically related contributions. But, because this could not be determined by the factual record, Breyer would send the case back to collect this evidence.

Justices John Paul Stevens and David Souter filed dissenting opinions. Based on other provisions of the law, Stevens viewed the statute as intending to make it more difficult for unions to finance political speech. And, he wrote, the state's interest in avoiding the appearance of employer political

involvement is inconsistent with its decision not to restrict deductions for charitable contributions that often are generated for political purposes.

Justice Souter acknowledged that the state is free to manage its affairs in ways that draw reasonable subject matter lines affecting speech. But, he said, a government is not free to draw those lines as a way to discourage or suppress the expression of viewpoints with which it disagrees. A reasonable reading of the statute raises a suspicion of viewpoint discrimination, Souter said, that cannot be disregarded. "A decision that ignores the elephant in the room is a decision with diminished authority." (*Ysursa v. Pocatello Education Assn.* [2-24-09] Supreme Court No. 07-869, \_\_\_ U.S. \_\_\_, 2009 DJDAR 2620.)

the policy was a violation of her First Amendment rights.

Gibson's grievance was denied by her employer, which views the prior approval process as needed to prevent conflicts of interest between a public employee's official duties and his or her outside activities. Gibson filed an ap-

### *The prior approval process prevents conflicts of interest.*

peal with the Department of Personnel Administration, which DPA denied. Gibson then filed a lawsuit against the agency, alleging a First Amendment violation. The district court dismissed the suit, and Gibson proceeded to the Court of Appeals.

To determine whether Gibson had engaged in constitutionally protected speech, the Ninth Circuit first considered whether her speech addressed a matter of public concern. Reviewing Supreme Court and Ninth Circuit precedent, the court concluded that filing a legal malpractice claim against a lawyer regarding a divorce is not an issue of public concern. It did not involve government malfeasance or challenge the conduct of a government agency or official, the court said. Rather, the malpractice action and Gibson's involvement in it were private matters between Goode-Parker and her former lawyer.

## **Limit on Employee's Outside Legal Work Not Unlawful Free Speech Restriction**

THE STATE Attorney General's policy that prohibits its lawyers from engaging in the practice of law without prior approval is not a prior restraint on speech. And, the Ninth Circuit Court of Appeals said in *Gibson v. Office of the Attorney General*, the employee's malpractice lawsuit stemming from a divorce does not address a matter of public concern deserving of First Amendment protection.

The dispute was brought by Lauren Gibson, an attorney in the antitrust

section of the Office of the Attorney General. Gibson filed a private malpractice action against a divorce lawyer on behalf of a coworker, Annette Goode-Parker. The internal policy of the Attorney General's Office requires that an attorney first obtain permission to engage in the private practice of law. Gibson sought permission to represent Goode-Parker a year after she filed the malpractice lawsuit. Gibson's supervisors denied the request, and she filed a grievance arguing that



The fact that the action could have affected the lawyer's disciplinary record did not transform the litigation into a matter of political, social, or other concern to the public at large, the Ninth Circuit instructed. The action was an individual grievance with no bearing on the public's evaluation of the public agency's performance. And, the court noted, Goode-Parker's malpractice action sought monetary damages. Whether a public complaint filed with the California state bar association is a matter of public concern was a question the court left for another day.

### *The A.G.'s policy does not prohibit all outside practice of law.*

The court also rejected Gibson's more-general assertion that the attorney general's policy operates as an unlawful prior restraint of speech. Because the Ninth Circuit has never addressed whether a public employer's policy regulating its employees' outside employment activities is a prior restraint, it looked to *Williams v. IRS*, (1990) 919 F.2d 745, a case decided by the Court of Appeals for the District of Columbia.

Like the policy in *Williams*, the Ninth Circuit observed, the A.G.'s policy requires prior permission before engaging in outside employment or business, but does not prohibit all

outside practice of law. The requirement to seek written permission allows the agency to assess whether the requested outside employment creates any conflict of interest or impedes any other legitimate interest of the state. "The OAG has a legitimate interest in regulating practice-related conduct of its lawyers to avoid any conflict of interest and to avoid any potential prejudice to the OAG and its clients," said the court. Further, the OAG has a

"legitimate interest in ensuring that its employees are devoting their full attention to the business of the OAG."

Because the A.G.'s policy serves legitimate government interests and does not unduly restrict its employees' constitutional rights, the court concluded that the policy is not an improper prior restraint on speech. (*Gibson v. Office of the Attorney General* [9th Cir. 2009] 554 F.3d 759.)

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### **No Violation of PSOPBRA Demonstrated by 'Misleading' Notice**

IN A FACTUALLY complex case of first impression, the Sixth District Court of Appeal reached an uncomplicated decision — the Public Safety Officers Procedural Bill of Rights Act does not require that notice of proposed discipline identify the decisionmaker who chose dismissal as the proposed discipline. The trial court ordered the reinstatement of two correctional officers at the California Department of Corrections and Rehabilitation because the notice they received was misleading as to who was the decisionmaker. However, the appellate court announced, the officers relied only on a Bill of Rights Act violation and did not allege a separate due process cause of action.

In February 2004, it was reported that a group of correctional officers, including Ronald Sphar and Robert Martin, had engaged in misconduct

on November 3, 2003. Following an investigation, a meeting was convened to discuss the appropriate level of disciplinary action. In attendance were Cheryl Pliler, CDCR's deputy director of field operations, and her superior, John Dovey, the department's chief deputy director. Pliler was designated the hiring authority with responsibility for signing any notices of adverse action. During the meeting, it was determined that five employees would be terminated, one would be demoted, and three, including Sphar and Martin, were to receive salary reductions.

On November 4, 2004, Pliler signed notices of adverse action informing Sphar and Martin of the intended 10 percent salary reduction. Thereafter, however, Dovey approved alterations to the notices that Pliler had signed, changing the adverse ac-

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Time flies like an arrow, fruit flies like a banana.  
-- Groucho Marx, comedian

Written by two experts in the field, this Pocket Guide focuses on the Act's impact in the public sector workplace and explains complicated provisions of the law that have vexed public sector practitioners, like the "salary basis" test and deductions from pay and leave for partial-day absences.

Each chapter tackles a broad topic by providing a detailed discussion of the law's many applications in special workplace environments. For example, the chapter that covers overtime calculation begins by defining regular rate of pay and then considers the payment of bonuses, fluctuating workweeks, and alternative work periods for law enforcement and fire protection employees. Other chapters focus on record keeping requirements, hours of work, and "white collar" exemptions. In each case, detailed footnotes offer an in-depth discussion of the varied applications of the FLSA

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tion to dismissal. Dovey's signature was not on the altered notices. The alterations were made after Pliler had signed them and without her consultation.

Sphar and Martin appealed their dismissals to the State Personnel Board and, while their appeals were pending, filed a petition under Sec. 3309.5 of the Bill of Rights Act claiming that the department had failed to provide them with timely valid notices of the adverse actions. CDCR asserted that due process does not require that the notice of adverse action be signed by the same person who determines the penalty.

The trial court sided with Sphar and Martin, reasoning that, although Dovey may have had the authority to change the penalty, the notices were misleading because they conveyed

the understanding that Pliler, the hiring authority, had approved of the penalty.

The department appealed the trial court's order that Sphar and Martin be reinstated.

The appellate court noted the officers' contention that, contrary to Sec. 3304(d), they were not notified of the proposed disciplinary action within the one-year limitation period. They sought relief from the superior court under Secs. 3309.5(c) and (d), which gives the superior court initial jurisdiction for alleged violations of the act and the power to render appropriate relief.

Citing *Mays v. City of Los Angeles* (2008) 43 Cal.4th 313, 190 CPER 40, the Court of Appeal commented that

the Bill of Rights Act does not require that the notice of proposed discipline identify the proposed level of discipline. Nor, the court concluded, does the act require that the notice identify the decisionmaker responsible for the adverse action. "While the...original notices were misleading about the identity of the decisionmaker *who had chosen dismissal* as the proposed discipline, the notices did not inaccurately reflect that Pliler was the decisionmaker who had decided to propose discipline." The court concluded, therefore, that the officers did not establish a Bill of Rights Act violation and reversed the trial court's judgment. (*Benefield v. California Department of Corrections and Rehabilitation* [2009] 171 Cal.App.4th 469.)

## Public Sector Arbitration

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### Failure to Accept Responsibility for Physical Altercation Insufficient for Disparate Discipline

THE COUNTY OF Sacramento lacked good cause to terminate an employee involved in a physical altercation at work. Rather, said arbitrator Bonnie Bogue, the county demonstrated sufficient cause to impose a 20-day unpaid suspension, like that imposed on the other employee involved in the fight.

*Evidence did not support that the grievant was the primary aggressor.*

The physical altercation occurred between the grievant and another employee, Richardson, at a Department of Waste Management & Recycling transfer station that was unusually busy due to Christmas tree disposals. The grievant directed customers as they entered the yard. Richardson operated a vehicle to pick up, stack, and load the trees into a shredder.

The employees had an argument that escalated into a physical altercation. After the fight, each employee gave written statements and, follow-

ing an investigation, termination of both employees was recommended. Instead, the department director imposed a 20-day unpaid suspension for Richardson and terminated the grievant.

Both employees' versions of events are that Richardson got out of his vehicle and approached the grievant. Thereafter, because there were no eyewitnesses, arbitrator Bogue was required to make a credibility determination concerning the grievant's responsibility for the physical fight.

Bogue noted that nothing in the county's policy or in the collective bargaining agreement mandated discharge of an employee who engages in a physical fight. That Richardson was not terminated supported this finding. Thus, Bogue determined that the issue was whether there was clear and convincing evidence that the grievant's termination was proper.

First, arbitrator Bogue found that the evidence did not support the conclusion that the grievant was the primary aggressor. Both employees had been arguing throughout the day when Richardson drove his vehicle toward the grievant, got out of his vehicle, and told the grievant to repeat what

he had just said. Richardson testified the grievant was using very vulgar language. Bogue considered Richardson's move toward the grievant as an act of physical aggression — particularly in light of his larger size compared to the grievant — that significantly escalated the confrontation.

Bogue rejected the contention that the grievant was unlikely to have used vulgar language because he was a relatively recent immigrant in his fifties. While the grievant denied ever using "bad words," he had an incentive to make such a denial. But Bogue

*The arbitrator looked favorably on the consistency of the grievant's testimony.*

also noted Richardson's equally strong incentive to embellish the story with claims of vulgar language to justify his subsequent misconduct. Bogue found the evidence to be inconclusive as to whether the grievant used offensive language that baited Richardson into a physical altercation. Thus, the county failed to meet its burden of proof on this factual point, and there was no clear and convincing evidence to support the county's conclusion that the grievant provoked the fight through vulgar language directed at Richardson.

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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

Every step in the arbitration process — from filing a grievance to judicial review of arbitration awards — is clearly expalined. Specifically tailored to the public sector, the guide covers the hearing procedure, rules of evidence, closing arguments, and remedies. The Guide covers grievance arbitration, as well as factfinding and interest arbitration. Included are a table of cases, bibliography, and index.

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The arbitrator looked favorably on the consistency of the grievant's testimony and his written statement taken contemporaneously with the events that led to arbitration. The grievant wrote and testified that after he turned his back to Richardson, Richardson jumped out of his vehicle and hit him on his face.

In contrast, Richardson's testimony was inconsistent from his written statement. In his testimony, he made no mention of the grievant's vulgarity, and said that he charged the grievant after the grievant grabbed a chair. He also admitted that the grievant never swung at him.

The arbitrator also noted that Richardson followed the grievant to his position, rather than walking away. Bogue explained that because of clear and convincing evidence that

the grievant did not pick up a chair or threaten to hit Richardson with it, she doubted Richardson's credibility concerning the justification for his actions.

Bogue also considered the after-effects of the fight as a barometer of culpability. She noted the grievant sought medical attention. In contrast, there was no evidence that Richardson sustained any injuries.

Arbitrator Bogue noted that Richardson took no responsibility in his written statement. It was the department director who found Richardson's acceptance of responsibility as a basis for lesser discipline, and the grievant's failure to take responsibility a reason for termination. However, Bogue determined that the evidence did not support the conclusion that because Richardson accepted responsibility

and the grievant did not, the greater level of discipline was proper for the grievant.

Bogue agreed that the county had good cause to discipline the grievant, but found the county failed to present clear and convincing evidence that the grievant was more culpable and therefore deserving of harsher discipline. Bogue determined that, at best, the evidence showed the employees were equally responsible, and she concluded that equal punishment was proper.

Accordingly, Bogue awarded reinstatement to the grievant with back pay and restoration of his seniority, offset by a 20-day unpaid suspension (*County of Sacramento and International Union of Operating Engineers, Loc. 39*).

# Arbitration Log

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- **Termination**
- **Conflict of Interest**

**County of Riverside and [Social Worker]** (2-9-08; 9 pp.). *Representatives:* Linda Scheschy (human resources analyst) for the county; Jill B. Hunt, Esq. (Keller, Weber and Dobrott) for the grievant. *Arbitrator:* Philip Tamoush.

*Issue:* Was the grievant's termination proper?

*County's position:* (1) The grievant had a personal financial relationship with a client of the Department of Public Social Services. He rented his home to her and named himself as payee for her and her son's Social Security benefits. The grievant received the benefit checks and paid his tenant and her son with personal checks for living expenses.

(2) The grievant failed to inform his supervisors of this obvious conflict of interest. "Common sense" dictates that he should not engage in this behavior with his client and her son.

(3) The grievant terminated the client's benefits when she moved out of his home. The grievant should have reported what he knew about his client and was dishonest during the ensuing investigation.

(4) Social workers are assigned to cases by supervisors and have no authority to change client status on their own volition. The grievant is an experienced social worker and knew, or should have known, that his actions during and after the relationship were wrong.

(5) The grievant's receipt of his client's Social Security allotments, and rent presented clear conflicts of interest. Based on the county's established practice, termination was appropriate for such egregious behavior.

*Grievant's position:* (1) The grievant is a seven-year employee and a valuable professional with no previous discipline. He has received commendations for his dedication and hard work. The county ignored his work history when it considered proper discipline. Management's decision to terminate him improperly relies on the county's investigation. There may also have been bias against the grievant because of his race.

(2) The grievant's relationship with the client did not adversely affect the department. There is little doubt that the client's benefits should have been terminated when the grievant believed she had moved out of the county. The grievant took the appropriate action to terminate benefits once he learned this.

(3) The county failed to meet its burden of showing cause for termination. Even if there were some question regarding the grievant's behavior, termination is too strong.

(4) The grievant has been honest and forthright during the investigation. His supervisors failed to inform him of rules that required him to report that the client was a friend and tenant.

(5) Discipline should be preventative, not punitive. Under the principles

of progressive discipline, immediate termination is not warranted.

*Arbitrator's holding:* Grievance denied.

*Arbitrator's reasoning:* (1) Management must show it had cause to discipline the grievant based on its policies and the grievant's actions.

(2) The grievant is an experienced professional, well-versed in his duties, and has not claimed that he was unaware of his actions. While the grievant's supervisors did not effectively communicate the rules and obligations with respect to conflicts of interest, a "reasonable man" would have examined his actions relative to his client.

(3) The grievant had a relationship with his client that involved her Social Security benefits even before he was employed by the department. She also had been living in his home.

(4) The department provided the grievant with training as a social worker, and he was aware of what constitutes conflict of interest. Further, the grievant failed to inform anyone that his client was a friend, renting his home, and paying him fees from the benefits she received.

(5) The grievant's failure to make his supervisors aware of his interaction with his client was dishonest and represented an obvious conflict of interest. He did not deny the relationship he had with his client. Further, his actions constituted theft of county monies because he colluded with the client to withhold information that he was renting to her. Additionally, the grievant should have reported that the client was receiving benefits from both the federal and local governments.



(6) The grievant accessed a department computer and terminated the client's benefits without cause. He relied solely on personal information obtained from her children to determine that she no longer qualified.

*(Binding Grievance Arbitration)*

- **Contract Interpretation**
- **Accumulated Vacation Leave**

**Kern Community College Dist. and California School Employees Assn. and its Chaps. 246, 336, and 617.** (7-17-08; 16 pp.) *Representatives:* Bob Baker and Tim Liermann (labor representatives) for the association; Eileen O'Hare Anderson (Liebert Cassidy Whitmore) for the district. *Arbitrator:* Joseph F. Gentile.

*Threshold issues:* (1) By failing to raise the claim during earlier steps of the grievance procedure, the district waived the assertion that the grievance was untimely filed;

(2) The contract permits CSEA to file a grievance on behalf of an employee.

*Issue:* Did the district fail to direct employees with maximum accrued vacation benefits to use those benefits or receive pay for the excess thereby causing forfeiture of earned vacation credit?

*Union's position:* (1) When accumulated vacation credits approach the maximum for employees, the employer is required to direct the employee to use the accrued vacation credit or provide payment for the excess.

(2) The employer failed to comply with this provision of the contract and, as a result, has refused to allow credit for accrued vacation.

(3) This conduct causes employees to forfeit a valuable, bargained-for benefit.

(4) Each employee should be made whole for any employer forfeited vacation credit.

*District's position:* (1) The contract terms clearly and unambiguously state that vacation days may be accumulated up to the equal of the prior year and the current year.

*Arbitrator's holding:* The grievance is denied.

*Arbitrator's reasoning:* (1) Section 9K3 of the parties' agreement imposes a "cap" on an employee's ability to accrue vacation benefits. The maximum accrual may be equal to the prior year and the current year.

(2) The contract also provides that, when the accumulation approaches the maximum, the college president "may direct the employee to use the vacation... or provide payment for the excess."

(3) The use of the word "may" is discretionary. Therefore, the employer is not required to direct the employee to use the accrued vacation credit, as the union claims.

(4) Prior to the execution of a supplemental agreement, the district allowed employees to exceed the vacation cap specified in the contract. That practice ended when the supplemental agreement was executed in 2006. It provided that future vacation benefits would comply with the contractual cap on accumulated leave.

*(Binding Grievance Arbitration)*

- **Promotion**

**Bay Area Air Quality Management District Employees Assn. and Bay Area Air Quality Management Dist.** (7-22-08; 14 pp.) *Representatives:* Linda A. Tripoli, Esq. for the district; Sarah Varela, Esq. (Davis, Cowell and Bowe) for the association. *Arbitrator:* Gerald R. McKay (AAA No. 74 390 00373 No. 07).

*Issues:* (1) Did the district comply with the requirement in the parties' MOU to provide information to the question regarding rejection of his promotion?

*Threshold decision:* The employer waived its right to challenge the timeliness of the demand for arbitration by first waiving the issue at the arbitration hearing.

(1) The plain language of the agreement, requires that "any determination" to overturn the hiring manager's recommendation be in writing and include an explanation. This requirement exists when the executive officer makes a decision to overturn the hiring manager's decision. When the executive officer disapproves a hiring manager's recommendation, it is a "determination" under the terms of the agreement.

(2) The employer failed to provide the grievant with specific and constructive reasons for the denial of his promotion despite the clear requirement to do so. General conversations or after-the-fact explanations do not satisfy the contractual rules.

(3) The employer should be ordered to provide the grievant with specific and constructive reasons for denial of promotion.



(1) The clear and unambiguous language of the contract does not require a written explanation when the executive officer does not approve the hiring manager's first recommendation.

(2) The purpose of providing a detailed written explanation of disapproval by a manager *below the executive officer* is to facilitate final review by the executive officer, who could still decide to approve the hiring manager's recommendation.

(3) The decision to promote another employee, rather than the grievant, is not grievable.

*Arbitrator's holding:* Grievance sustained.

(1) The hiring manager recommended the grievant for a promotion, but was ordered to change his recommendation because the executive officer did not agree with his selection. Essentially, the hiring manager was told not to follow the process and to simply change his mind and withdraw the grievant's recommendation. This plan fell apart when the grievant learned that the hiring manager had originally recommended him to the executive officer.

(2) The language states that "any determination" not to approve the hiring manager's recommendation must be in writing and provide a detailed explanation of the reasons for the determination. The executive officer is the last step in the process and has the same obligation to explain why he rejected the candidate and to provide constructive reasons for doing so as any subordinate.

(3) While the contract does not permit the grievant to grieve his failure to be promoted, it does entitle him to know why he was not promoted in

order to improve his chances of future promotions.

(4) The executive officer is directed to write an explanation for why he rejected the grievant, and what the grievant may do to be a more successful candidate in the future. The letter shall be presented to the grievant with a copy sent to the union.

*(Binding Grievance Arbitration)*

- **Contract Interpretation**
- **Denial of Annual and Sick Leave**
- **Past Practice**

**Bay Area Air Quality Management District Employees Assn. and Bay Area Quality Management Dist.** (1-7-09; 13 pp.). *Representatives:* Sarah Varela (Davis, Cowell & Bowe) for the union; Linda Tripoli for the district. *Arbitrator:* Frank Silver.

*Issue:* Did the district violate the memorandum of understanding when it denied the accrual of annual and sick leave for the entire pay period during which the grievant took unpaid leave in excess of 80 hours in a fiscal year? If so, what is the remedy?

*Association's position:* (1) The plain language of Sec. 12.13 of the MOU, adopted May 15, 2002, provides for the accrual of annual and sick leave for all time actually worked following 80 hours of leave without pay. The contract provision, which states that an employee will not accrue annual or sick leave "for the period of leave without pay in excess of 80 hours," does not mean that such leave should not be accrued for the entire pay period during which an employee may take as little as one hour of leave without pay in excess of 80 hours.

(2) The district violated the terms of the MOU when, in 2006, it denied the grievant accrual of annual and sick leave during the final three two-week pay periods of the fiscal year because he took some hours of leave without pay in each pay period after having taken 80 hours of leave without pay earlier in the fiscal year.

(3) The grievant was entitled to accrue leave on a prorated basis for the time that he worked.

*District's position:* (1) No language in Sec. 12.13 evidences the parties' intent that leave accruals will be prorated.

(2) Even if construed as ambiguous, there was an established and communicated past practice with regard to non-accrual of annual and sick leave. Since at least 1997, an employee with more than 80 hours of leave without pay did not accrue annual or sick leave during any pay period containing additional leave without pay.

(3) A 1998 letter of understanding stated that an employee in these circumstances would not accrue annual and sick leave during the entire pay period in which the employee returned to work.

(4) This practice was communicated to employees in a memo enclosed with paychecks in 1999, and it was accessible on the district's computer network. Knowledge of the practice must be imputed to the association.

*Arbitrator's holding:* Grievance sustained.

*Arbitrator's reasoning:* (1) The parties' intent in agreeing to a contract provision is evidenced primarily by the actual contractual language. Where the contractual language is clear and

unambiguous, only exceptionally strong extrinsic evidence can establish an interpretation inconsistent with the contract language. The district's interpretation is inconsistent with the seemingly clear language of Sec. 12.13.

(2) A fundamental rule of contract interpretation instructs that the contract be construed as a whole. Article XI, Fringe Benefits, states that, with one exception, "all other employment benefits will be prorated based on the hours worked." The language of Sec. 12.13, read in light of the contract as a whole, supports the association's position.

(3) Contrary to the district's contention, Sec. 12.12 merely states that an employee must work 50 percent of his or her regularly scheduled assignment in order to accrue annual or sick leave.

(4) The 1998 letter of understanding explicitly stated that it did not constitute a past practice and that it governed only until expiration of the prior MOU on June 30, 1999. The 1999 payroll insert was issued when the prior MOU had expired and the parties were engaged in negotiations for a successor MOU. Neither of these documents provides evidence of a past practice that would be sufficient to contradict the seemingly clear contract language.

(5) The district is directed to credit the grievant with annual and sick leave accrual, prorated for hours during any pay periods in which he took unpaid leave in excess of 80 hours for the 2005-06 fiscal year.

*(Binding Grievance Arbitration)*

- **Attendance**
- **Progressive Discipline**

**University of California, San Francisco, and Coalition of University Employees** (1-21-09; 8 pp.). *Representatives:* Mary Higgins for the union; Kathryn M. Mente for the university. *Arbitrator:* Paul D. Staudohar.

*Issue:* Was the dismissal of the grievant for just cause?

*University's position:* (1) Because of previous attendance problems, the grievant was required to provide medical justification of her illness when she returned to work after sick leave as a condition of her "attendance improvement plan."

(2) After a several-day absence, the grievant falsified a doctor's note that originally indicated she was off work for one day. At a meeting held to discuss the absence, the grievant admitted she falsified the note because she was in too much pain to work and unable to get an appointment with her doctor. Immediately after the meeting, the grievant left work without informing her supervisor. The grievant told a coworker she had a therapy appointment and had filled out a leave form. No leave form was found.

(3) The falsification of a doctor's note is fraudulent and in violation of California law. As stated in the collective bargaining agreement, this "serious misconduct" is cause for dismissal.

*Union's position:* (1) The union acknowledges that the grievant falsified the doctor's note. However, dismissal is too severe and inconsistent with principles of progressive discipline.

(2) While falsification of a doctor's note is a foolish mistake, it does not indicate intent to deceive. The grievant has

no prior record of discipline and should be reinstated, without back pay.

*Arbitrator's holding:* Grievance denied.

*Arbitrator's reasoning:* (1) There is no doubt that the grievant falsified the doctor's note to make it appear that he approved her being absent from work for several extra days. The grievant's supervisor testified that the grievant admitted the falsification at the investigatory meeting. The grievant admitted the act in arbitration.

(2) The agreement mandates for at least one written warning "except when corrective action is the result of performance or conduct that an employee knows, or reasonably should have known, was unsatisfactory." The agreement specifies that dishonesty or other serious misconduct are examples of such performance.

(3) Falsification of a doctor's note violates the trust that is essential in the workplace. Therefore, the university had just cause to dismiss the grievant.

(4) The union's contention that the grievant is entitled to wages and vacation pay were not raised in the initial grievance or during steps of the grievance procedure. Nor are they referenced in the parties' stipulated issue. The university did not agree that the issue was properly before the arbitrator.

(5) Under the terms of the attendance improvement plan, the grievant was expected to notify her supervisor of any known medical appointments. There were no completed leave forms found on the day the grievant left work following the investigatory meeting.

*(Binding Grievance Arbitration)*

# Resources

## Public School Layoff Rules

At a time when school districts are planning unprecedented numbers of layoffs, two new CPER Pocket Guides will be beneficial to public school employers, both certificated and classified employees, union reps, and labor relations specialists.

*Pocket Guide to Layoff Rules Affecting Classified Employees* is a must for classified employees and public school employers. This guide covers legitimate reasons for layoff; notice requirements; collective bargaining rights; seniority; computing and exercising seniority; reemployment rights; and options in lieu of layoff. Also included are pertinent Education Code citations.

*Pocket Guide to Layoff Rules Affecting Certificated Employees* contains important information for certificated employees and their employers who are facing or contemplating layoffs. Chapters cover permissive grounds for layoff; employees subject to layoff procedures; timing and process; selections for layoff; preferred right of reemployment; status during layoff; return to work after layoff; and dismissal and non-re-election during layoff. Also included are pertinent Education Code citations.

**Pocket Guide to Layoff Rules Affecting Classified Employees** (2009, 1st edition; 29 pp.) \$6. **Pocket Guide to Layoff Rules Affecting Certificated Employees** (2009, 1st edition; 20 pp.) \$6. California Public Employee Relations, <http://cper.berkeley.edu>.

## LEARN WorkFamily

The Labor Project for Working Families announces LEARN WorkFamily — a unique, free online education and resource network to help unions build a family-friendly workplace culture. This network offers an opportunity to exchange information, ideas, strategies, and experiences on organizing and bargaining for work family benefits. A highlight of this network is a password-protected online database of contract language on work family issues such as family leave, childcare, elder care, flexible work options, adoption, bereavement leave and much more.

Search the online database for negotiated work family contract provisions on a wide variety of topics; get tips on bargaining for work family benefits; learn techniques to build a progressive and successful work family agenda; download resources; and read and share stories about work family bargaining wins. The project is funded by the Alfred P. Sloan Foundation.

To access **LEARN WorkFamily**, register free at <http://www.learnworkfamily.org>. For more information, email [info@working-families.org](mailto:info@working-families.org) or call (510) 643-7088.

## Higher Ed. for All

What if every high school graduate of a given school district could go to college for free — not just those with good grades or financial need? And what if this promise was guaranteed for decades? What kind of transformation might ensue, not just in the lives of the students themselves but in the surrounding communities? Such are the questions raised by the Kalamazoo Promise, an unprecedented experiment in education-based economic renewal that is being watched and emulated by scores of cities and towns around the nation.

When a group of anonymous donors announced in 2005 that they would send every graduate of this midsized public school district to college for free, few within or outside Kalamazoo, Michigan, understood the magnitude of the gesture. Now, in the first comprehensive account of the Kalamazoo Promise, Michelle Miller-Adams charts its initial impact as well as its potential to bring about fundamental economic and social change in a community hurt by job loss, depopulation, and racial segregation.

The author's firsthand account reveals both the promise and the challenges inherent in place-based universal scholarship programs and offers guidance to all those working to prepare their communities for success in the twenty-first century.

**The Power of a Promise, Education and Economic Renewal in Kalamazoo**, by Michelle Miller-Adams (2009) 257 pp. W.E. Upjohn Institute for Employment Research, <http://www.upjohninst.org/>. Hardcover \$40; softcover \$18.

# 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

**One-time breach of no-strike clause is not unilateral policy change: State of California (Dept. of Veterans Affairs and Dept. of Personnel Administration).**

*(State of California [Departments of Veterans Affairs and Personnel Administration] v. Service Employees International Union, Loc. 1000, CSEA, No. 1997-S, 12-22-08; 28 pp. dec. By Chair Neuwald, with Member Wesley; Member McKeag dissenting).*

**Holding:** While SEIU may have condoned the nurses strike, it did not unilaterally change the no-strike policy in the parties' MOU.

**Case summary:** The state charged that SEIU breached the terms of the parties' MOU by condoning a sick-out of certified nurse assistants at the Chula Vista Veterans Home, failing to notify union staff of the no-strike provisions of the MOU, and failing to encourage the nursing assistants to return to work. The complaint alleged that this conduct was a unilateral change.

The parties' agreement provides that the union may not authorize, institute, aid, condone, or engage in a work stoppage. Reviewing federal precedent, the board noted that a no-strike provision prohibiting a union from condoning a strike requires the union to take some affirmative steps toward ending the job action. Under this standard, the board

found it "arguable" that SEIU condoned the sick-out. The board also found the union "may have" failed to encourage employees to return to work.

However, like the ALJ, PERB viewed the key issue as not whether there may have been contract violations, but whether such a breach had a generalized impact or continuing effect sufficient to constitute a unilateral change. Affirming the ALJ decision, the board found there was no policy change. Relying on *Grant Joint Union High School Dist.* (1982) Dec. No. 196, 53 CPER 43, PERB reaffirmed that every breach of contract does not violate the act. The breach must amount to a change of policy, not merely a default in a contractual obligation. After extensive analysis of PERB case law, the board concluded that SEIU did not implement a new policy of repudiating the no-strike clause. SEIU never asserted it was legally permitted to condone the strike or to fail to urge employees to return to work. Although it is arguable that the union breached the contract, it did not implement a unilateral change in policy. In addition, the board noted, there is no evidence that SEIU gave its labor relations representative the authority to condone the sick-out. Nor did union management ratify any policy change he may have made. At most, the board said, the labor relations representative's action may have amounted to a one-time breach of the contract, but the record does not reveal that SEIU made any policy change generally applicable to future situations.

PERB also rejected the contention that the conduct in this case had a generalized effect on bargaining unit members because striking employees' pay was docked, non-striking employees had to perform weekend overtime work, and the change affected veterans in the nursing home.

#### Reprint Service

PERB headquarters in Sacramento will provide copies of decisions, currently at \$5 a case, plus \$3 shipping and handling. Also, PERB decisions are collected in the government documents section of all state depository libraries, including the libraries of major universities. Most county law libraries and major law school libraries also receive copies. The decisions also are available on PERB's website at <http://www.perb.ca.gov>.



These impacts “were simply the effects of a one-time alleged breach of contract,” PERB said.

In her dissenting opinion, Member McKeag concluded that SEIU committed a unilateral change when it condoned the sick-out.

## EERA Cases

### *Unfair Practice Rulings*

**Request to withdraw appeal of dismissal and underlying unfair practice charge granted following parties’ settlement: Kern CCD.**

(*Kern Community College Dist. v. California School Employees Assn. and its Chaps.* 246, 336, and 617, No. 1999, 1-20-09; 2 pp. dec. By Chair Neuwald, with Members Wesley and Rystrom).

**Holding:** The district’s request to withdraw its appeal and the underlying unfair practice charge is in the best interests of the parties and consistent with the purposes of EERA.

**Case summary:** The district filed a charge alleging that the association failed to bargain in good faith by refusing to sign a tentative agreement, maintaining untenable and unreasonable bargaining positions, threatening to strike, engaging in disruptive activities, and attempting to bypass the district bargaining team and deal directly with the board of trustees. A board agent dismissed the charge, and the district appealed.

Thereafter, the district reached a settlement with the association and requested to withdraw its appeal and the underlying unfair practice charge.

The board granted the district’s request, finding it in the best interests of the parties and consistent with the purposes of EERA.

**No standing to file charge when no longer district employee: SFUSD.**

(*Hsiong v. San Francisco Unified School Dist.*, No. 2000, 1-20-09; 4 pp. dec. by Member Wesley, with Chair Neuwald and Member McKeag.)

**Holding:** The board agent’s dismissal of the unfair practice charge was upheld because the charging party lacked standing to file it.

**Case summary:** The charging party is one of a small group of former district employees, members of a bargaining unit represented by the International Federation of Professional and Technical Engineers, Local 21, who were laid off in June 2005. Between 2001 and April 2007, employees represented by IFPTE were working without a contract, and did not receive salary increases.

In April 2007, IFPTE and the district reached an agreement that provided for salary increases for eligible employees retroactive to July 1, 2001. The agreement did not contain specific language providing for retroactive pay to individuals who were no longer employed at the time the contract was settled. However, the district did apply the retroactive increase to employees who had worked during the relevant time period, but were retired or deceased as of April 2007.

The charging party was informed by the district that he was not eligible for the increase, and he filed an unfair practice charge.

The B.A. determined that the charging party did not have standing to file the charge because he no longer was an employee covered by EERA at the time of the alleged unfair practice. Section 3541.5(a) states that “any employee, employee organization, or employer shall have the right to file an unfair practice charge....” Section 3540.1(j) defines a public school employee, in relevant part, as “any person employed by any public school employer....” Under *Monterey Peninsula Community College Dist.* (2002) No. 1492, 156 CPER 92, and *California Union of Safety Employees (Trevisanut et al.)* (1993) No. 1029-S, 105 CPER 69, in order to have standing to file an unfair practice charge, a charging party must have been an employee, employee organization, or employer at the time of the alleged unfair practice.

PERB agreed with the B.A. that the charging party lacked standing and that it lacked jurisdiction, and affirmed the dismissal.

**Board affirms application of equitable tolling doctrine when parties are engaged in non-binding dispute resolution procedures: Long Beach CCD.**

(*Long Beach Council of Classified Employees v. Long Beach Community College Dist.*, No. 2002, 1-30-09; 20 pp. + 27 pp. ALJ dec. By Member Wesley, with Chair Neuwald, and Members Rystrom and Dowdin Calvillo.)

**Holding:** The statute of limitations in EERA does not operate as a jurisdictional bar to PERB's authority. But, it is not an affirmative defense. Rather, as part of the charging party's prima facie case, it must assert that the alleged proscribed conduct occurred within the six-month limitations period.

**Case summary:** In his proposed decision, the ALJ applied the doctrine of equitable tolling and concluded that the unfair practice charge was timely filed because the statute of limitations was tolled while the parties utilized the negotiated interim grievance procedure to resolve their dispute. He then concluded that work schedules are within the scope of representation under EERA, and that the district imposed a 4/10 work schedule on employees without negotiating with the council. He concluded that the change affected by the district was not prompted by a compelling business necessity, as permitted by the parties' agreement. That language did not authorize the district to act unilaterally as it did. The contract language, the ALJ reasoned, was designed to give the district some flexibility in scheduling shifts for specific employees, not employees generally. Therefore, he concluded, the district was required by the contract to ask for volunteers and then to assign the least-senior employees to the schedule.

The board summarily affirmed the ALJ's proposed decision concerning the merits of the charge, but discussed at length the doctrine of equitable tolling. PERB reaffirmed its position that the statute of limitations is not a limitation on its jurisdictional authority. The board found nothing in the language of Sec. 3541.5(a)(1) to support the conclusion that the six-month limitations period is jurisdictional. This interpretation does not defeat the purpose of the limitations period, the board said, because PERB will not toll the statutory period unless the dispute for which the parties have

used a non-binding dispute resolution procedure is the same dispute at issue in the unfair practice charge.

The board departed from its prior rulings and rejected the notion that the statute of limitations must be raised as an affirmative defense. Overruling *Walnut Valley Unified School Dist.* (1983) No. 289, 57 CPER 63, PERB held that the statute of limitations is an element of the charging party's prima facie case.

The board also noted that, while Sec. 3541.5(a)(2) provides that the statute of limitations is tolled while the parties are engaged in a grievance procedure that ends in binding arbitration, nothing in EERA provides that this is the *only* basis for which the limitations period can be tolled.

The board underscored that it will toll the statute only when the parties are engaged in a non-binding dispute resolution procedure that is contained in a written negotiated agreement. Application of the equitable tolling doctrine also requires that the charging party reasonably and in good faith pursue the non-binding dispute resolution process and that tolling does not cause surprise or prejudice to the respondent.

**Charging party failed to allege facts constituting an unfair practice: Torrance USD.**

(*Menges v. Torrance Unified School Dist.*, No. 2007, 3-9-09; 12 pp. dec. by Member Dowdin Cavillo, with Members McKeag and Wesley.)

**Holding:** The unfair practice charge was upheld because the charge failed to state a prima facie case.

**Case summary:** The charging party was hired as a probationary 3-hour food service worker and assigned to West High School. She later was transferred to South High School as a 1.5-hour food service worker. There she experienced a "hostile work environment." She felt intimidated and harassed by her supervisor and another coworker, and suspected she was being discriminated against because she was not African American.

She was terminated while still a probationary employee. The reason given was that she was unable to perform her job properly. She did not receive a written



warning prior to her termination as required by personnel commission rules.

The charging party filed an unfair practice charge with PERB.

The board agent dismissed the charge, finding that it failed to identify any section of EERA that had been violated, and did not contain a statement of facts and conduct alleged to constitute an unfair practice under EERA. The charge did not allege any protected activity in which the charging party was engaged while an employee of the district. PERB does not have jurisdiction to adjudicate racial discrimination, "hostile work environment," or personnel commission rule violations. The B.A. concluded that "the lack of EERA protected activity is fatal to the charge since there can be no nexus assessment between any protected activity" and the charging party's dismissal from her probationary position.

### *Duty of Fair Representation Rulings*

**No breach of duty of fair representation where union had rational basis for not filing grievance: Glendale Guild/AFT Local 2276.**

(*Waszak v. Glendale Guild/AFT Loc. 2276*, No. 2003, 1-30-09; 12 pp. dec. by Chair Neuwald, with Members McKeag and Dowdin Cavillo.)

**Holding:** The board agent's dismissal of the unfair practice charge was upheld because the charge did not state a prima facie case. The union had a rational basis for not filing the charging party's grievance.

**Case summary:** The charging party was employed by the Glendale Community College as an adjunct professor. The guild was the exclusive representative of his bargaining unit.

In early 2007, the charging party applied for a position as a full-time, tenure-track, history professor. He was to be interviewed in March and wanted to submit a current performance evaluation to the screening committee before the interview.

Roger Bowerman, chair of the charging party's department, was responsible for preparing the performance evaluation. When Bowerman was late with the evaluation, guild president Mike Allen suggested that the charging party

submit the draft evaluation to the screening committee, which he did. On March 22 the college rejected the charging party's application and hired another applicant.

The college issued an evaluation on March 30 that was so unfavorable that the charging party became "livid." He submitted a rebuttal to the evaluation and provided a copy to the union's grievance officer. The officer discussed the evaluation and rebuttal with the union's executive committee, which acknowledged that the college had violated the procedures, and suggested that the charging party be reevaluated.

Subsequently, the charging party told the grievance officer that the "larger issue" was his rejection from the job and that the belated evaluation "had prejudiced" his application. She advised against filing a grievance and told the charging party that if he wanted to pursue legal action for a timeline violation, he would have to do so at his own expense.

The charging party filed an unfair practice charge with PERB. He alleged that the guild should have taken action against Bowerman in March 2007, for being late with his evaluation. The B.A. rejected this allegation as untimely.

The B.A. found that the grievance officer had a "rational basis" for not filing a grievance based on the tardy evaluation. First, by the time the charging party and the grievance agent were discussing the matter, the evaluation had been issued. Second, a grievance claiming that the charging party was prejudiced in his job pursuit by the failure to prepare a timely evaluation would, if a second round of interviews was conducted, put the charging party in a worse position, given that the final evaluation was less favorable. "Had Bowerman released the document *before* the committee acted," the B.A. said, "the document would have harmed, not helped, your job prospects."

The charge also alleged that the union's head negotiator breached the duty of fair representation when he encouraged the successful candidate to apply for the full-time position. The B.A. reasoned that the duty of fair representation is generally limited to contract negotiation, administration, and grievance processing. He found no cases

in which the duty prevented union officers from encouraging individuals to apply for vacant positions.

**Duty of fair representation owed to certificated employees on a reemployment list: Santa Ana Educators Assn.**

(*Felicijan v. Santa Ana Educators Assn.*, No. 2008, 3-10-09; 11 pp. dec. by Member Dowdin Cavillo, with Members McKeag and Neuwald.)

**Holding:** Certificated employees on a 39-month reemployment list pursuant to Ed. Code Sec. 44978.1 are employees under EERA and are owed a duty of fair representation by their union.

**Case summary:** The charging parties were certificated employees of the district and members of a bargaining unit represented by the association. They were placed on a 39-month reemployment list pursuant to Ed. Code Sec. 44978.1. Each had exhausted available leave and was still unable to perform their duties for medical reasons.

They filed an unfair labor practice charge alleging the association had breached its duty of fair representation by failing to represent them in disputes with the district over inappropriate materials contained in their personnel files.

PERB issued a complaint alleging the charging parties are employees within the meaning of Gov. Code Sec. 3540.1(j). The ALJ bifurcated this issue from the merits of the case and ruled that they were not employees while on the reemployment list, and that the association did not owe them a duty of fair representation during that period.

The board disagreed with the ALJ's conclusion.

The board cited an important distinction between Ed. Code Sec. 44978.1 and Ed. Code Sec. 45192, which governs similarly situated classified employees. Section 45192 provides that when a person on the reemployment list is medically able to return to work *and* a vacant position exists, that person will have a rehire preference over other candidates, said the board. "Thus, a person is not guaranteed reinstatement when he or she is cleared to return to work, but must apply for an open position, if one exists." A number of cases have held that placement of a classified employee on a Sec. 45192 reemployment list terminates the person's employment.

In contrast, the board observed, Sec. 44978.1 provides that if a certificated individual on the list becomes medically able to work during the 39-month period, the employee "shall be returned to employment in a position for which he or she is credentialed and qualified." In *Veguez v. Governing Bd. of Long Beach Unified School Dist.* (2005) 127 Cal. App.4th 406, 171 CPER 53, the Court of Appeal held that Sec. 44978.1 guarantees a right to reinstatement during the 39-month period once the individual is medically cleared to return to work. "Thus," according to the board, "based on the language of the statute itself, placing an individual on the 39-month reemployment list constitutes the beginning of an unpaid medical leave of absence rather than a termination of the individual's employment."

The board found further support for its position in the legislative history. Section 44978.1 was added to the Ed. Code to end the abuse of sick leave by certificated employees. PERB concluded that the legislature intended the section to create an unpaid leave status for employees who are unable to return to work after exhausting their medical leave rather than allowing them to collect more leave each year without returning to work. Nothing in the legislative history indicates that placement of a certificated employee on the reemployment list was intended to end the employment relationship.

The board concluded that placement of a certificated employee on a reemployment list pursuant to Sec. 44978.1 does not constitute a separation from service. Accordingly, charging parties were "employees" of the district under EERA and were owed a duty of fair representation by the association. It returned the case to the ALJ to take evidence and rule on the merits of the allegations in the complaint.

## HEERA Cases

### *Unfair Practice Rulings*

**Anti-union animus not imputed to decisionmaker: Regents of U.C. (Los Angeles).**

*Coalition of University Employees v. Regents of the University of California* (Los Angeles), No. 1995-H, 12-19-08;

16 pp. dec. By Member Rystrom, with Chair Neuwald and Member McKeag).

**Holding:** While the manager who initiated the layoff was aware of the employee's union activity, no evidence demonstrated that she harbored anti-union animus or was influenced by the animus of other employees.

**Case summary:** The union charged that the university laid off an employee in retaliation for his union activities. The employee, Burt Thomas, had been active in union activities for several years, serving as the local president, steward, and bargaining team member. He filed grievances and distributed union flyers.

In December 2004, when three UCLA hospitals lost funding, managers were ordered to reduce their staff by 8 percent. Manager Carma Lizza selected Thomas for layoff. Lizza's superior approved of the reductions.

The board found that Lizza was aware of at least some of Thomas's union activities. As for unlawful motive, PERB declined to impute to Lizza the anti-union animus held by two other employees. The board noted that Lizza spoke to no one before she made her layoff decision and had no conversations with any supervisor or campus official regarding Thomas's participation in protected activities. The board declined to rely on decisions of the National Labor Relations Board, and affirmed that it will not impute animus to the decisionmaker absent evidence for doing so. And, the board found no merit in the contention that the university's decision to lay off Thomas was so economically indefensible that it must have been the product of unlawful motivation.

Because the union failed to demonstrate a prima facie case of retaliation, the board did not reach the issue of whether the university would have taken the action it did in the absence of the employee's protected activity.

## MMBA Cases

### *Unfair Practice Rulings*

**Retaliation for union activity demonstrated, no unilateral change in union leave policy: Omnitrans.**

*Amalgamated Transit Union, Loc. 1704, v. Omnitrans*, No. 1996-M, 12-19-08; 32 pp. dec. By Member Rystrom, with Chair Neuwald, and Members McKeag and Dowdin Calvillo).

**Holding:** The employer retaliated against a bus driver for his protected activity. The employer did not unilaterally change its union leave policy.

**Case summary:** The union alleged that the employer retaliated against two bus drivers, Dale Moore and William Truppe, because they represented the union in contract negotiations. The board found that both employees engaged in protected activity when they requested union leave to negotiate a successor MOU. The employer had knowledge of this activity. Both employees were charged with an absence without pay; Truppe was issued a notice of dismissal, and Moore received a proposed four-day suspension. Therefore, the union established that the employer took adverse action against the drivers. The fact that Moore did not serve the proposed suspension did not refute that finding because the notice of suspension was specific and unequivocal.

The board concluded that the terms of the parties' MOU and past practice require employees to submit a request for union leave 24 hours in advance of the time off. PERB rejected the ALJ's conclusion that the MOU changed the past practice.

The board also noted that the purpose of the notice requirement is to permit the employer to keep buses running on schedule by providing substitutes for drivers who are absent for union business.

In the case of Truppe, the notice of dismissal was issued two days after he participated in negotiations. However, the board found nothing other than timing to connect the adverse action and his protected activity. The reason for Truppe's discipline, said the board, was his failure to submit his request for union leave 24-hours in advance. The union failed to establish that the employer was otherwise motivated.

Moore, on the other hand, submitted his request for union leave 24-hours in advance. The employer charged him with an absence because he had not provided the request two days in advance. This was a departure from established

procedures and demonstrated disparate treatment. Having demonstrated no valid business reason to discipline Moore, the board found that the employer retaliated against him because of his protected activity.

The union also alleged that the employer had unilaterally changed its union leave policy. It asserted that the parties' MOU and past practice permit employees to take paid union business leave for any purpose so long as it is authorized by the union. The board found that the employer never knowingly granted union leave for any activity unrelated to its business. When it became aware of the use of union leave for non-work related purposes, it stopped the practice. And, the evidence shows that the parties' MOU did not contemplate the term "authorized union business" to include non-employment related business.

**Increase in disciplinary suspension not retaliation for employee's appeal: City of Modesto.**

(*Modesto City Employees Assn. v. City of Modesto*, No. 1994-M, 12-19-08; 15 pp. dec. By Member Dowdin Calvillo, with Members Wesley and Rystrom).

**Holding:** The association failed to demonstrate that the city increased an employee's suspension from two days to five in retaliation for his exercise of protected activity.

**Case summary:** Blair Bradley, a city employee, was involved in a vehicle accident and thereafter was notified of the city's intent to impose a three-day suspension. He was then involved in a second incident and received written notice of a recommended five-day suspension. The association filed an appeal on Bradley's behalf.

During and after the *Skelly* hearing, the parties engaged in a series of discussions during which the director of public works considered reducing the suspension to two days, with three days "held in abeyance" and applied in any future discipline imposed for similar conduct. The parties continued to discuss the term of the suspension and the association's intent to bring the appeal to an arbitrator. The final notice of discipline imposed a five-day suspension.

The board found that Bradley's appeal of the proposed discipline was an attempt to assert a right established by the parties' MOU and was protected activity under the MMBA.

The board affirmed the ALJ's finding that the official who issued the final notice of discipline lacked knowledge of Bradley's protected activity; however, it found that two other city officials had knowledge of the appeal at the time they drafted the final notice of discipline.

Because the final notice of suspension was an adverse action, the board examined the nexus between the suspension and Bradley's protected activity. PERB acknowledged that the unlawful motive of subordinates may be imputed to the decisionmaker when the subordinates exert influence on the decisionmaking process that leads to the adverse action. In this case, however, the board found that the association failed to show that the two subordinates harbored an unlawful motive when they drafted the final notice of discipline. The two subordinates were aware that the director of public works had considered reducing the five-day suspension in exchange for an agreement not to appeal, but neither was aware of the terms of the final suspension at the time they drafted the final notice. Therefore, neither could have acted with the intent of increasing the length of the suspension because of Bradley's appeal.

**Parties completed negotiations over employee rulebook: Omnitrans.**

(*Amalgamated Transit Union, Loc. 1704 v. Omnitrans*, No. 2001-M, 1-30-09; 10 pp. dec. By Member McKeag, with Members Rystrom and Dowdin Calvillo).

**Holding:** No unilateral change is demonstrated where the employer gave the union notice and an opportunity to bargain, and the parties completed negotiations over proposed changes to the employee rulebook.

**Case summary:** The union alleged that the employer failed to meet and confer over changes to an employee rulebook. The board held that the charge was timely filed. Although the employer provided notice to the union of its intent to implement the 2007 rulebook, it subsequently conveyed that it was looking forward to employee input and was amenable to making changes. Based on this wavering of intent, the charge was filed within the six-month statute of limitations period.

The board found it “undisputed” that the rulebook contained numerous changes in policy. And, because it adopted new standards of discipline for all bargaining unit employees, it affected matters within the scope of representation.

Based on written communication between the parties, the board found that union and management engaged in bargaining with regard to the rulebook. After suggesting that negotiations were nearly complete, however, the union did not request further bargaining. Instead, after citing six remaining areas of concern, the union acknowledged a 30-day grace period to provide employees with an opportunity to adjust to the changed rules. By this conduct, PERB concluded that the parties had reached agreement and believed that bargaining was complete. The union’s failure to rebut this conclusion, which was set forth in the board agent’s warning letter, presented further support for the board’s finding.

**Admission of telephonic testimony to be decided by ALJs on case-by-case basis: City of Torrance.**

(*American Federation of State, County and Municipal Employees, Loc. 1117, v. City of Torrance*, No. 2004-M, 2-18-09; 14 pp. dec. By Member Dowdin Calvillo, with Chair Neuwald and Member Wesley.)

**Holding:** The Administrative Procedure Act does not prohibit a PERB administrative law judge conducting an evidentiary hearing in an unfair practice case from admitting telephonic testimony of a witness.

**Case summary:** During an unfair practice hearing before an ALJ, telephonic testimony of a witness was admitted over the city’s objection. The ALJ found that PERB is not bound by the Administrative Procedure Act, which prohibits testimony by telephone if a party raises an objection. Instead, he relied on the broad grant of authority given to ALJs to obtain a complete evidentiary record on which to make a decision.

On appeal, the city asked the board to strike the witness’s telephonic testimony. Reviewing the applicable sections of the APA, comments of the Law Revision Commission, and the legislative history, the board concluded that

the act has both mandatory and optional provisions. PERB then determined that the telephonic testimony proscription is intended to be optional. In support of this conclusion, the board cited regulations of agencies that both prohibit and permit witnesses to provide testimony by telephone. If the APA’s provision is mandatory, the board reasoned, the Office of Administrative Law would not have approved regulations in conflict with it.

PERB has not adopted a regulation regarding the use of telephonic testimony. However, consistent with the legislative intent, the board announced that the APA allows an agency to forego adopting a specific regulation on the subject and, instead, determine on a case-by-case basis whether to permit telephonic testimony. The board upheld the ALJ’s ruling to admit the testimony over the city’s objection.

**Charges that county suspended meetings, refused to allow grievance not a violation: County of San Diego.**

(*Kroopkin v. County of San Diego*; No. 2005-M, 2-27-09; 2 pp. + 13 pp. regional attorney dec. By Member Neuwald, with Members Wesley and Dowdin Calvillo.)

**Holding:** The charging party does not have a right to addend labor/management committee meetings and, therefore, the county’s decision to suspend those meetings was not improper.

**Case summary:** The charging party alleged that the county violated the act when it advised the union president that it was suspending the labor/management meetings because of the charging party’s conduct and refused to process a grievance contesting this action.

The regional attorney dismissed the charges. He concluded that the charge failed to include sufficient facts to establish that the letter sent to the union president had an adverse impact on his employment. He found that the record did not support the allegation that the charging party was barred from attending labor/management meetings. Nor did he demonstrate an individual right to attend such meetings. Therefore, the charging party failed to demonstrate a right to file a grievance regarding the suspension of the labor/management meetings. Nor does the record reveal that



the charging party's employment was adversely impacted by the county's decision to suspend these meetings.

The board summarily affirmed the R.A.'s dismissal.

**No allegations support claim that union's conduct violated charging party's rights: SEIU Loc. 221.**

(*Kroopkin v. Service Employees International Union, Loc. 221*, No. 2006-M, 2-27-09; 2 pp. + 11 pp. regional attorney dec. By Member Neuwald, with Members Wesley and Dowdin Calvillo.)

**Holding:** The charging party failed to demonstrate an individual right to attend the labor/management committee meetings or how such a decision adversely impacted his employment relationship with the county.

**Case summary:** The charging party alleged that the union president violated the act when he distributed a letter sent to him by the County of San Diego indicating the county intended to suspend the labor/management meetings because of the charging party's conduct.

The regional attorney dismissed the charge, concluding that the charging party failed to allege how distribution of the letter would affect his relationship to his coworkers and supervisors. Nor did he allege facts to establish that distribution of the letter had an adverse impact on his employment relationship with the county. The R.A. also found that the record did not support the allegation that the charging party was barred from attending labor/management meetings. Moreover, the R.A. noted, the charging party failed to establish an individual right to attend such meetings. Employee organizations are entitled to select the individuals who will represent them in meetings with the employer.

Absent a showing that the union's conduct substantially impacts the employee's relationship with his or her employer, PERB will not intervene in the internal affairs of an employee organization. Even if the union barred the charging party from attending the union/management meetings, the R.A. posited, the charge was deficient because the charging party failed to demonstrate how the union's actions impacted his employment relationship with the county.

The board summarily affirmed the R.A.'s dismissal of the charge and declined to consider an allegation that the union had agreed to file a grievance contesting the county's decision to suspend the meetings. The board found no good cause to entertain this allegation as it referred to facts that occurred before the charge was dismissed.

***Duty of Fair Representation Rulings***

**No DFR breach absent evidence that union acted without rational basis or devoid of honest judgment: SEIU, Loc. 1021.**

(*Estival v. Service Employees International Union, Loc. 1021*, No. 1998-M, 1-14-09; 2 pp. + 7 pp. B.A. dec. By Chair Neuwald, with Members McKeag and Wesley).

**Holding:** The board agent properly dismissed the charging party's assertion that the union breached its duty of fair representation by failing to file a grievance or challenge his release from employment.

**Case summary:** Many of the allegations in the charge occurred more than six months prior to the filing of the unfair practice charge and thus were untimely. Accordingly, the board agent appropriately dismissed the charge that the union failed to assist the charging party in a claim filed with the Department of Labor, conduct that occurred more than a year before the charge was filed.

Although not expressly stated, the board has concluded that the MMBA requires that unions refrain from representing their members in an arbitrary, discriminatory, or bad faith manner. However, the charging party failed to allege facts demonstrating how the union's failure to challenge his release from employment was without a rational basis or devoid of honest judgment. Moreover, by the time the charging party inquired about his right to grieve his termination, the time period for doing so had passed.

The union investigated the circumstances surrounding the charging party's termination and determined that, as a provisional employee, he was not entitled to just cause protection. The union also found no evidence that the charging party had been dismissed for retaliatory reasons. The fact that the charging party filed a complaint with the



DOL that was resolved in his favor six months before he was terminated does not, without more, establish retaliation. That the union may have reached an incorrect conclusion does not demonstrate a breach of the duty of fair representation.

The board affirmed the B.A.'s dismissal. On appeal, PERB declined to consider new charge allegations or supporting evidence not previously presented and known to the charging party at the time he filed the unfair practice charge.

## Activity Reports

### ALJ Proposed Decisions

#### Sacramento Regional Office Final Decisions

*Sacramento County Sheriffs' Assn. v. County of Sacramento*, Case SA-CE-485-M. ALJ Shawn P. Cloughesy. (Issued 11-17-08; final 12-15-08; HO-U-952-M.) No violation was found where the union filed a domination and interference charge against the county for taking sides in an internal union dispute. After an election, newly elected leaders requested PERB to withdraw the charge and complaint with prejudice and to dismiss the case. The ALJ found that the new leaders had the authority to withdraw and dismiss the complaint as the election had been certified as valid by a federal court order.

*AFSCME Loc. 146 v. Nevada Irrigation Dist.*, Case SA-CE-524-M. ALJ Shawn P. Cloughesy. (Issued 12-09-08; final 1-6-09; HO-U-954-M.) No violation was found. AFSCME alleged a unilateral change violation against the district for changing an MOU provision regarding voluntary forfeiture from employment. The ALJ found the district had never relied on the forfeiture termination and erroneously construed it as disciplinary in a notice of intent to terminate. When the district correctly construed the provision to be non-disciplinary, this did not affect an improper unilateral change.

*California School Employees Assn. and Its Chap. 379 v. State Center Community College Dist.*, SA-CE-2440-E. ALJ Bernard McMonigle. (Issued 1-14-09; Final 2-10-09, HO-U-955-E.) No violation was found where the union alleged the district had made a unilateral change when it demanded reimbursement for paid released time for union officers to attend a statewide annual conference. Education Code Sec. 88210 requires employers to release union officers for union duties outside negotiating and grievance handling, and requires reimbursement by the union making the request. The board's decision that leave for conference attendance is within the scope of bargaining (*Healdsburg Union HSD and Healdsburg Union S.D./San Mateo City S.D.* [1984] PERB Dec. No. 375), predates the legislature's enactment of Ed. Code Sec. 88210 and, under the standard set in *Healdsburg Union HSD and Healdsburg Union S.D.* (1980) PERB Dec. No. 132, establishes an "immutable provision" in the Education Code that precludes a finding of negotiability under EERA.

#### Oakland Regional Office — Final Decisions

*Welcome v. County of Contra Costa*, Case SF-CE-154-M. ALJ Philip E. Callis. (Issued 11-26-08; final 12-23-08; HO-U-953-M.) No violation was found. The employee's unfair practice charge against the county was dismissed where the employee failed to appear and proceed at the formal hearing.

#### Los Angeles Regional Office — Final Decisions

No final decisions.

#### Sacramento Regional Office — Decisions Not Final

*Operating Engineers Loc. 3 v. City of Clovis*, Case SA-CE-513-M. ALJ Philip E. Callis. (Issued 11-19-08; exceptions filed 12-23-08.) The union rejected the city's last and final offer of a 3 percent wage increase and declared impasse. The city did not implement its final offer, and the union filed an unfair practice charge alleging failure to bargain in good faith. Thereafter, the union notified the city it would drop the unfair practice charge and accept the 3 percent increase. The city rejected the union's offer and asserted that negotiations had concluded. The ALJ found that the city violated its duty to meet and confer in two respects. The city could not permanently conclude negotiations if impasse was broken by changed circumstances. Additionally, the city's contract offer is not automatically terminated by rejection but may be accepted within a reasonable time unless withdrawn prior to acceptance. The city was ordered to cease and desist from refusing to bargain after impasse was broken and to implement its final wage offer.

*Cottonwood Teachers Assn. v. Cottonwood Union Elementary School Dist.*, Case SA-CE-2399-E. ALJ Christine A. Bologna. (Issued 11-25-08; exceptions filed 2-5-09.) The parties negotiated a formula for salary increases in 2006-07, and a first-ever contractual grievance procedure in a two-year successor agreement. No unilateral change or repudiation of the salary formula was found because the association's understanding of the salary increases changed three times, and the district's expert testified that the funds the district actually received were nearly \$200,000 less than the association's calculations.

The district unilaterally repudiated the newly negotiated grievance procedure when it refused to process a grievance without the names and signatures of 23 teachers. Grievances

may be filed by the association or one or more of its members. The association processed the grievance in its own name. The district bypassed the association by sending the level II response denying the salary grievance to all district employees, bargaining unit employees, and non-represented classified employees, rather than to the association. Because the grievance was based on a disagreement over the negotiated salary formula, the district had a duty to refrain from communicating directly with represented employees.

*City of Lodi and Lodi Professional and Technical Employees and AFSCME Loc. 146*, Case SA-SV-168-M. ALJ Shawn P. Cloughesy. (Issued 12-17-08; exceptions filed 1-16-09.) The petition for a new bargaining unit was denied. Lodi Professional and Technical Employees sought to sever the City of Lodi's general service unit to exclude engineers, engineering technicians, planners, and water services technician. LPTE failed to show that the classes in the proposed unit share a commonality of duties, educational requirements, work locations, or reporting structure that is separate and distinct from the overall general services unit. Additionally, a history of stable and successful negotiations exists between the city and the exclusive representative. Because professional employees have a right to belong to a separate unit, granting the petition might lead to a fragmentation of bargaining units.

*Joint Council of International Union of Operating Engineers, Stationary Engineers Loc. 39, AFL-CIO and Service Employees International Union, Loc. 1292, AFL-CIO v. County of Tehama (Public Works Dept.)*, Case SA-CE-536-M. ALJ Shawn P. Cloughesy. (Issued 2-10-09; exceptions due 3-09-09.) The union alleged that the county issued a written reprimand to a member for making a public comment at a county board of supervisors meeting. The comment did not involve the member's working conditions; the member was neither a representative of the union nor speaking in any union representational capacity. The ALJ ruled that the comments did not constitute protected activity and dismissed the charge.

#### **Oakland Regional Office — Decisions Not Final**

*Sonoma County Law Enforcement Assn. v. County of Sonoma*, Case SF-CE-523-M. ALJ Donn Ginoza. (Issued 11-19-08; exceptions filed 12-15-08.) The county was required to participate in interest arbitration as to law enforcement employees

covered by the interest arbitration statute, but was not required to engage in interest arbitration for the entire unit. By refusing to participate in interest arbitration as to covered employees prior to implementing its last, best, and final offer, the county violated Sec. 3505.4 of the MMBA. As to law enforcement employees not entitled to interest arbitration, the county was permitted to implement terms following impasse regardless of its refusal to engage in interest arbitration. In so doing, it implemented terms reasonably comprehended within its last, best, and final offer, or within offers made and rejected during bargaining. The union had adequate notice of the county's bargaining proposal. The county also did not deprive the union of its right to meet and confer prior to adoption of the annual budget when it implemented health plan changes in the benefit year beginning shortly after the one-year anniversary of the expired MOU. At no time did the county refuse to resume negotiations. The county was ordered to cease and desist from failing to participate in interest arbitration but not to return to the status quo ante, since the implementation consisted of a combination of economic benefits to employees and cost savings to the county.

*City of San Jose v. Assn. of Building, Mechanical and Electrical Inspectors*, Case SF-CO-168-M. ALJ Christine A. Bologna. (Issued 12-2-08; exceptions filed 1-12-09.) While on strike against the city, members of the building inspectors bargaining unit picketed city hall and four private construction sites thereby obstructing work. No violation was found as there is no language in the MMBA, or in the other laws within PERB jurisdiction, similar to the "secondary boycott" unfair labor practice provision of National Labor Relations Act Sec. 8(b)(4)(b). The federal courts and the NLRB have found the distinction between lawful primary and unlawful secondary activity to be elusive. Peaceful informational picketing is an exercise of free speech and assembly rights under the U.S. and California Constitutions, and is protected activity under PERB precedent.

*AFSCME Council 57, Loc. 829 v. City of Foster City*, Case SF-CE-506-M. ALJ Philip Callis. (Issued 2-27-09; exceptions due 3-23-09.) The union alleged that the city improperly denied statutory released time to a public safety dispatcher on the union negotiating team who was scheduled to work an evening shift after spending a full day in contract negotiations.

Based on prior board precedent under EERA Gov. Code Secs. 3540 et seq., the ALJ concluded that a public employer is not required to provide released time for an employee to rest and recuperate after participating in negotiations. (*Burbank USD* [1978] PERB Dec. No. 67.)

*Regents of the University of California, UPTE, and CUE*, Cases SF-UM-645 and SF-UM-654-H. ALJ Philip Callis. (Issued 2-27-09; exceptions due 3-23-09.) Two exclusive representatives at the University of California filed competing unit modification petitions seeking to include the recently created classification series of clinical research coordinator in their respective bargaining units. UPTE sought inclusion of the CRC's in its professional research (RX) unit. CUE sought inclusion of the CRC's in its clerical and allied (CX) unit. The university opposed both petitions, arguing that the new classifications should be left in a residual group of unrepresented administrative classifications. The ALJ concluded that the CRC's should be placed in UPTE's RX unit. The ALJ found that the CRC's were professional-level employees, which precluded their placement in the clerical unit. UPTE presented strong evidence that the CRC's shared a community of interest with the other research professionals in its unit. The university, on the other hand, failed to produce any convincing evidence that the CRC's shared a community of interest with the residual unit of administrative employees.

#### Los Angeles Regional Office — Decisions Not Final

*California School Employees Assn. and Its Chap. 111 v. Palo Verde Unified School Dist.*, Case LA-CE-5023-E. ALJ Ann L. Weinman. (Issued 1-16-09; exceptions filed 2-9-09.) The complaint alleged the district discharged a probationary employee in retaliation for protected activities, which consisted of complaining to CSEA about her job duties and assisting CSEA in filing a PERB charge alleging unilateral changes in job duties. The district's assistant superintendent was aware of the protected activities, but the district claimed that the decision to discharge was made solely by the employee's direct supervisor, who had no knowledge. The district contends that the discharge was based solely on the employee's conflicts with other employees.

The employee was discharged for protected activities. Improper motive was inferred from very close temporal proximity, vague and ambiguous reasons for the charges, direct evidence of anti-union animus, and disparate treatment. The ALJ found that the assistant superintendent told the supervisor about the protected activities and urged discharge for that reason. The district failed to show that the employee would have been discharged in the absence of the protected activities. The alleged personal conflicts were not investigated, no warnings were given to the employee, satisfactory evaluations and no negative documents were in her personnel file, and no first-hand witnesses testified to alleged personnel conflicts.

*Amalgamated Transit Union Loc. 1704 v. Omnitrans*, Case LA-CE-427-M. ALJ Ann L. Weinman. (Issued 2-24-09; exceptions due 3-23-09.) The complaint allege that Omnitrans bypassed ATU by forming a "focus group," and unilaterally changed the grievance procedure by rejecting a grievance that challenged formation of the group. The focus group, formed to discuss the bidding procedure for extra-board assignments, consisted of volunteer drivers, an ATU representative, and management. The focus group recommended changing the process to provide permanent bidding by seniority; and its recommendation was adapted by management in its presentation to ATU. The ALJ found that Omnitrans engaged in unlawful bypass of ATU, as the bidding procedure is a negotiable subject on which ATU did not waive its right to negotiate.

ATU filed two grievances over the formation of the focus group. These were denied on grounds that there was no violation of the MOU and the grievances did not fall under the MOU's definition of a grievance, which defines a grievance to be a violation of the MOU; it specifically excludes challenges to policy and practice. ATU presented no evidence that Omnitrans' denial of these grievances was different from its handling of previous grievances. The request of attorneys' fees and costs due to Omnitrans' failure to appear in person at the settlement conference was denied.

## Report of the Office of the General Counsel

### Injunctive Relief Cases

Five requests for injunctive relief were filed during the reporting period of November 1, 2008, through February 28, 2009. Four were denied by the board and one was withdrawn by the filing party. Additionally, one request made during an earlier reporting period was resolved and withdrawn.

#### *Requests denied*

*Siskiyou County Employees Assn. v. County of Siskiyou*, IR No. 560, Case SA-CE-579-M. On December 1, 2008, the union filed a request for injunctive relief to compel the county to provide requested information. On December 8, the board denied the request.

*Sonoma County Law Enforcement Assn. v. County of Sonoma*, IR No. 561, Case SF-CE-594-M. On December 2, 2008, the union filed a request for injunctive relief to prevent the county from implementing a last, best, and final offer before a determination was made by the Court of Appeal in a related matter involving the constitutionality of provisions of California Code of Civil Procedure Secs. 1299 et seq. On December 9, the board denied the request.

*International Union of Operating Engineers (Unit 12) v. State of California (DPA)*, IR No. 563, Case LA-CE-664-S. On January 29, 2009, the union filed a request for injunctive relief to prevent implementation of the state's furlough plan. On February 3, the board denied the request.

*International Association of Firefighters Loc. 689 v. City of Alameda*, IR No. 564, Case SF-CE-619-M. On February 3, 2009, the union filed a request for injunctive relief to prohibit "brown outs" implemented by the city. On February 9, the board denied the request.

#### *Requests withdrawn*

*Siskiyou County Employees Assn. v. County of Siskiyou*, IR No. 562, Case SA-CE-492-M. On December 3, 2008, the union filed a request for injunctive relief to compel the county to provide certain documents to the union for an upcoming

PERB hearing. On December 5, the request was withdrawn by the union.

*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 PERB staff to expeditiously process the underlying unfair practice charge and reserved its decisionmaking authority with respect to the request for injunctive relief pending the conduct of a prompt informal settlement conference and, if appropriate, formal hearing before a PERB administrative law judge. In December 2008, the matter was resolved and the request was withdrawn by the union.

### Litigation Activity

Five cases were opened during the reporting period of November 1, 2008, through February 28, 2009.

*AFSCME Local 575 v. PERB; Los Angeles County Superior Court*, California Court of Appeal, Second Appellate District, Case No. B211910. (PERB Case LA-CE-2-C.) In November 2008, Local 575 filed a writ petition with the appellate court alleging the board erred in Dec. No. 1979-C (reversing the ALJ's proposed decision [which found the court engaged in unlawful interference and discrimination under the Trial Court Act by disciplining an employee/Local 575 officer for violating email-use and courtroom-reservation policies] and dismissing the case). In January 2008, PERB filed the administrative record with the appellate court. In February 2009, Local 575 filed its opening brief.

*Rio Teachers Assn., CTA v. PERB; Rio School Dist.*, California Court of Appeal, Second Appellate District, Case No. B212815. (PERB Case LA-CE-5090-E.) In December 2008, the association filed a writ petition with the appellate court alleging the board erred in Dec. No. 1986 (affirming a board agent's partial dismissal of the association's allegations that the district engaged in bad faith bargaining and retaliation in violation of EERA). In December 2008, PERB filed a motion to dismiss. In January 2009, the association filed — and the appellate court granted — a request to dismiss the association's writ petition.



*City of Burbank v. PERB; Burbank Employees Assn.*, California Court of Appeal, Second Appellate District, Case No. B212945. (PERB Case LA-CE-326-M.) In December 2008, the city filed a writ petition with the appellate court alleging the board erred in Dec. No. 1988-M (affirming an ALJ's finding that the city violated the MMBA by failing to provide the association with requested information necessary and relevant to the association's representation of one of its members in a disciplinary arbitration). In February 2009, PERB filed the administrative record with the appellate court.

*Deglow v. PERB; Los Rios College Federation of Teachers Loc. 2279*, California Court of Appeal, Third Appellate District, Case No. C060717. (PERB Cases SA-CO-424-E and SA-CO-426-E.) In December 2008, Deglow filed a writ petition with the appellate court alleging the board erred in Dec. No. 1990 (affirming an ALJ's dismissal of Deglow's charges for failure to prosecute). In December 2008, PERB sought and was granted from the appellate court an extension of time to file the administrative record.

*Amalgamated Transit Union Loc. 1704 v. PERB; Omnitrans*, California Court of Appeal, Fourth Appellate District, Case No. E047450. (PERB Case LA-CE-216-M.) In January 2009, Local 1704 filed a writ petition with the appellate court alleging the board erred in Dec. No. 1996-M (reversing in part an ALJ's proposed decision [which found that Omnitrans retaliated against an employee/Local 1704 officer and committed a unilateral change in violation of the MMBA]). In January 2009, PERB sought and was an extension of time to file the administrative record.

### Personnel Changes

Tiffany Rystrom was reappointed to the board by Governor Schwarzenegger on February 27, 2009, at which time she also was designated as board chair. She has served on the board since 2007. From 2001 to 2007, Rystrom worked as of counsel with the law firm Carroll, Burdick & McDonough. From 1983 to 2000, she was a partner in the law firm Franchetti & Rystrom. Previously, Rystrom served as a deputy attorney general for the California Attorney General's Office from 1979 to 1983, and as a deputy district attorney for the Marin County District Attorney's Office from 1978 to 1979. From

1977 to 1978, she was a judicial clerk for the California Courts of Appeal, First District.