

## CONTENTS

### *Features*

- 5 Furloughs: The Devil's in the Details  
*Steve Berliner and Alison Neufeld*
- 14 Public School Negotiations: After the Gold Rush  
*Gregory J. Dannis*

### *Recent Developments*

#### **Public Schools**

- 20 New Budget Cuts Billions From Schools
- 20 Restrictions on Unions' Use of School Mailboxes Upheld
- 24 Schools May Resort to Little-Used State Law for Teacher Layoffs
- 26 Teachers Sacrifice Pay to Save Jobs
- 27 West Contra Costa Teachers Headed for a Possible Strike
- 28 LAUSD Will Push for Legislation to Speed Firing of Teachers  
Accused of Crimes

#### **Local Government**

- 30 Economic Downturn Brings Concessions and Layoffs
- 31 *County of Sonoma* Invalidates S.B. 440
- 35 Investigation of Sick Leave Abuse Triggered Application of Bill of Rights Act
- 36 Retirement Costs Pickup and Medical Benefits Not Vested Rights  
Under Contract Clause
- 39 Commission's Rejection of Late Appeal Not Abuse of Discretion

## CONTENTS

# *Recent Developments*

CONTINUED

### **State Employment**

- 40 Government Employee Rights Act Abrogated States' Sovereign Immunity From Constitutional Claims
- 42 Merit System Intended to Prevent Cronyism, Not Pay Disparity
- 46 Decertification Effort in Unit 21 Fails
- 46 Another Pension Initiative Circulating
- 47 Fired Up Over Furloughs
- 48 Legislative Pay Cuts Coming...Later
- 49 State Layoffs to Begin in September

### **Higher Education**

- 50 Parking Location at CSU Campuses Not Within Scope of Representation
- 52 Equitable Tolling Doctrine Is Available Under HEERA
- 53 UC Implements Sliding Scale Furloughs While Employees Point to Reserves
- 56 Modest Gains in U.C. Bargaining Reversed As State Funding Goes South
- 57 CSUEU Agrees to Extend Contract, Others at Impasse
- 58 CSU: Layoffs or Furloughs?

CONTENTS

*Recent Developments*

CONTINUED

**Discrimination**

- 60 City Wrong to Discard Test Results Where White Firefighters Tested Better
- 63 Supreme Court Raises the Bar for Proving Age Discrimination
- 66 Pension Plan That Gives Less Service Credit for Pregnancy Leave Upheld
- 67 No ‘Discriminatory Animus’ Where HIV-Positive Instructor Not Allowed to Teach Full Load

**News From PERB**

- 70 PERB Chair Tiffany Rystrom Loses Battle With Cancer

**Arbitration**

- 71 Grievant Entitled to Supplemental Benefits, But Monetary Recovery Limited to 60 Days

**Departments**

- 4 Letter From the Editor
- 73 Public Sector Arbitration Log
- 76 Public Employment Relations Board Decisions
- 92 PERB Activity Reports
- 96 Fair Employment and Housing Act Decisions

## LETTER FROM THE EDITOR

Dear *CPER* Readers:

Accept furlough days in order to avoid layoffs. Defer or give back negotiated pay increases. *Increase* class size. With staggering budget cuts that leave no segment of the public sector unaffected, this is concession bargaining like I've never seen during my 20-plus-year tenure at CPER. By comparison, reverberations following Proposition 13 were a walk in the park. The good old days.

While this could be the "Doom and Gloom" issue of *CPER*, there is important information to impart.

The main article by Liebert Cassidy Whitmore attorneys Steve Berliner and Alison Neufeld focuses on the different bargaining obligations that attach to a local agency's decision to lay off employees versus the decision to trim labor costs by use of furloughs. As the Local Government section of the issue proves, their practical information could not come at a better time.

Greg Dannis of Miller Brown and Dannis shares how the budget meltdown is being felt at the bargaining table. In his article, "Public School Negotiations: After the Gold Rush," he cautions against overreaching by both labor and management and urges a united, problem-solving approach to waiting out the crisis.

With most state employees taking three furlough days a month, Katherine Thomson could not reach DPA spokesperson Lynelle Jolley on "furlough Fridays," since Jolley, herself, was not at work. And, when Thomson finally did talk to Jolley, the news wasn't good.

An unprecedented second round of layoffs among certificated employees is covered in the Public School's section. Other budget slimming efforts in the schools include reductions in the number of workdays and salary rollbacks.

The unrelenting cuts bombarding both CSU and the UC systems are immense and raise questions about the ability to guarantee affordable higher education opportunities to students across the state. Of course, cuts to the University of California fall close to home, as CPER continues to confront its own financial challenges and "hold the fort."

As we were putting together this issue, Managing Editor Stefanie Kalmin commented that reviewing and editing our stories was "depressing." Unfortunately, there's nothing I can do about that. During these hard times, it's all part of the job description.

Sincerely,



Carol Vendrillo  
Editor

# Furloughs: The Devil's in the Details

*Steve Berliner and Alison Neufeld*



*Steve Berliner is a partner, and Alison Neufeld is of counsel, 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 furloughs and layoffs.*

PUBLIC SECTOR EMPLOYERS have been hard hit by the collapse of worldwide financial markets, California's failing economy, the state electorate's rejection of propositions aimed at closing the budget gap, and the potential diversion of local government funds by the state. Although the country appears to have begun to emerge from the recession, a full recovery in the labor market is expected to take years.<sup>1</sup>

In addition to cutting positions and seeking wage concessions, local government agencies are turning to furloughs to survive these lean times. Agencies with collectively negotiated furlough policies in their union contracts can see significant cost savings and increased flexibility in this time of uncertainty. Furloughs preserve staffing levels and allow employers to avoid the restructuring necessitated by layoffs.

From the employees' perspective, furloughs should be preferred to an equivalent reduction in salary because time off is given in exchange for the reduced pay. The benefits of furloughs are even more obvious for those who otherwise might be laid off. Yet a surprising number of employee organizations have refused that option. Their bargaining teams are often made up of more-senior employees who would be insulated from layoffs but personally affected by furloughs.

While Governor Schwarzenegger was recently able to unilaterally impose furloughs on state employee organizations, this was due to his unique executive power under state law that is not available to other public agencies. The ability of a particular public agency to implement furloughs will vary widely depending on the content and duration of the memorandum of understanding with the pertinent employee organization, as well as local ordinances and state law. In the absence of a negotiated furlough policy or contract language constituting a clear and unmistakable waiver of the right to bargain, a furlough decision will likely need to be taken to the bargaining table.

In some cases, where the employer lacks a specific grant of authority to impose furloughs and the MOU contains a zipper clause, the employee organization may be able to refuse to negotiate, effectively blocking the furloughs. Under these circumstances, employers may be left with no real choice but to implement layoffs.

### *The Governor's Furloughs*

Furlough became a household word in California in December of 2008, when Governor Schwarzenegger issued Executive Order S-16-08 requiring some 238,000 represented and unrepresented state employees to take off two days a month between December 2008 and June 2010. Subsequently, Executive Order S-13-09 added a third furlough day per month for both represented and unrepresented state employees.

To date, all challenges to the Governor's furlough program have failed. On January 29, 2009, Sacramento County Superior Court Judge Patrick Marlette denied writ petitions in four cases brought by unions representing state employees in various bargaining units. The court found that the Governor has statutory authority to reduce the hours of state employees in order to meet the needs of state agencies.<sup>2</sup> This statutory authority is expressly incorporated in MOUs between the state and the affected employee organizations.

In addition, certain provisions of the MOUs authorized the state to reduce hours for lack of funds, and to take other necessary action in an emergency. These provisions appeared in various articles addressing subjects such as "State Rights" and "Layoffs."

The court found that the evidence proved the existence of a fiscal emergency justifying the furloughs, and that the emergency permitted the Governor to implement furloughs without first meeting and conferring with the affected employee organizations. The court rejected the employee organizations' argument that the furloughs modified the

salary ranges of represented employees in violation of state law. The court explained:

This case involves a temporary reduction in the hours worked by certain state employees, which will result in a loss of pay for the hours not worked. The order does not change established salary ranges at all: state employees will continue to receive their normal pay according to established ranges in weeks that do not include a furlough day.<sup>3</sup>

Subsequently, the court ordered that the Governor had authority to impose furloughs on employees of independently elected constitutional officers, including the Lieutenant Governor, the Secretary of State, the State Treasurer, the State Controller, the Superintendent of Public Instruction, the Insurance Commissioner, the Attorney General, and members of the State Board of Equalization.<sup>4</sup>

### *Are Furloughs an Option for Other Public Employers?*

Most public employers lack the executive authority to furlough employees possessed by the Governor under state law and the MOUs between the state and employee organizations.

As a result, the decision to implement a furlough program generally will have to be taken to the bargaining table.

Some agencies have had the foresight to include furlough rules in their current memorandum of understanding. These fortunate few need not negotiate the decision, although impacts not addressed in the MOU must be negotiated at the request of the employee organization. For others, the standard rules apply, i.e., the obligation to bargain will attach when the employer gives notice of its intent to implement a furlough program and an affected employee organization makes a request to negotiate. These legal principles are discussed below.

*Some agencies have  
had the foresight  
to include furlough  
rules in their current  
memoranda of  
understanding.*

### *Meet-and-Confer Requirements*

The Meyers-Milas-Brown Act requires cities, counties, and other covered agencies to “meet and confer in good faith regarding wages, hours, and other terms and conditions of employment” with the employee organizations recognized as the representatives of employee bargaining units.<sup>5</sup> The term “wages, hours, and other terms and conditions of employment” is generally synonymous with the scope of representation under the MMBA, which is defined as:

...all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.<sup>6</sup>

Management is not obligated to negotiate over subjects that fall outside the scope of bargaining. However, the agency must negotiate over the effects of that decision insofar as they affect matters within the scope of bargaining.

California courts and the Public Employment Relations Board<sup>7</sup> apply a three-part test to determine whether a management decision must be negotiated.<sup>8</sup> The first question is whether the decision will have “a significant and adverse effect on the wages, hours, or working conditions of the bargaining unit employees.” If not, there is no duty to meet and confer. The second question is whether the significant and adverse effect arises from the implementation of a “fundamental managerial or policy decision.” If so, there is no duty to meet and confer.

If both factors are present — i.e., if an action taken to implement a fundamental managerial or policy decision has a significant and adverse effect on the wages, hours, or working conditions of the employees — a balancing test

applies. The action “is within the scope of representation only if the employer’s need for unencumbered decision making in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question.” In balancing the interests to determine whether parties must meet and confer over the decision, a court may also consider whether the “transactional cost of the bargaining process outweighs its value.”<sup>9</sup>

The meet and confer process does not require the employer to agree to any specific proposal, but does require both parties to “seriously attempt to resolve differences and reach a common ground.”<sup>10</sup>

*PERB recognizes a  
critical distinction  
between a layoff  
decision and a decision  
to implement an  
involuntary reduction  
in hours.*

### *Scope of Representation*

It is well established that a decision to lay off employees based on economic considerations is a fundamental managerial or policy decision that is not negotiable. Only the effects of the decision, and not the decision itself, fall within the scope of representation.<sup>11</sup>

Although PERB has not specifically ruled that furlough decisions must be negotiated, it recognizes a critical distinction between a layoff decision and a decision to implement an involuntary reduction in hours (which is, after all, the essence of a furlough).<sup>12</sup> PERB explains that layoffs suspend the employment

relationship entirely, while a reduction of hours “maintains the relationship but alters some of its terms.”<sup>13</sup> Accordingly, while a decision to implement layoffs need not be bargained, an employer must seek the employee organization’s consent for a reduction in hours as an alternative to layoffs.<sup>14</sup>

For example, in *Oakland Unified School Dist.*,<sup>15</sup> the district reduced 150 custodial positions from a 12-month work year to a 10-month work year. PERB found that this reduction for these custodial positions was within the scope of representation because the action was taken in lieu of a layoff.

In reaching this finding, PERB explained, “We agree that an employer may unilaterally reduce the employees’ work

year by means of a layoff and, at the same time, establish a reinstatement date two months hence. Here, however, such was not the case. In the instant case, the district reduced the work year of its custodial employees *as an alternative* to the layoff of an additional 40 custodians, and not as a layoff itself.”<sup>16</sup>

PERB’s recognition of the analytical distinction between a layoff and an involuntary reduction in hours affecting individuals who continue in their employment is consistent with the recent decision in *International Association of Firefighters, Loc. 188 v. Public Employment Relations Board*.<sup>17</sup>

The Court of Appeal agreed with PERB that the City of Richmond’s decision to lay off firefighters was not subject to collective bargaining under the MMBA because “collective bargaining rights attach only after the workforce is reduced.” At that point, the court said, the duty to meet and confer arises over the effects of the non-negotiable layoff decision on the employment conditions of “remaining employees.”<sup>18</sup> Since furloughed employees will remain in the workforce, their collective reduction in hours can occur.

### ***When May An Employer Unilaterally Impose Furloughs?***

**General rule: unilateral actions are prohibited.** The duty to meet and confer prevents an employer from making unilateral changes that would alter a mandatory subject of bargaining until the employer has given the employee organization notice and an adequate opportunity to bargain. If bargaining is requested, the employer may not make a unilateral change until the parties have either reached an agreement or reached impasse and have exhausted any mandatory impasse resolution procedures.<sup>19</sup>

The MOU is a binding contract that an agency may not change unilaterally. As stated above, an agency’s representatives are required to “meet and confer in good

faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations.”<sup>20</sup> When the negotiations result in an agreement, the parties must prepare the MOU and present it to the governing body for approval.<sup>21</sup>

Once approved by the agency’s governing body, the MOU becomes a binding agreement between the employee organization and the local government.<sup>22</sup> Unless the parties agree otherwise, the terms and conditions of employment contained in the MOU are fixed for the duration of the

agreement.<sup>23</sup> Most of these terms and conditions continue in effect after the expiration of the MOU, pending the negotiations and adoption of a successor agreement.<sup>24</sup>

Both the agency and the employee organization have the right to adhere to and enforce the language of an MOU.<sup>25</sup> As the California Supreme Court noted in *Glendale City Employees Assn., Inc. v. City of Glendale*: “Why negotiate an agreement if either party can disregard its provisions?”<sup>26</sup>

Zipper clauses may require the employee organization’s agreement to participate in meet and confer efforts.

A contractual zipper clause is intended to “zip up” the MOU thereby “protecting both parties from a demand by the other party to reopen negotiations with the intent of modifying or adding to the current contract terms or otherwise changing the status quo.”<sup>27</sup> A zipper clause acts as a waiver of the right the parties would otherwise have to demand bargaining during the contract term on matters not addressed in the contract.<sup>28</sup>

When an MOU contains a zipper clause, the employee organization may demand bargaining in response to the employer’s proposed changes in terms and conditions of employment not governed by the MOU.<sup>29</sup> But, a zipper clause may permit an employee organization to refuse to negotiate over terms and conditions of employment that are not set forth in the MOU. Consequently, a zipper clause may prevent changes to practices, policies, or rules outside the MOU during the term of the contract.

*A zipper clause may prevent changes to practices, policies, or rules outside the MOU during the term of the contract.*

In the absence of a zipper clause or other restricting language, such as a maintenance of benefits clause, an agency likely has the right to meet and confer over terms and conditions not set forth in the MOU. If no agreement is reached during negotiations, the agency may impose those non-MOU changes after exhausting impasse procedures.

**Exceptions to the general rule.** Occasionally, employers determine that they need to change working conditions without agreement. There are four legally recognized defenses to employer-initiated unilateral action: waiver, necessity, impasse, and expiration of the collective bargaining agreement. Since the essence of collective bargaining is bilateralism, courts and PERB construe these exceptions narrowly.

(1) *Waiver.* An exclusive representative may waive its right to negotiate a proposed change in the terms and conditions of employment by agreeing to waive its right to bargain during the term of the agreement (contract waiver), or by failing to request negotiations despite notice and a reasonable opportunity to negotiate before the implementation of the proposed change.

In order to justify unilateral action the contract must contain specific language that clearly and unmistakably waives the right to bargain over the change at issue. Such a waiver is most often found when the specific subject is covered by the express terms of an existing agreement. For example, in one case, PERB held that a provision in a collective bargaining agreement, permitting “one duty free lunch period of no less than 30 minutes each day,” constituted a clear waiver of a teachers union’s right to bargain over a reduction in the teachers’ lunch period from 50 to 30 minutes.

Management rights clauses, which may reserve to management the “exclusive” right to take specified actions, are generally not considered to be a sufficiently clear and unmistakable waiver allowing unilateral action. For example, PERB determined that even though a management rights clause reserved for a county “the exclusive right to...assign its employees,” the county could not unilaterally change

shift assignments because the language did not constitute a “clear and unmistakable relinquishment” of the union’s right to bargain.<sup>30</sup>

A public employer may act unilaterally if it offers written notice and a reasonable opportunity to meet and confer before the intended action and the employee organization fails to request bargaining. Simply protesting an employer’s contemplated unilateral action is not the same as a demand to bargain. However, an employee organization need not request

bargaining when such a request would be futile or if a firm decision has already been made by the employer. Under such circumstances, the unilateral change would be unlawful.

PERB has also suggested that under some circumstances, a union’s failure to negotiate in good faith, following the employer’s notice and opportunity to negotiate, may constitute a waiver of the union’s right to negotiate, and hence authorize an employer’s unilateral action.

(2) *Necessity (fiscal emergency).* In rare cases, PERB has found that an employer’s unilateral change was justified by business necessity. In order to qualify for this exception, the employer must show “an actual financial emergency which leaves no real alternative to the action taken and allows no time for meaningful negotiations before taking action.”<sup>31</sup>

When an employer attempts to use a declaration of fiscal emergency as the basis for changing its contractual obligations, the facts behind the declaration and the proposed employer actions will be scrutinized to determine whether the declaration was warranted, and whether more reasonable alternatives are available than the employer’s proposed response. In *Sonoma County Organization of Public Employees v. County of Sonoma*,<sup>32</sup> the California Supreme suggested that contractual monetary commitments may be deferred only if the fiscal emergency is so disastrous that the agency would be forced to cease operations if the crisis were not resolved.

The *Sonoma* court rejected a declaration of fiscal emergency when, due to state action in the wake of passage of Proposition 13, the county’s revenues were reduced by 6

*In rare cases, PERB  
has found that an  
employer’s unilateral  
change was justified  
by business necessity.*

percent. The court reviewed United States Supreme Court precedent interpreting the limitation on the contracts clause of the United States Constitution. Those cases provide that compliance with financial obligations is not like a policy decision. Paying those obligations cannot be avoided simply because the agency would rather spend money on other things. Moreover, the type of response will be scrutinized to determine if a more moderate course will resolve the problem as well.<sup>33</sup>

In *Sonoma County*, the Supreme Court never got past the threshold issue of whether a fiscal emergency existed, and therefore never addressed the issue of whether the county's actions were the most appropriate under the circumstances. Based on *Sonoma County*, a 6 percent reduction in revenues would not be, in and of itself, sufficient to constitute a fiscal emergency.

(3) *Bankruptcy*. Notwithstanding a state law that prohibits the rejection of collective bargaining agreements, a municipality filing for Chapter 9 bankruptcy protection may be permitted to reject collective bargaining agreements.<sup>34</sup> In the bankruptcy proceedings involving the City of Vallejo, the bankruptcy court determined that the city was entitled to relief based on findings that the general fund would begin the fiscal year with no reserves and operate at a multi-million dollar deficit. This would leave insufficient available funds to pay the city's debts as they became due and prevent the city from lawfully borrowing from private lenders or other city funds.<sup>35</sup>

Employee associations are free to challenge the rejection of the collective bargaining agreements in bankruptcy court. Ultimately, the decision as to whether or not the contracts will be rejected rests in the hands of that court. Given the current economic climate, proponents of bankruptcy filings maintain that Chapter 9 may be the most viable way to make the best of a bad situation.

Critics, on the other hand, maintain that bankruptcy does not provide a realistic solution for the financial crises

of public agencies. According to this view, the bankruptcy court can provide a forum but not the funding that public agencies sorely need. There is a stigma attached to a Chapter 9 filing, and the mere filing of a petition will likely escalate borrowing costs. In addition, the attorneys' fees associated with a bankruptcy case can be crippling for a public agency.

(4) *Impasse*. A public employer may unilaterally implement changes to working conditions if it negotiates in good faith, the parties reach a *bona fide* impasse, and the employer exhausts its impasse procedure obligations in good faith. In addition, there must not be any contractual bar to the change during the term of the MOU, such as a zipper clause or maintenance of benefits provision.

*If an exempt employee  
fails to stay within  
the 40-hour limit,  
the need to pay over-  
time could defeat the  
money-saving purpose  
of the furlough.*

### *The FLSA Implications of Furloughs*

The Fair Labor Standards Act<sup>36</sup> requires employers to pay employees 1.5 times their regular rate of pay for hours worked in excess of the threshold level for employees in the employer-designated workweek or work period.<sup>37</sup> The FLSA exempts some "white collar" employees from the FLSA overtime pay rules if certain requirements are met.

With limited exceptions, one of these requirements is that the employee is paid on a "salary basis."<sup>38</sup>

In order to pay on a "salary basis," an employer may not reduce the compensation of an exempt employee because of employer-mandated absences or the employer's operating requirements. If an exempt employee performs any work during a workweek, therefore, the employee must receive his or her full salary regardless of the number of days or hours worked, unless an exception applies.<sup>39</sup>

The Department of Labor implemented 29 CFR Part 541, "Defining and Delineating the Exemptions for Executive, Administrative, [and] Professional... Employees," on April 20, 2004. Section 541.710 is applicable exclusively to "employees of public agencies," and identifies two permissible deductions to an employee's predetermined pay available

only in the public sector: partial-day docking and budget-required furloughs.

In relevant part, the furlough regulation states: “(b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid ‘on a salary basis’ except *in the workweek in which the furlough occurs and for which the employee’s pay is accordingly reduced.*”<sup>40</sup>

In other words, exempt employees who are furloughed and who accordingly receive a reduction in their pay lose their overtime exemption for the workweek in which the furlough occurs *and* for each workweek in which the employee’s pay is reduced. Accordingly, if exempt employees are furloughed for a day because of budget constraints, and therefore receive less than their full salaries for that workweek, the employees lose their FLSA overtime-exempt status for that furlough workweek only.

If a furlough is spread out over several weeks or months, exempt employees will lose their exempt status during every workweek the furlough is in effect. There is a danger that some exempt employees will be tempted to do “make-up” work during a furlough week in order to keep up with the press of business, which could lead to overtime liability. Therefore, all exempt employees should be clearly directed not to work during furlough days and not to work over 40 hours in any workweek in which a furlough occurs (and any workweek in which their salary is reduced from a previous furlough).

Should exempt employees fail to comply with the directive to stay within the 40-hour limit, the need to pay overtime could defeat the money-saving purpose of the furlough. The potential liability for violation of the furlough regulation includes (1) back pay in the amount of FLSA straight and overtime compensation for the hours worked in the affected workweek(s); (2) liquidated damages of up to the amount of back pay owed; (3) an extension of the statute of limitations from two years to three; and (4) the employee’s attorneys’ fees.<sup>41</sup>

## *How Furloughs Affect Retirement Benefits*

Retirement benefits provided under the Public Employees’ Retirement System are a function of four factors: applicable retirement formula; age at retirement; service credit; and final compensation. Furloughs will not affect either of the first two factors.

With respect to service credit, PERS recently has issued a Circular Letter<sup>42</sup> indicating that a furlough of two or fewer days per month will not affect service credit for full-time employees, as the amount of work needed to qualify for one year of service credit is set far enough below the expected number of full-time hours to allow for such contingencies.<sup>43</sup> It may impact part-time employees, though.

With respect to the fourth factor, final compensation, furloughs should also have a limited, if any, effect. Compensation is made up of two components: pay rate (essentially, base monthly pay) and special compensation (additional items of compensation that reflect special skills, duties, etc.)<sup>44</sup> If an item of pay does not qualify as either pay rate or special compensation under the strict standards set forth in the applicable statutes and regulations, it will not be included in the final compensation amount. All other things being equal, this will result in lower retirement benefits than if the item of pay were PERSable.

In its Circular Letter, PERS confirms that a furlough does not affect pay rate. Moreover, PERS confirms that in most circumstances, a furlough will not affect special compensation.<sup>45</sup> Even though retirement benefits will be based on pay rate and special compensation (not actual earnings), PERS states that employer and employee contributions are based on actual earnings.

Therefore, items of special compensation paid as a flat dollar amount regardless of earnings will not be impacted by a furlough. Those that are calculated as a percentage of normal base salary also will not be affected. Those that fluctuate based on actual earnings will go down. Since actual earnings are going to be reduced, those items of special

*Items of special  
compensation paid as  
a flat dollar amount  
regardless of earnings  
will not be impacted.*

compensation calculated as a percentage of actual earnings will decrease, reducing reportable compensation in the year of the furlough.

One item of special compensation identified by PERS as subject to this exception is the reporting of Employer Paid Member Contributions (EPMC) as special compensation. Since contributions are based on actual earnings, the amount of EPMC, and therefore the amount that can be reported as special compensation, is reduced.

The impact of any reduction in special compensation resulting from a furlough is further limited by the fact that an employee need not choose the final year<sup>46</sup> of employment as his or her final compensation period. Even if an employee retires in the furlough year, that person can choose another year as the final compensation period if doing so results in greater retirement benefits.

## Conclusion

Decisions addressing voluntary reductions in hours in lieu of layoff strongly suggest that the decision to furlough employees, unlike the decision to layoff employees, is a matter within the scope of representation under the MMBA. In the absence of a negotiated furlough policy or language constituting a clear and unmistakable waiver of the right to bargain, the decision to furlough employees will likely need to be taken to the bargaining table. The provisions of a current MOU governing topics that are normally subject to the meet and confer requirement, including work schedule or the required hours to be worked, may preclude an employer from implementing furloughs without the agreement of the employee organization. If the MOU contains a full-fledged zipper clause, the employee organization can even refuse to meet and confer. Unfortunately, employers in this situation may be forced to impose layoffs. \*

1 See, *Wall Street Journal Online*, June 7, 2009, "Despite Improving, Job Front Remains Grim," Sudheep Reddy.

2 Gov. Code Secs. 19851, 19849.

3 *Professional Engineers in California Government, et al. v. Governor Arnold Schwarzenegger et al.*, Sacramento Superior Court Case No. 2008-80000126; *California Attorneys, Administrative Law Judges and Hearing Officers in State Employment v. Governor Arnold Schwarzenegger et al.*, Sacramento Superior Court Case No. 2009-80000134; *Service Employees International Union, Loc. 1000, Governor Arnold Schwarzenegger et al.*, Sacramento Superior Court Case No. 2009-80000135.

4 *Arnold Schwarzenegger, Governor, et al. v. State Controller John Chiang, et al.*, Sacramento Superior Court Case No. 2009-80000158.

5 Gov. Code Sec. 3505.

6 Gov. Code Sec. 3504.

7 PERB is the quasi-judicial administrative agency, modeled after the National Labor Relations Board, that enforces the statutes governing public sector labor relations in California. PERB is responsible for adjudicating most disputes that arise under the MMBA.

8 *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 164 CPER 75.

9 *Rialto Police Benefit Assn. v. City of Rialto* (2007) 155 Cal.App.4th 1295, 1301, 187 CPER 54.

10 *Independent Union of Public Service Employees v. County of Sacramento* (1983) 147 Cal.App.3d 482, 487, 59 CPER 40.

11 *Building Material & Construction Teamsters Union v. Farrell* (1986) 41 Cal.3d 651, 657, 69 CPER 23.

12 *San Ysidro School Dist.* (1997) PERB Dec. No. 1198, 124 CPER 78.

13 *Azusa Unified School Dist.* (1983) PERB Dec. No. 374, 60 CPER 81.

14 *North Sacramento School Dist* (1981) PERB Dec. No. 193 at pp. 4-5, 52 CPER 67.

15 (1985) PERB Dec. No. 540, 67X CPER 13.

16 *North Sacramento School Dist, supra*, at p. 15.

17 (2009) 172 Cal.App.4th 265.

18 *International Association of Firefighters, Loc. 188, supra* at 286.

19 *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1083, 172 CPER 46.

20 Gov. Code Sec. 3505.

21 Gov. Code Sec. 3505.1.

22 *Glendale City Employees Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 27 CPER 87.

23 *San Bernardino Public Employees Assn. v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1224, 133 CPER 19.

- 24 *City of El Cajon v. El Cajon Police Officers Assn.* (1996) 49 Cal. App.4th 64, 72, 120 CPER 62.
- 25 *Stockton Unified School Dist.* (2005) PERB Dec. No. 1759, 173 CPER 84.
- 26 *Glendale City Employees Assn., Inc. v. City of Glendale* (1975) *supra* at 336, 27 CPER 87.
- 27 *City of Fresno v. People ex rel. Fresno Firefighters, LAFF Loc. 753* (1999) 71 Cal.App.4th 82, 89, 136 CPER 33.
- 28 *City of Modesto* (2004) PERB Dec. No. 1724-M, 173 CPER 95.
- 29 *Los Angeles Community College Dist.* (1982) PERB Dec. No. 252, 55 CPER 71.
- 30 *Independent Union of Public Service Employees v. County of Sacramento, supra*, 147 Cal.App.3d 482, 59 CPER 40.
- 31 *Calexico Unified School Dist.* (1983) PERB Dec. No. 357, 60 CPER 74.
- 32 (1979) 23 Cal.3d 296.
- 33 *Id.* at 308.
- 34 *In re City of Vallejo* (Bkrtcy.E.D.Cal.) 2008 WL 4146015.
- 35 *International Association of Firefighters, Loc. 1186, et al. v. City of Vallejo, et al.*, \_\_\_B.R. \_\_\_, 2009 WL 1841693 (9th Cir. BAP (Cal.)
- 36 29 USC Sec. 201 et seq.
- 37 29 USC Sec. 207; 40 hours in a 168 workweek for most public employees. The threshold can exceed 40 hours and to as many as 28 days in a work period for public employers who have adopted a 7(k) exception for certain safety employees.
- 38 29 USC Sec. 213(a); 29 CFR Part 541.
- 39 29 CFR Sec. 541.602(a).
- 40 29 CFR Sec. 541.710(b).
- 41 29 USC Sec. Sec. 216, 255.
- 42 No. 200-016-09 (March 19, 2009).
- 43 See also Gov. Code Sec. 20962.
- 44 See Gov. Code Sec. 20636; see also, 2 California Code of Regulations, Sec. 571.
- 45 See also Gov. Code Sec. 20636(b)(2).
- 46 Or a 36-month period, if the agency did not amend its PERS contract to provide the single highest year.

## Los Angeles City Employee Relations Board

is inviting applications for the position of Hearing Officer

For information, contact the LACERB  
200 North Main St., Suite 1100  
Los Angeles, CA 90012-4124

Phone: (213) 473-9700  
Fax (213) 473-7751

<http://www.lacity.org/erb/>

Reprinted with permission from CPER No. 196 (August 2009). Copyright by the Regents, University of California. The California Public Employee Relations Program (CPER) provides nonpartisan information to those involved in employer-employee relations in the public sector. For more information, visit <http://cper.berkeley.edu>.

# Public School Negotiations: After the Gold Rush

*Gregory J. Dannis*



*Greg Dannis is a shareholder of Miller Brown & Dannis, a law firm with offices in San Francisco, Long Beach, and San Diego. In addition to his employment, labor, and public entity law practice, he negotiates at 20 to 30 tables annually for public school and community college districts. A version of this article was first presented as the keynote speech at the 2009 Association of California School Administrators Symposium for Negotiators.*

REMEMBER how negotiations used to be? We were:

- Debating whether to pass through the entire cost-of-living adjustment, as the union demanded, or hold something back to account for increased business costs, such as rising energy prices;
- Assessing the cost of step and column movement to determine if it should be subtracted from the salary raise;
- Attempting to contain the increased cost of health and welfare benefits, and asserting that it had to be seen as part of the total compensation increase; and
- Dissecting the district's budget to determine if it had the "ability to pay" a little bit more than its last, best offer.

Who would have thought we would look back and say, "Those were the good old days!"

California became a state after gold was discovered at Sutter's Mill, and we have prospered for over 150 years, assuming that the gold would never run out, whether it be through precious stone, property, a fruit basket that feeds the world, or miraculous silicone chips. We believed we would always be the "Golden State." Now, we exist in a new world of "after the gold rush."

We've experienced economic crises before. Proposition 13 decimated school district funding, and we have never recovered fully. In the 1990s, we experienced the "un-cola years," for which we were finally made whole a few years ago.

But now things are different:

- The current crisis reveals the fundamental defects and weaknesses in the structure of state finances, including the funding system for public schools. California cannot remain the "Golden State" if it contributes less money to schools than 95 percent of the other states, even while 1 of every 7 or 8 K-12 students in the nation attends a California school.

- Our current funding structure, which is based on the erratic ebb and flow of tax revenue, cannot support a stable and consistent commitment to public education.
- It is not just the schools that are suffering; the entire safety net of social services is being threatened. And, if that net is hauled in, educators will be increasingly challenged to teach pupils who are homeless, hungry, and ill.
- The crisis is national, not just local. All told, 40 states report an estimated \$150 billion in budget shortfalls. California represents 28 percent of that, \$41.5 billion; and New York, like us, faces a gap of about 25 percent of its entire budget.

It is no exaggeration to say the financial upheaval is global in scale. But, even if we think globally, we can only act locally — at the bargaining table in each of our 1,000 school districts. Because times are so different, the job as negotiator has changed and will continue to evolve after the gold rush.

### ***Crisis: An Opportunity for Change?***

President Obama was elected on a platform of change. He views the crippled economy as an opportunity for change, the only question being how deep and fundamental it will be. Should we approach negotiations as an opportunity to seek unprecedented changes? Maybe and maybe not.

One union representative recently told me: “Success at the bargaining table right now is a constructive defense of the status quo.” From labor’s point of view, victory may be just preserving benefits, salaries, and working conditions. Management, on the other hand, may see this as an opportunity to finally cap health benefit contributions, increase class size, or shorten the work year.

If these actions are vital to the district’s solvency, they should be put on the table and pursued in good faith. The

danger, however, is in overreaching. Management cannot fall prey to the temptation to “go after the contract” by using the economy as an excuse. Labor, likewise, must not retreat to the old saw of “if there’s no money, then get language that management has always opposed.”

Labor and management both must critically assess what is *needed* as opposed to what they *wanted*.

### ***Can We Satisfy Our Constituents?***

Negotiations break down when constituents have unrealistic expectations; this happens more frequently in times of crisis.

School boards face the possibility of bankruptcy and deeper cuts than they ever imagined. Districts need help from all stakeholders, but sometimes mistakenly assume that employees and their unions will compromise core needs and beliefs. This is unlikely, however, and management should not accuse labor of not appreciating the gravity of the situation or being selfish. History teaches us that in difficult times, labor will agree to difficult concessions through *negotiations*, not by abdicating its role.

Individual unions may take a “NIMBY” attitude: “There will be no cuts to my bargaining unit — ‘not in my backyard’ — but I demand that you cut everywhere else to solve the problem.” If either party takes unrealistic positions, it will increase the likelihood that management will take unilateral actions and decrease the chances for bilateral agreements.

I see increasing demands that negotiations move at a faster pace. Everyone wants “the fix” done *now*! Raise class sizes. Cap health benefit costs. Win a job protection clause. Guarantee no reduction in salaries or benefits. These demands would affect huge changes that would directly threaten or protect individual security. Because of this, the pace of change — and the pace of negotiations — will be slower than usual.

*Labor and  
management both  
must critically assess  
what is needed  
as opposed to what  
they wanted.*

Neither the collective bargaining statutes nor the agency that enforces them considers how quickly to implement change or how long the negotiation and impasse processes may take. The Educational Employment Relations Act and the Public Employment Relations Board care only that the process is followed.

### ***The Law and the Contract Are Not by Crisis Transformed***

The phrase “business necessity” is being bandied about more often these days. These words represent a legal defense to a unilateral action that, by law, must be negotiated. To my knowledge, this defense has *never* been successful in over 30 years of PERB decisions. Maybe unprecedented mid-year budget cuts and draconian reductions in ongoing funding will, for the first time, justify unilateral action based on business necessity. But until then, hard times still do not justify acting alone on negotiable matters.

Clients are asking questions I have not heard for 20 years: Can we unilaterally freeze salaries? Can we suspend step and column movement? Can we impose furlough days? Can we close the district office and force people to use vacation? The answers to these questions are the same as they were two decades ago: Absent enabling contract language or clearly established practice, these changes are negotiable. Conversely, if a union demands to negotiate the decision to lay off, reassign, or transfer personnel, the answer is still that these matters are not negotiable, assuming in the latter two cases that existing contract language is followed.

Since existing contract language was forged before the current economic crisis could be imagined, one cannot argue it was “the intent of the parties” to apply this language in a certain way. The crisis was never discussed back when the language was negotiated. Nonetheless, management and labor are reinterpreting and reconstruing contractual language to create new rights and protections in response to our fiscal predicament.

Despite the creativity involved, these efforts to revise history threaten the integrity of the negotiated bargain and the stability of the relationship. The contract always will be applied to unforeseen situations, but the underlying meaning and the plain words of the agreement are not magically transformed as a grant of more management authority or greater worker protections simply because times have changed.

The same phenomenon is true for past practice. Both parties would like to turn a single example of conduct into binding past practice if that isolated instance favors their interest. If 10 years ago, the employer once let a worker facing layoff bump into a position in which he or she never served, the union asserts this is a binding past practice that confers the same right to all employees. If the union once let management reduce a worker’s hours without negotiating, the employer claims a right to do so based on binding past practice.

This distorts the utility of past practice as an interpretive aid that helps the parties to enforce the contract and maintain universal definitions of workplace rules. This approach will encourage management to try anything once and force labor to oppose anything that has never been tried. Just when the parties need more flexibility, we will create more rigidity.

### ***Good Faith Negotiations Are Threatened***

The duty to negotiate in good faith requires behavior that demonstrates a sincere desire to reach an agreement.

In part, this means giving the union relevant and accurate information in a timely manner. Responding to union RFIs — requests for information — is usually not a problem unless the union is really issuing RFHs — requests for harassment — those endless requests for volumes of paper made for the sole purpose of keeping the employer busy. These boxes of documents never affect the outcome of negotiations.

Normally, the parties wait for the proposed state budget in January, the May revise, and passage of the final

*Hard times do  
not justify acting  
alone on negotiable  
matters.*

budget between July and August before exchanging serious economic proposals. Some even wait for the first interim report to get a clearer picture of district finances. If a district insists on waiting longer — for example, until the second interim report — the union may see it as unreasonable delay and bad faith bargaining.

Now, however, we are forced to rely on an endless stream of bad information. Since the governor's declaration of a fiscal crisis over a year ago, we have learned that *no* information is the most accurate. The governor's January 2008 budget proposed no mid-year cuts — and it was wrong. The May revise improved the education budget — and it was wrong. The budget enacted in September 2008 was based on May revise data — and it was wrong.

How can we bargain effectively in an environment of delayed information, changed information, and bad information? Neither side is bargaining in bad faith, but dysfunction at the state level prevents negotiations in which the parties have faith when it comes to economic issues.

This is not healthy for our labor-management relationship. As both sides get more frustrated, emotions rise, someone to blame is sought, and the process erodes. Do not let this happen. Confront the frustration and complain about it together. If you can afford to wait, call off negotiations until there is something real to talk about.

### ***The Human Element of Negotiations Has Changed***

Successful bargaining depends on the free exchange of information. A common understanding of the negotiations "model" being used also facilitates good results. For example, it is preferable if both parties are using an interest-based or core-values approach. It is folly to believe we can educate the other side into submission or train them to surrender.

Regardless of how much we depend on data or the approach we use, negotiations always are based on a dynamic mix of substance and emotion because people do

the negotiating. Recently, however, the bargaining process has become more emotional and less substantive. In these anxious times, I expect this trend to continue.

The facts only go so far since the economic data are built on a foundation of quicksand. At some point, a negotiator may declare, "I know the facts. I understand the facts. But I don't *like* the facts, and I'm not going to listen to them anymore. What I know is that I'm scared, I'm mad as hell, and I'm not going to take it anymore."

This emotion will change the labor-management relationship. In the alternate universe of collective bargaining, labor wants to be treated as a partner in defining

the rules of the workplace. When a patronizing management attitude is perceived at the bargaining table, the union will not tolerate this disrespect and will insist on being treated as an equal instead of as a child.

Now things have changed. At a recent negotiations session, a part-time classified worker broke down in tears and said, "Just save our jobs; my husband was laid off and now I'm the only one providing health benefits for my family." Even though it will never be said directly, many employees and their unions feel the presence of unconscious paternalism. The goal in negotiations is to ensure the employer

will take care of their basic needs.

I am not suggesting that we adopt a more paternal tone. But we all need to comprehend what I understood when that classified worker spoke through her tears: Union negotiators and the employees they represent have a real fear of losing their jobs and the dignity that comes with providing for those who depend on them. Thus is the human element of negotiations ascendant.

This has caused a role reversal in the kind of open- or closed-door contracts that management and labor seek. Traditionally, labor wants a contract with as many reopeners — open doors — as possible to maximize its opportunities to achieve better wages, benefits, and working conditions. The employer wants as few reopeners as possible, to close

*How can we bargain  
effectively in an  
environment of  
delayed information,  
changed information,  
and bad information?*

the doors on the possibility of making more concessions at the bargaining table.

Now, labor seeks multi-year closed contracts to reduce management's ability to get reductions in compensation or working conditions. The employer wants more reopeners, or maybe only a one-year contract, in case it needs to get concessions if the economic crisis continues.

In the recent past, I have reached tentative agreements on closed multi-year contracts with no salary increases that were based on proposals from the union, not the district. In one case, the union rejected an offer to reopen the contract in the third year. "No," they said, "we want this agreement buttoned up for as long as we think this fiscal crisis will last." Negotiators are operating with different interests and must look at the opened and closed doors from a new perspective.

### ***Can Negotiations Survive Without Any Gold?***

What else can be done to promote the survival of the negotiations process after the gold is gone? Some would say nothing can or should be done, hoping to at last be free of the burdens of bargaining. As the old saying goes, "collective bargaining is like hitting your head against a brick wall — it feels really good when you stop!"

However truthful, wishing for the demise of negotiations is short-sighted. And collective bargaining serves as an orderly and efficient problem-solving process that fosters stability in the workplace. It is unrealistic to expect it to disappear. Instead, our energy must be directed to making the process work even in tough times. Here is what labor and management can do.

***Reexamine our system of negotiations.*** I believe in the negotiations process, but something is either broken or near the breaking point. In too many places, bargaining takes too much time and energy, and causes lost work and money. This is counterproductive when there is little money and more work to be done with fewer workers. Here's an

astounding reflection on our current state of negotiations: Although we know that negotiations are a mandated activity for which districts receive cost reimbursement, we have not received that money and are owed about \$150 million. As I understand the proposed state budget, to fund the collective bargaining mandate, base revenue limit funding would need to be reduced more than has been proposed. Let's get this straight. We should cut funding for public schools to pay for bargaining over wages, benefits, and working conditions? I do not propose we get rid of negotiations, but this house cannot stand.

### ***Define victory, then claim it.***

There will be no raises this year. Class sizes will not be reduced; in fact, reduced class sizes may disappear. We will not reclassify positions into higher salary ranges even if a study says we should. These kinds of "big ticket" items are not in the offing. But there are small victories we can pursue. Is there an hourly rate or a stipend that, if increased just a little, would acknowledge the efforts of a group of employees? Is there a process or policy that can be improved without sacrificing management rights? Most importantly, is there a way to keep

employees "whole" when increased benefit costs and no wage increase result in a total compensation *decrease*? Now is the time to jointly define "victory" in negotiations and then claim it together.

***Suspend, don't eliminate.*** In this climate, we may need to discontinue practices we cannot afford. Rather than completely eliminating them, consider suspending them instead. This is a more proportionate response and does not overreach. And, it offers the union a politically viable opportunity to be part of the solution, with both parties able to express a shared belief that their fortunes will improve in the future.

***Don't dig in your heels or draw lines in the sand.*** The only certainty we can claim at present is that there is, and will continue to be, uncertainty. This means we should avoid speaking in absolutes or making ultimatums. Instead, share

*There has been a  
role reversal in the  
kinds of open- or  
closed-door contracts  
that labor and man-  
agement seek.*

proposals that can be refined through the give and take of negotiations. No problem exists for which there is only one solution.

***United we stand, divided we fall.*** I hate trite sayings, but this is too apt to ignore. The immediate future looks bleak and we will feel the effects, but if labor and management are at odds, the impact on both parties will only be worse. Now is the time to “sprinkle a dose of reality” on local chapters if expectations remain out of line.

***Don't be too hard on yourself.*** I am often asked, “Aren't we the worst, most dysfunctional, craziest district you work for?” And my answer is “no,” except for one district that has not asked me yet. I go to a different district every day. So, from my vantage point, they're all a little crazy — in a good way — and everyone does a better job than they believe. So go easy on yourself, especially in these trying times.

***Don't be too hard on your union.*** A variation on the “aren't we the craziest district” question is, “Isn't our union the most unreasonable you've ever seen?” For the vast majority, the answer is a resounding *no*! Trust me, there are unions out there — even though they are few — that are amoral in their pursuit of power; more interested in attaining this power than representing their members; quick to sacrifice the interests of students for those of adults; and situationally ethical at best. I suppose there are employer counterparts to these unions, but the point is to realize it could be much worse. Do everything to prevent this from occurring in your district.

### ***Remaining Positive in an Altered State***

The task of negotiating is constantly stimulating. It demands creativity to craft solutions that apply to each district and the relationships it has with the union. But now we face a common challenge: How to hold on to the joy of the job and not surrender to the mind-numbing pessimism of a pervasive economic meltdown and keep creative juices flowing.

The answer is deceptively simple. First, we must recognize and reaffirm the value of the greater team, not just the bargaining team. We see examples where one group is pitted against another — management versus employees, certificated versus classified. Education can be distilled down to the teacher in the classroom, but no teacher teaches alone, and a quality program depends on a cohesive *team* of management, classified, and certificated employees.

Second — and this may sound trivial — we must keep a sense of humor even when the sacrosanct social contract of a free public education for all citizens appears to be breaking down. It is more important than ever to cut through the tension, lighten the mood, and laugh out loud together. Even in tough times, if we can't laugh it off from time to time, chances are we can't make it work. \*

## Recent Developments

# Public Schools

---

## New Budget Cuts Billions From Schools

THE NEW BUDGET adopted by the legislature in July, after heated and prolonged negotiations, cuts \$6 billion from K-12 schools and community colleges over a two-year period. It provides for repayment of the approximately \$9.8 billion that was cut from education budgets in the last two years, but fails to specify how or when the funds are to be repaid. The only promise is that it will be "after the economy rebounds." Also included is a provision that allows districts to shorten the school year by up to five days through 2012-13.

The budget compromise avoided suspension of Proposition 98, the constitutional amendment that guarantees a minimum level of state spending on schools. Governor Arnold Schwarzenegger, during the budget negotiations, had asked the legislature to suspend Prop. 98 and give schools about \$3 billion less than the Department of Finance calculated they were owed for the 2009-10 school year. That proposal was met with outrage from the education community. The California Teachers Association launched a \$1 million ad campaign attacking the governor. State Superintendent of Public Instruction Jack O'Connell warned that a suspension would "cause both severe and long-lasting harm to our schools."

It is reported that legislators found a maneuver to avoid suspending the popular proposition. It involves reassigning \$1.6 billion in funds from last year's budget to this year's budget. The accounting change is possible because the funds were not distributed prior to the end of the fiscal year on June 30.

The California Federation of Teachers and the Service Employees International Union, Local 99, filed a lawsuit against the state last May, asking for reimbursement of the funds withheld from schools in past years. The lawsuit is still pending. CTA sought to force repayment through its support of Propositions 1A and 1B, both of which failed to pass. Reimbursement of funds withheld in prior years reportedly was one of the main sticking points in the budget negotiations. Legislators

supportive of education hoped for a guarantee that schools would be repaid whenever funds were withheld. Schwarzenegger did not want to rewrite or amend Prop. 98 to make it clear that repayment was required. Ultimately, a compromise was reached, with both sides agreeing to the one-time reimbursement for last year.

But the promise of repayment at some unspecified time in the future does nothing to ease the crisis faced by schools right now. Most districts already have instituted a number of cost-saving measures, including layoffs, canceled summer school classes, discontinued bus service, closed schools, and cuts from sports, art, and music programs. They will have to brace for more cutbacks in light of the new budget.

Lawmakers and educators are hopeful that some of the cuts will be made up through federal stimulus funds. The state's public schools received \$2.6 billion during the last fiscal year and will apply for additional funds in the fall. \*

---

## Restrictions on Unions' Use of School Mailboxes Upheld

IN A CLOSELY watched case, the California Supreme Court affirmed unanimously a First District Court of Appeal decision holding that a school district can prohibit teachers unions from distributing to school mailboxes materials to support or defeat political candidates. In *San Leandro Teachers Assn. v. San Leandro Unified School Dist.*, the high

court found that the district's policy was in line with Education Code Sec. 7054(a), which prohibits the use of "school district funds, services, supplies or equipment" to urge support or defeat of political candidates or propositions. It also determined the policy did not violate Government Code Sec. 3543.1(b) of the Educational Employ-

ment Relations Act that affords school employee organizations the right to use mailboxes subject to “reasonable regulation.” And, it similarly rejected the union’s claim that the policy violated its constitutionally protected right to free speech. (For a full discussion of the Court of Appeal decision, see *CPER* No. 186, pp. 28-32.)

### Background

The San Leandro Teachers Association serves as the exclusive bargaining representative of the district’s certificated employees. The district maintains a permanent “on site” mailbox for each of those employees. The district paid for construction of the mailboxes and the cost of maintaining them, although

the boxes do not require any specialized servicing.

The district uses the mailboxes to distribute written communications to employees, and SLTA is allowed to use them to reach its members under EERA’s access provisions. In addition, the terms of the parties’ collective bargaining agreement provide that SLTA has the right to “use teacher mailboxes... for lawful communications to teachers.”

At the center of this dispute are two newsletters placed in the mailboxes by SLTA in 2004. Both contained information about the union’s representation activities, including contract negotiations, and activities of its political action committee. The flyers also asked members to help elect certain school

board candidates that SLTA had endorsed. SLTA paid for production of the documents, and they were placed in the mailboxes by teachers during non-duty time.

Shortly thereafter, the district instructed SLTA to stop using the mailboxes to distribute material containing “impermissible political endorsements” in violation of Ed. Code Sec. 7054.

SLTA filed an unfair practice charge with the Public Employment Relations Board, alleging that the district’s directive violated EERA by denying the access rights conveyed in Gov. Code Secs. 3543.5(a) and (b). When PERB refused to issue a complaint and dismissed the charge, SLTA filed a lawsuit in superior court. (See discussion of PERB’s ruling at *CPER* No. 152, p. 86.)

*cper*

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

**-- Robert Frost. poet**

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

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

## Pocket Guide to the Educational Employment Relations Act

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

The superior court overruled PERB and held that school districts cannot prohibit teachers unions from using members' school mailboxes to distribute newsletters with political content. Such a restriction would violate the state constitution's free speech protections. The court found the use of public funds was nominal and that the newsletters were "simply not the type of

*The court found  
the mailboxes were  
'equipment.'*

political campaigning activity to which Section 7054 is directed." (See discussion of the superior court's decision at CPER No. 179, pp. 47-50.)

The district appealed. The First District Court of Appeal reversed, and the Supreme Court granted review.

### Supreme Court Decision

**The statutory question.** The court began its analysis by applying statutory rules of construction to Ed. Code Sec. 7054(a), which provides: "No school district or community college district funds, services, supplies, or equipment shall be used for the purpose of urging the support or defeat of any ballot measure or candidate, including, but not limited to, a candidate for election to the governing board of the district."

The court first considered the parties' differing interpretations of the words of the statute. The district asserted that mailboxes provide a "ser-

vice" because, otherwise, the union would have to pay the U.S. Postal Service to disseminate its materials. SLTA argued that "services" means useful activity performed by a human agency. While the *distribution* of mail is a service, the mailboxes themselves are not. The district contended that the mailboxes are "equipment," while the union maintained that "equipment" is an object that is handled, used, or operated, such as a fax machine.

Not persuaded by either party's construction, the court went beyond the words of the statute to consider the legislative history. The court noted that it was passed in 1977, in reaction to *Stanson v. Mott* (1976) 17 Cal.3d 206. In that case, the court held that government agencies could not use public funds to campaign for candidates or propositions, finding it would "present a serious threat to the integrity of the electoral process." As originally enacted, Sec. 7054 sought to limit the scope of *Stanson*. However, the amended statute made clear that "it was designed to avoid the use of public resources to perpetuate an incumbent candidate or his or her chosen successor, or to promote self-serving ballot initiatives, thereby compromising the integrity of the electoral process."

The legislative history refers to "materials produced with taxpayer monies," the court noted, "which school mailboxes clearly are." And, it agreed with the district that permitting employee organizations to use mailboxes to influence elections, while prohibiting their use by other organizations, "is a

potential abuse that section 7054, and the *Stanson* decision, were designed to guard against." Accordingly, the court found the mailboxes were "equipment" within the meaning of the statute, and that their use by SLTA to promote candidates was prohibited.

"Nor is a construction of section 7054 to ban placing candidate endorsements in school mailboxes inconsistent with Government Code section 3543.1, subdivision (b)," the court continued.

*SLTA's right to  
access is subject  
to 'reasonable  
regulation.'*

SLTA's right to access conveyed by that statute is subject to "reasonable regulation." While not defined by the code section itself, the court in *Regents of the University of California v. PERB* (1990) 220 Cal.App.3d 346, 85 CPER 52, interpreted a nearly identical provision of the Higher Education Employer-Employee Relations Act, and stated "To assess the reasonableness of a particular regulation, the Board must balance, in light of applicable public policies, the benefits conferred by the regulation and the burdens it imposes." Applying this balancing test, the Supreme Court found the prohibition against using mailboxes for candidate endorsements "is a reasonable regulation pursuing a legitimate statutory objective." "Moreover, such a regulation would not unduly limit a union's statutory right of

cper

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

-- Pete Seeger, folksinger

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

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

## Pocket Guide to K-12 Certificated Employee Classification and Dismissal

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

<http://cper.berkeley.edu>

access” because it “still has numerous alternative channels with which to communicate its views to its members.”

The court emphasized the narrowness of its ruling. “We do not hold that school districts are compelled to exclude candidate endorsements from school mailboxes,” so long as it is done “on an equitable basis.” In addition, the court clarified, its holding does not extend to union literature in school mailboxes that does not urge the support or defeat of any candidate, “but merely urges members to become more involved in upcoming elections...or engages in public policy discussion in more general terms.”

**The constitutional question.** The court next considered whether the district’s regulation violates the California Constitution.

However, the court proceeded to analyze it under the First Amendment,

incorporating the “forum” approach used by the Court of Appeals where the first step is to determine the nature of the forum involved: a traditional public forum, meaning “a place that has long been used by the public at large for the free exchange of ideas,” like a public street or park; a designated public forum, meaning property the state has opened for expressive activity by all or part of the public; or, a non-public forum, which is public property that is not traditionally used for public communication.

The court rejected the union’s argument that the mailboxes are a designated public forum. Instead, it agreed with the district that they are a non-public forum, relying on *Perry Education Assn. v. Perry Local Educators Assn.* (1983) 460 U.S. 37, 57 CPER 53, which held that teacher mailboxes in a school district’s interschool mail system were not a public forum, and that the

district could prevent unions other than the teachers’ exclusive bargaining representative from using it. Here, the court found, although the district allowed other organizations to use the mailboxes, that use was limited to non-political matters benefiting teachers. “This is not a case where ‘by policy or by practice’ the District has ‘opened its mail system for indiscriminate use by the general public,’ in which case one could ‘justifiably argue a public forum has been created,’” said the court, quoting *Perry*. Here, the court found the district only grants selective access to outside interests, which is “indistinguishable” from that granted to the union in *Perry*.

The court rebuffed the SLTA’s argument that *Perry* involved the issue of access based on the speaker’s identity, not the content of the message. *Perry* specifically stated that “implicit in the

concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity.” “Thus,” continued the court, “we read *Perry* to apply to restrictions based on content as well as speaker identity.”

SLTA argued that the state constitution’s free speech clause requires a

*The court agreed with the district that the mailboxes are a non-public forum.*

different analysis because it is broader and more protective than the free speech clause of the First Amendment.

It also maintained California courts have not employed a public forum analysis when determining free speech rights of teachers in a school setting. Instead they have used a balancing test. In *L.A. Teachers Union v. L.A. City Board of Ed.* (1969) 71 Cal.2d 551, at issue was a district policy that prohibited off-duty teachers from circulating in the faculty lunchroom and lounge a petition urging the improvement of public school education. There, the court held that the teachers’ interest in political expression outweighed the districts’ concerns about disruption. Employing the balancing test used in *L.A. Teachers Union*, the court in *CTA v. San Diego Unified School Dist.* (1996) 45 Cal.App.4th 1383, 119 CPER 44, held that the district’s interest in regulating activity in the class-

room outweighed the teachers’ right to free expression in the classroom, but not in non-instructional settings.

These decisions did not influence the court because *L.A. Teachers Union* was decided before the public forum analysis was introduced in *Perry* and because it was decided under the First Amendment. The court also distinguished that case, reasoning that teachers’ lunchrooms and lounges are places where unrestricted conversations between teachers are held, whereas school mailboxes “are not places where open exchanges of ideas occur.”

The court emphasized the “narrow reach” of its holding. “Neither the First Amendment nor the free speech clause of the California Constitution nor, as discussed, California statutory law, countenances undue restriction on the political speech of teachers or their unions,” said the court. “But we hold the District may constitutionally determine pursuant to section 7054 that internal school mailboxes should be kept free of literature containing endorsements of political candidates.”

The court’s holding differs from the appellate court’s decision and that

of PERB in an important way. Both PERB and the First District concluded that Sec. 7054 prohibited the use of mailboxes to advocate for or against any ballot measure or to endorse political candidates, whereas the Supreme Court found only that a school district rule prohibiting their use for these purposes was a reasonable regulation and not unconstitutional. In other words, the issue could be subjected to negotiation.

Attorneys for the California Teachers Association and the American Civil Liberties Union expressed disappointment at the decision, but were relieved that the court kept its ruling narrow. “I believe what the court did was reaffirm the rights of public employees to engage in political activity on non-working time,” said Priscilla Winslow, the CTA attorney who represented the union at oral argument.

“I think the effect of this decision will be to validate the practices that have been going on in virtually all school districts,” said Gary Mathiason, the district’s lawyer. (*San Leandro Teachers Assn. v. Governing Board of the San Leandro Unified School Dist.* [2009] 46 Cal.4th 822.) \*

## Schools May Resort to Little-Used State Law for Teacher Layoffs

WITH THE DEEPENING of the financial crisis, school districts throughout the state are considering a whole range of ways to cut back on expenses, from discontinuing bus service to eliminating sports. One tool under consideration is

a seldom-used provision of the law that allows for a second round of teacher layoffs after the usual May 15 deadline.

Education Code Sec. 44955.5 allows districts to issue new pink slips between five days after the enactment

## 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.

---

### **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.

To order this and other titles in the CPER Pocket Guide Series visit

<http://cper.berkeley.edu>

of the new budget and August 15 if they do not get at least a 2 percent increase in per-student state funding and can show that it is necessary to decrease the number of permanent employees in the district. Circumstances giving rise to a second round of layoffs have happened only twice since the code section was passed in 1983. San Francisco Unified School District, the only district to have used the law, issued layoff notices when the circumstances triggered a second round of layoffs in 1991, but the district ultimately rescinded them when it found other funding sources. The provision was almost invoked for another time in 2002, but the legislature suspended the law for a year.

There may be a number of districts that will look to Sec. 44955.5 as a way to lay off teachers this year. Many of the 26,500 pink slips that school districts issued before March 15 were revoked before the May 15 deadline. But, with the failure of the propositions on the May 19 ballot and the continuing downward spiral of the state budget, wholesale layoffs are back on the table. In Northern California, administrators in the San Francisco, Natomas, Folsom Cordova, Elk Grove, and Sacramento City unified school districts are considering a second round of layoffs. \*

union president Pam Meers, but “we wanted to keep our district in the black. We want to keep jobs.” The district’s 110 clerical workers, represented by the California School Employees Association, Chapter 607, agreed to four furlough days during each of the next

### *Teachers in the Temecula USD saved the jobs of nearly 300 employees.*

two years. The 2,000-student district faces a \$1 million deficit next year, and it is anticipated that the wage cuts will save approximately \$500,000.

Teachers in the Poway Unified School District, also in San Diego County, represented by the Poway Federation of Teachers, agreed to a 2.7 percent rollback in their salaries and five fewer paid professional development days.

The Twin Rivers Unified School District, in northern Sacramento County, and its teachers union, Twin Rivers United Educators, approved a new contract that adds three-and-a-half furlough days, which saved 33 teacher positions and \$2.169 million. The contract was approved by 85 percent of the teachers who voted and will be in effect for two years.

The Natomas Unified School District, in Sacramento County, just reached an agreement with California School Employees Association, Chapter 745, that will require bargaining unit

---

## Teachers Sacrifice Pay to Save Jobs

THROUGHOUT the state, teachers and other school district employees reluctantly are voting to accept pay cuts in order to avoid massive layoffs due to the financial crisis. In many areas, unions and school districts are trying to work together to minimize the impact of budget cuts on the classroom.

The Manteca Unified School District and the Manteca Educators Association reached a side-letter agreement that calls for reducing the number of workdays of 1,300 teachers by three days for both the 2009-10 and 2010-11 school years, resulting in a 1.8 percent pay cut. Subsequently, the school board was able to negotiate a 5 percent salary reduction from classified staff and ad-

ministrators, and has now voted to go back to the bargaining table with MEA to renegotiate its 2009-10 contract in hopes of getting the union to agree to a further reduction.

In San Diego County, teachers in the Alpine Union School District voted to accept two furlough days during each of the next two years. In return, they will be allowed to reduce their workday by five minutes. They also voluntarily gave up a 1 percent bonus that already had been approved for the 2008-09 school year. Their union, the Alpine Teachers Association, was advised against accepting the furloughs by its parent union, the California Teachers Association. “CTA told us not to do this,” said

members to take 12 unpaid furlough days for each of the next two fiscal years. Negotiations with the Natomas Teachers Association for a 3 percent salary cut and up to five furlough days are continuing.

Teachers in the Temecula Unified School District in Riverside County voted to accept three furlough days for the 2009-10 school year, thereby saving the jobs of nearly 300 employees.

And, in Los Angeles, the Lynwood Unified School District and the Lynwood Teachers Association agreed on a 3 percent pay cut for the 2009-10

school year, along with one furlough day. The goal was to save the jobs of 77 teachers that the school board added to its reduction-in-force numbers in June, which would have resulted in a total loss of 151 positions for the upcoming school year.

To date, most of the concessions by teachers and other employees have been in the smaller school districts. However, with the financial pressure continuing unabated, unions in larger districts undoubtedly will have to seriously consider similar measures. \*

on health care benefits and class size, began in May 2008, but turned nasty. Both sides have filed unfair practice charges with the Public Employment Relations Board.

When bargaining stalled, PERB declared an impasse. Mediation was not successful. The mediator certified the parties to factfinding. Each side selected their panel member, and when those members did not choose a chair, PERB appointed Bonnie Poultry Castrey. The impasse procedure set out in EERA Sec. 3548(d) requires the panel to meet with the parties and hold hearings within 10 days of the chair's assignment. The district refused to waive the time limits. Castrey's only available date within the 10-day time period was June 1. The union's panel member told the chair

---

## West Contra Costa Teachers Headed for a Possible Strike

CLAIMING THAT it "had no choice" in light of its deteriorating financial situation, the West Contra Costa school district board voted unanimously to force a contract on the United Teachers of Richmond. Teachers present at the July 8 board meeting reacted with hisses and boos. "It looks like we have the fight of a lifetime ahead of us," said the union.

The contract imposes a cap on the district health benefit contribution of \$508.30 a month per current employee and \$450 per retiree, effective January 2010. Currently, there is no cap. It also eliminates any district payment toward health insurance premiums for teachers' dependents, also effective at the beginning of next year. Other terms give the district the authority to increase class

size to 33 students, although the union claims that the provision could mean there would be over 40 students in both elementary and secondary classes. The imposed contract removes seniority as the primary factor in teacher transfers. Not surprisingly, it provides for no pay increases.

The imposition of the contract is the final step the school district can take once the bargaining process has run its course. With the impasse procedures of the Educational Employment Relations Act exhausted, the union now can take a strike vote, and a union membership meeting is scheduled for later this month.

The contract between the district and the union expired on June 30, 2008. Negotiations, which centered

*UTR explained that it did not attend the factfinding hearing 'because there was nothing to be gained.'*

that neither he nor members of the union were available until late July.

Castrey went ahead with the hearing on June 1, although neither the union panel member nor the union bargaining team attended. The district presented its position on all 10 article of the contract and also asserted its inability to pay. The chair allowed the union to respond in writing and provided it

with the opportunity to do so by June 5. Having received no response, in her report dated June 15, 2009, Castrey issued findings on procedural matters such as the date of impasse and the selection of panel members. However, she declined to make recommendations on the issues in dispute. "Clearly without the UTR's perspective on the issues, the Panel is at a loss to weigh and balance the

*At the factfinding hearing, the district presented its position on all 10 articles.*

facts in order to make specific recommendations for settlement as we only know half of the facts," she explained. "Hence, without the UTR's cooperation to gather their facts, the Panel is left to determine when the Factfinding process is completed." Based on the requirement of Sec. 3548.3(a) that the panel issue a decision within 30 days, Castrey determined that the panel "has concluded its work."

On its website, UTR explained to its members that it did not go to the factfinding hearing "because there was nothing to be gained by attending." The district had put forward three different versions of its "last, best and final offer," two of them within a week-and-a-half, said the union. "At no time was there ever an indication that actual negotiations could take place. In fact, the district representative on the fact-

finding panel acknowledged that their only interest in the process was to try to wring concessions from the union." Additionally, the union maintained, its participation in the process only would have lent credence to the non-binding factfinding report.

UTR objects to the district's "apparent determination to balance its budget by dramatic cuts in compensation and increases in class sizes." It argues that the most sensible short-term solution to its current school funding crisis would be to cut the school year by 10 days, as UTR President Pixie Hayward Schickele testified before the joint California Legislative Budget Committee on June 1, at the same

time that the factfinding hearing was proceeding. "This kind of solution can only come from Sacramento. Going to a factfinding hearing instead of going to Sacramento would have gotten the proper priorities backwards."

The district already has laid off 125 teachers, and the board has approved a plan to lay off more. Dozens of maintenance workers, secretaries, and administrators also have been let go. The adult education budget has been cut by 25 percent. But, even after these cost-saving measures, the district could be facing \$7 million in retroactive cuts and an additional \$61 million shortfall this year. \*

---

## **LAUSD Will Push for Legislation to Speed Firing of Teachers Accused of Crimes**

THE LOS ANGELES Unified school board narrowly approved a resolution to seek changes to state laws that would expedite the termination of teachers accused of serious crimes. By a vote of four to three, the board acted in the face of objections by union leaders and some board members who wanted to delay the vote to allow for greater teacher input.

The initial version of the resolution, introduced by school board member Marlene Canter, hoped to facilitate the firing of both poorly performing and abusive teachers. Canter modified it after it met strong opposition from the teachers union, United Teachers of Los Angeles, and from other board

members. The resolution was amended to cover only teachers deemed to have committed egregious or immoral acts, such as physical or sexual abuse. At the insistence of union members, administrators were added to the scope of the resolution.

School officials were reacting to an investigation by the *Los Angeles Times* that concluded, "It's remarkably difficult to fire a tenured public school teacher in California." In a May 3, 2009 article, the *Times* summarized its findings based on a review of every case on record during the last 15 years in which a tenured employee was fired by a California school district. It concluded that "the vast majority of firings stem

from blatant misconduct, including sexual abuse, other immoral or illegal behavior, insubordination or repeated violations of rules such as showing up on time.” Firing a teacher is difficult because building a case for dismissal is so time-consuming, expensive, and draining. As a result, administrators only take a stand in the most egregious cases, the article explained.

The *Times* investigation also discovered that, among the cases which were pursued, more than one-third

*UTLA would oppose  
any reform efforts  
unless union officials  
are involved.*

were rejected by the review panels. The paper also found that dismissal because of poor performance is rare. In 80 percent of the dismissals that were upheld, classroom performance was not a factor.

When school board members Canter and Tamar Galazan introduced a similar measure to facilitate the firing process last spring, objections were raised by the union, other board members, and a state senator. The board ultimately passed another resolution, introduced by Member Yolie Flores Aguilar, to create a task force to discuss the issue and make recommendations to state lawmakers for changes to the Education Code. The task force is

headed by former Occidental College President Ted Mitchell. Other members will be chosen by Superintendent Ramon C. Cortines. The panel is not limited to making recommendations about teachers who are accused of egregious or immoral acts. It also will examine teacher quality and the process by which teachers are terminated.

The entire issue of teacher dismissal evokes strong responses on both sides. “If the dismissal process is not reformed, we will continue to face the choice of returning to schools some teachers that we don’t want working for us, or keeping them out of the classroom and paying them to do nothing while great teachers face layoffs,” said Dave Holmquist, LAUSD’s chief operating officer. A.J. Duffy, president of UTLA, said that the union would oppose any reform efforts unless union officials are involved in the process. “UTLA has tried for years to work with the district and the Board of Education to come up with a sane and reasonable policy for evaluation which could fix most of the problems. And the district has consistently refused,” he said. “The fault lies with the corrupt bureaucracy that refuses to do its job.” \*

## Local Government

---

### Economic Downturn Brings Concessions and Layoffs

WHILE EVERYONE'S ox is being gored as a result of the state's massive budget deficit, local governments may end up taking the most staggering blow. The final budget deal hammered out in Sacramento will take billions from cities and counties by borrowing \$2 billion from local property tax revenues, with a promise to repay this amount by 2113. The state backed off from taking another \$2 billion out of local gas taxes, but still will shift \$1.7 billion from local redevelopment agencies to state coffers.

Even before these cuts are realized, however, California cities and counties are scrambling.

In Alameda County, budget cuts will have a significant impact on the criminal justice system, with layoffs hitting court administrators, sheriffs' deputies, and district attorneys. In the public defenders office, the prospect of losing attorneys means more cases will have to be referred to private attorneys. Ironically, Public Defender Diane Beles posits that referring more cases to outside counsel might end up costing the county more than retaining in-house public defenders. Public defender and union president Bob Mertens expressed concern that attorney layoffs may subject the county to civil liability if the

public defender's office is unable to provide adequate representation.

The budget situation in the City of Vallejo, which filed for bankruptcy protection in May, is going from bad to worse. City officials are contemplating huge cuts in salaries and services, including police and fire. Vice President of the Vallejo Police Association Mat Mustard said that more cuts to law enforcement will have a "devastating" impact on the community. In fact, police officials had to call for back-up support from the Solano County Sheriff's Department when a Friday night fatal shooting left law enforcement with too few officers to handle a large, unruly crowd.

In Oakland, cuts to a wide range of city services have been ordered by the city council to fill what is estimated to be an \$83 million general fund deficit. In June, the council adopted a spending plan that included a 10 percent pay reduction for all city employees, service cuts, and fee increases. SEIU Local 1021 reached an agreement with the city that includes a 10 percent pay cut. The reduction will be achieved through furlough days and increased retirement contributions from employees.

The city's collective bargaining agreements with SEIU Local 55 of the International Association of Fire Fighters, and Local 21 of Professional

& Technical Engineers had expired. Not so with the Oakland Police Officers Association. Under the terms of OPOA's current labor agreement with the city, officers were set to get a 4 percent pay increase on July 1. The union and the city went back to the bargaining table in an effort to deal with a budget cut of up to \$13.4 million and avoid layoffs. A plan to defer the 4 percent increase was presented to the members by OPOA President

*Local governments may end up taking the most staggering blow.*

Dom Arotzarena. The proposal also includes giving back six paid holidays. A series of general membership meetings have been held to explain the terms of the tentative agreement. Ultimately, it will be up to a vote of OPOA whether to keep their contract in place until it expires in one year, or agree to postpone their scheduled 4 percent salary hike. As CPER went to press, the membership vote had not been tallied.

Back in January, Contra Costa County was looking at ways to plug a \$56 million budget gap. As the economic situation worsened, the county informed Sheriff Warren Rupf that his department faced an \$18 million shortfall, making the jobs of as many as 70 deputies susceptible to layoffs, the county's first workforce reduction since the early 1990s.

Jim Bickert, president of the Contra Costa Deputy Sheriffs Association, knew that times were tough in the county, but the specific layoff plan outlined by Sheriff Rupf caught the union off guard.

By July, when the financial clouds darkened, three labor unions in the county agreed to two-year contracts with major job and benefit concessions. The agreements were struck with AF-SCME Local 2700, which represents 5,300 employees, along with Public Employees Union Local One and SEIU Local 1021. Union members agreed to accept mandatory unpaid furloughs of 48 hours a year for two years; this equates to a 2.3 percent wage cut.

In addition, the new contracts provide that, going forward, employees and the county will evenly split all health insurance premium cost increases, up to 11 percent. In the past, the county has paid all of the premium increases. In May 2011, the county's share of the premiums will convert to a dollar amount. The new premium deal will apply to current retirees. All county employees hired after December 31, 2009, will no longer receive retiree health care benefits. An editorial in the local newspaper praised the county and the public employee unions for agreeing to a contract that "should be used as a model for other public agencies that are struggling to balance their budgets and still provide basic services in a deep and protracted recession."

In Sacramento, when city officials predicted hundreds of layoffs, union leaders were skeptical that the budget

picture was as bad as the city claimed. Current contracts with police and fire organizations included 5 percent wage increases. Other full-time employees represented by Local 39 are entitled to get a 4 percent boost this year. Initially, all of the unions said they would not renegotiate their contracts.

In a series of community meetings, city leaders said that they would have to cut nearly 300 filled positions to close a \$50 million budget gap unless the unions agreed to freeze their pay and go along with proposed furlough plans. Some labor leaders took issue with the city for suggesting that there were only two choices — have unions make concessions or lay people off. A representative of the firefighters union told the *Sacramento Bee*, "The third choice is to stop spending money on stupid things."

A negotiating team from the police union agreed to sit down with city officials. The union said it was not willing to reopen its entire contract with the city, but it wanted to hear what specific concessions the city had in mind. In March, after some marathon negotiating sessions, the Sacramento Police Officers Association agreed not to take a 5 percent increase due in July, which

saved the city \$6.5 million and avoided layoffs of any police officers.

Council Member Robbie Waters accused the city of "playing a game of chicken with the firefighters." In the end, though, after months of negotiations, the firefighters union agreed to freeze salary and step increases for 30 months, and defer the wage increase set for July 14 until 2012. The firefighters also agreed to extend their current contract by two years. This pact will reduce the city's deficit by \$10.5 million and save the jobs of 50 firefighters.

Local 39 negotiators returned to the table, but no agreement with the city was struck. Estimates are that 180 city workers were laid off in mid-July. These include members of the park maintenance staff and the utility district.

As the bad budget news continues to bombard cities and counties across the state, local public agencies — along with the unions that represent their employees — will continue to face some very hard choices.

Local governments have pledged to sue the state. Governing boards in Los Angeles have passed measures endorsing legal action. The League of California Cities and the California State Counties Association are drafting the legal documents. \*

---

## ***County of Sonoma Invalidates S.B. 440***

IN A MUCH anticipated decision, the First District Court of Appeal struck down the amended version of the statute that compels binding interest arbitration of

bargaining impasses involving public agencies and employee organizations representing law enforcement employees. The constitutional infirmities of

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

Now, firefighters have a new resource.

## Pocket Guide to the Firefighters Bill of Rights Act

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

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

The FBOR guide provides:

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

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

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

<http://cper.berkeley.edu>

an earlier version of the statute were not cured by inclusion of a provision allowing a unanimous vote of the local governing body to hold off the arbitration panel's award.

### Background

In 2000, the state legislature passed Senate Bill 402, which provided for compulsory arbitration of labor disputes between employee organizations representing firefighters and law enforcement officers, and local agencies. Under Code of Civil Procedure Sec. 1299, when a labor organization and an employer reached a bargaining impasse, the employee organization could request that the dispute be referred to an arbitration panel.

The panel, made up of three members, receives from the parties their last, best offer of settlement as to each issue in dispute, including economic issues, like salaries, wages, and benefits. The panel is then authorized to conduct a hearing and, at its conclusion, selects without modification the offer that most nearly complies with a list of factors delineated in the law. After five days, the panel's decision is made public and, under the first version of the statute, the panel's ruling became binding on the parties.

In 2003, the California Supreme Court, in *County of Riverside v. Superior Court*, 30 Cal.4th 278, 160 CPER 19, declared S.B. 402 unconstitutional because it impermissibly intruded on the powers held by the county to fix compensation. (For a complete discussion of the *County*

*of Riverside v. Superior Court* opinion, see CPER No. 160, pp. 19-25.)

The legislature's response to that decision was Senate Bill 440. It tracked the original legislation except that the panel's decision could be rejected by a unanimous vote of all the members of the governing body.

### Sonoma County case

Despite the legislature's declaration of its intent to make the amended statute consistent with *County of Riverside*, the court in *County of Sonoma v. Superior Court* held otherwise.

After the county and the Sonoma County Law Enforcement Association reached impasse, the association requested that their dispute be submitted to interest arbitration under the revised statute. The county denied the request, and SCLEA proceeded to superior court to compel arbitration. Following a hearing, the superior court ruled last August that the amended statute was constitutional.

The appellate court disagreed and concluded that the statute divests the county's governing body of its authority to provide for employee compensation. Following an analysis of the history and purpose of the constitutional provision, the court concluded that the vesting of power in the boards of supervisors was intended to be exclusive.

The Court of Appeal rejected SCLEA's contention that the statute was valid because it addresses a matter of statewide concern, an argument rejected in *Riverside*, holding that

compensating county employees is a municipal function.

Also unpersuasive was the association's argument based on a distinction between substantive and procedural regulation of labor relations, claiming that procedural statutes do not conflict with constitutional powers of local governments. To respond to this assertion, the court examined the interplay between the arbitration statute and the workings of the Meyers Milius Brown Act. Like S.B. 402, S.B. 440 involves arbitrators in matters that extend beyond those over which labor and management customarily bargain, such as formulating policy and balancing public needs with finite financial resources. It is the responsibility of the legislative body to weigh those needs and set priorities.

The court agreed with the county's position that the governing board's limited power to reject the panel's decision "is more akin to the veto power traditionally associated with the executive than it is to the legislative power to make laws."

The county also asserted that the constitutional grant to its "governing body" to set compensation of employees refers to a majority of its five-member board. "Since a majority of the governing body possesses all of the authority of the whole and effectively becomes the full board, [S.B. 440's] allocation to the 'governing body' of the power to establish employee compensation must be read as allocating that power to a majority of the governing board." The court referenced "the deeply em-

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>

bedded principle of majority rule in a democratic society," and concluded that the statute interferes with the constitutional authority of legislative bodies to set compensation because the statute permits less than a majority of the governing body to do so by making the arbitration panel's decision final and binding on the county. "Therefore, the terms of the statute empower a minority of a board of supervisors to make the arbitrators' decision binding on the county, even if the majority of that body disagrees."

The court also recognized that under the MMBA, an MOU between a public agency and an employee organization only becomes binding if it is affirmatively approved by the governing body of the local agency. The statute

does not require a favorable determination by the county's governing board, said the court, but renders the panel's decision binding unless it is rejected by a unanimous vote of the board. "This means that the arbitrators' decision will become binding where there is no legislative action at all," the court reasoned. The court found the statute cannot be squared with the governing body's constitutional authority to "provide for" county employee compensation.

SCLEA also argued that the statute was intended to place a check on the local board's power to unilaterally implement contract terms when the parties fail to reach a bilateral agreement. "Such an argument proves too much," said the court. "One might just as well argue that the meet and

confer requirement of the MMBA is 'meaningless' because the governing body retains the ultimate authority to refuse to agree on any particular issue in the negotiations."

The court declined to sever the unanimity clause from the remainder of the statute to avoid invalidating the statute in its entirety. The legislature adopted S.B. 440 over the specific objections of local governments to the unanimous vote requirement, and the court was uncertain that the bill would have been adopted absent that provision.

The statute delegates the county's constitutional powers to a private body, the court said, because it places the authority to decide disputed compensation issues in the hands of the arbitration panel at the behest of the union.

And, said the court, the mere fact that the panel's decision does not become binding if the board of supervisors is able to muster the needed unanimous vote does not mean that delegation has not occurred. The statute does not require the governing board to ratify the

panel's decision before it becomes binding. "The decision can become binding without any legislative action at all," the court concluded. (*County of Sonoma v. Sonoma County Law Enforcement Assn.* [2009] 173 Cal.App.4th 322.)\*

Paterson was relieved from duty but was exonerated by a board of rights. He was reinstated with back pay, but sued the city for failing to afford the procedural protections conveyed by the PSOPBRA. Section 3309.5(e) of the act authorizes a civil penalty of \$25,000 for each violation of the act. The trial court dismissed Paterson's claims, and he appealed.

## Investigation of Sick Leave Abuse Triggered Application of Bill of Rights Act

AN INVESTIGATOR sent to the home of a police officer suspected of abusing sick leave was engaged in an investigation of wrongdoing that *could* lead to punitive action, said the Second District Court of Appeal in *Paterson v. City of Los Angeles*. The appellate court rejected the city's argument that the Public Safety Officers Procedural Bill of Rights Act did not apply because the officer ultimately was exonerated by a board of rights. Application of the act is determined at the beginning of the exchange between the investigator and the police officer, the court said, and does not turn on whether, once the investigation concludes, punishment results.

When Los Angeles police officer Robert Paterson called in sick for a 48-hour period beginning on December 4, 2004, his supervisor, Lieutenant Raymond Garvin, was suspicious. Paterson's December 4 and 5 sick leave request was bracketed by other days off, and Garvin mistakenly believed that Paterson was a frequent user of sick leave.

On December 5, Garvin sent an investigator, Sergeant Adrian Legaspi, to Paterson's home. Armed with a tape recorder, Legaspi knocked on the front door and was met by Paterson's son, who gave Legaspi his father's cell phone number. While standing in front of Paterson's house, Legaspi called the number and asked Paterson if he was at home. When Paterson said yes, he was, Legaspi told him she was at his residence and informed him that he had just given a false and misleading statement to a supervisor.

Legaspi immediately called Garvin, and a formal complaint was prepared. The internal affair's report refers to statements Paterson made to a supervisor who was conducting a "legitimate and necessary investigation concerning possible sick leave abuse."

The city took the position that Legaspi was conducting a sick leave check which is authorized by department policy. Paterson agreed that supervisors can go to an officer's house. But, if the purpose is to investigate misconduct, the Bill of Rights Act applies.

## *Application of the act does not turn on whether punishment results.*

The appellate court first referenced Gov. Code Sec. 3303, which extends the procedural protections of the Bill of Rights Act "when a public safety officer is under investigation and subject to interrogation...that could lead to punitive action." The section requires that the agency notify the officer of the identity of the interrogating officers and the nature of the investigation before the questioning begins; it prohibits abusive interrogation techniques; and it demands that interrogations be conducted at a reasonable hour and be of reasonable length. The act also allows the officer to designate a representative to be present during the interrogation.

The city's primary argument was that the act did not apply because Paterson was exonerated by the board of rights, and the exoneration and reinstatement nullified any punitive action

taken. The court rejected that interpretation of the statute. “We need look no further” than Sec. 3303, said the court, which extends the procedural protections of the act to an investigation or interrogation “that *could* lead to punitive action.” Under the city’s nullification theory, the court reasoned, the act’s procedural rights would apply only if the investigation, once concluded, “*has led to* punishment.” The act does not require a showing that an adverse employment consequence has occurred or is likely to occur, said the court. Rather, “punitive action may exist when action is taken which *may* lead to the adverse consequences at some *future time*.”

Under the city’s theory, the court continued, a public agency would violate the act if, at the time of the questioning, it was confident that it would not prevail in its attempt to impose discipline. This is “an absurd result,” the court commented. “Application of the Act is determined at the beginning of the action, not after its end.” In this case, the court quipped, “it is easy to determine that the sick check might have led to punitive action, because it did lead to punitive action.”

Section 3303 does not apply to any interrogation of a public safety officer “in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor....” Citing this section, the city argued that Legaspi was conducting a routine sick check and asked only innocent preliminary and casual questions. The facts suggest otherwise, said the court.

Garvin suspected wrongdoing and sent Legaspi to investigate. Legaspi’s first comments to Garvin — “Guess what...he’s not home. I have it all on tape.” — are not the kind of statements made following a routine communication or training session. “The statements say that Garvin and Legaspi set out to confirm a suspicion, indeed to catch Paterson in a lie. That is precisely the kind of conduct to which the Act applies,” the court said. “We cannot agree with the City that on these facts, only innocent or preliminary questions took place, and that Legaspi stopped her questioning as soon as she thought a serious offense, a false statement to a

supervising officer, had taken place.” “We would eviscerate the Act,” said the court, to find that Bill of Rights Act protections did not apply until after Legaspi obtained what she understood to be false statements.

A concurring opinion by Associate Justice Richard M. Mosk cautioned that not every sick leave check should be considered the type of investigation or interrogation that invokes Sec. 3303 protections. Whether there was a violation and what the appropriate remedy should be are matters to be determined by the trial court, he said. (*Paterson v. City of Los Angeles* [2009] 174 Cal. App.4th 1393.) \*

---

## Retirement Costs Pickup and Medical Benefits Not Vested Rights Under Contract Clause

IN *San Diego Police Officers Assn. v. San Diego City Employees Retirement System*, the Ninth Circuit concluded that employees’ vested contractual pension rights are protected by the U.S. Constitution’s contracts clause. But, terms that can be modified through the collective bargaining process are not. In this case, the city’s contribution to the employee retirement plan was a mandatory subject of bargaining and equal to a negotiated salary item. Therefore, said the Ninth Circuit, the term was subject to modification and was not a vested pension right.

Similarly, the eligibility requirement for retiree medical benefits was not a protected vested right because it

could be altered through the bargaining process.

In 2005, the city engaged in negotiations with the association and three other unions whose agreements were set to expire on June 30, 2005. The city’s primary goal during these talks was to obtain financial concessions from the unions to achieve recurring budgetary savings. To that end, the city proposed either a reduction in salary or a reduction of the city’s subsidy, or “pick up,” of the employees’ pension contribution. Negotiations progressed but were unsuccessful, and the city gave the association its final offer — a one-year agreement with a 3.2 percent reduction in the amount of the employees’ pickup. The final offer also made changes in

NEW EDITION

13th edition, 2009

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

Prepared by Cecil Marr and Diane Marchant  
Updated by Dieter Dammeier and Richard Kreisler

Our best-selling Pocket Guide!

Known statewide as the definitive guide to the rights and obligations established by the act covering peace officer discipline, this edition includes new case law covering exceptions to the statute of limitations, adequacy of disciplinary notice, and the *Spielbauer* decision.

Specific topics covered by the new edition include:

- Approval of pre-interrogation "anti-huddling" policy
- Supreme Court holding that a formal grant of immunity is not required before compelled questioning
- Limitations on the release of financial records
- Disclosure of investigative material, findings of police review commission
- Impact of criminal investigation on tolling of the statute of limitations
- Compelled cost-sharing of appeal, arbitration

The Pocket Guide offers a clear explanation of the protections relating to investigations, interrogations, self-incrimination, privacy, polygraph exams, searches, personnel files, administrative appeals, and more. The Guide also includes the text of act and summaries of all important cases, a table of cases, glossary, and index of terms.

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

<http://cper.berkeley.edu>

the service eligibility requirements for retiree health benefits.

The city council voted to impose the terms of the final offer, and the association filed a complaint in federal court alleging a violation of the constitutional provision that bars the impairment of contracts. The district court sided with the city and the association appealed to the Ninth Circuit.

*Was the city's pickup  
a vested retirement  
benefit or a salary  
item subject to modifi-  
cation or reduction?*

The association argued that the city's pickup portion of its employees' retirement contribution is a vested contractual right and, therefore, the 3.2 percent reduction imposed as part of the final offer violated the constitutional contract clause. The relevant inquiry, said the Ninth Circuit, is whether the city's pickup is a vested retirement benefit or a salary item subject to modification or reduction.

The association conceded that retirement pickups are a mandatory subject of bargaining, but argued that pickups are a vested retirement benefit. The circuit court rejected that contention. To the extent that the cases relied on by the association found a contractual right to the amount of the employees' contribution the Ninth Circuit said,

"the recognized right protected only increases in those total amounts, not the share paid by employees."

Also unpersuasive was the association's reliance on the historical practice in the city of negotiating the amount of a pickup only in lieu of, or in conjunction with, salary increases. "That does not bear on the legal classification of the City's pickup amount," said the court. The fact that the city has equated modifications in pickup and salary amounts confirms that the city has treated pickups as a compensation term, not a retirement benefit. "It simply cannot be said that the City's pickup is a vested contractual benefit entitled to protection under the Contract Clause," the court remarked.

The association also charged that the modifications imposed by the final offer on employee eligibility requirements for retiree health benefits impaired its vested contractual rights. The requirements, applicable only to current employees, established a service qualification of 10 years for 100 percent benefit, and 5 years for a 50 percent benefit.

The association relied on *California League of City Employees Assn. v. Palos Verdes Library Dist.* (1978) 87 Cal. App.3d 136, 40 CPER 25, where the court held that certain fringe benefits for long-term employees, like longevity pay and increases in vacation time, were vested constitutional rights. But the court found the reasoning in *Palos Verdes* unpersuasive, noting that it did not acknowledge the well-founded

presumption that a legislative body does not intend to bind itself contractually.

Instead, the Ninth Circuit looked to *San Bernardino Public Employees Assn. v. City of Fontana* (1998) 67 Cal. App.4th 1215, 133 CPER 19. That case held that personal leave accrual and longevity pay are conditions of employment that can be altered by the parties during negotiations under the

*The association  
conceded that  
retirement pickups are  
a mandatory subject of  
bargaining.*

Meyers-Millias-Brown Act. They were provided for in the terms of the MOU between the city and the union, and could not have become permanently and irrevocably vested.

Relying on *San Bernardino*, the Ninth Circuit looked to the evidence showing that the retiree medical benefits in San Diego were considered a term of employment that could be negotiated through the collective bargaining process. The court concluded that the retiree medical benefits "were longevity-based benefits that continued only insofar as they were renegotiated as part of a new agreement and were not protectable contract rights." (*San Diego Police Officers Assn. v. San Diego City Employees Retirement System* [9th Cir. 2009] 568 F.3d 725.) \*

## Commission's Rejection of Late Appeal Not Abuse of Discretion

THE DECISION of the Los Angeles Civil Service Commission to reject an appeal as untimely was not an abuse of discretion, the Second District Court of Appeal said. And the trial court's decision to view the appeal as a request for an extension of time improperly substituted its judgment for that of the commission.

The county's Department of Public Works discharged Massie Munroe from her position as an associate civil engineer because of her threatening and intimidating statements about guns and shooting people in the workplace. The notice of discharge advised Munroe that she had 15 days to seek an appeal before the civil service commission. On the date that she was terminated, Munroe's attorney mistakenly mailed the request for appeal to the outside counsel who had represented DWP at the *Skelly* hearing. When Munroe's attorney finally filed an appeal with the commission, 52 days later, it was found to be untimely.

Munroe appealed that determination, and her attorney asked the commission to exercise its discretion to hear the appeal because significant rights of his client were at stake.

The commission denied Munroe's appeal, and she filed a petition for a writ of administrative mandate seeking to direct the commission to hold the hearing.

The trial court granted Munroe's writ. It concluded that the commission's decision not to consider the appeal "probably was not arbitrary, capricious or lacking in evidentiary support." Nor had Munroe sought an extension of time. Nonetheless, the trial court found that the commission had abused its discretion when it failed to deem Munroe's late request for an appeal to constitute good cause for an extension of time under the commission's procedural rules.

### *Munroe's notice of appeal was sent two months late.*

On appeal, the court instructed that the appropriate inquiry of the trial court was whether the commission's action was arbitrary, capricious, or entirely lacking in evidentiary support, contrary to established public policy, unlawful, procedurally unfair, or at odds with the agency's procedural rules.

Reviewing the facts, the appellate court observed that Munroe's notice of appeal was sent to the commission nearly two months late. More important, said the court, Munroe was notified of her appeal rights. The notice specified that the appeal be sent to the

commission within 15 days. Based on this, the court concluded that the commission's decision to deny the appeal as untimely was not unlawful, lacking in an evidentiary basis, arbitrary, or capricious. Therefore, it was not an abuse of discretion.

Next, the Court of Appeal noted, the commission's rules provide for an extension of time based on a showing of good cause for the delay. The trial court's ruling that the commission erred in treating Munroe's appeal as good cause for an extension of time "was erroneous as a matter of law," said the court.

And, as the rules spell out, notice to another entity like DPW "could never constitute notice to the *Commission*." The procedure set forth in the notice of discharge "was neither complex nor obscure," said the court, and "Munroe proffered no excuse to the Commission or to this court for ignoring the rule." The court added, "counsel's failure to discharge routine professional duties is not excusable."

Finally, the appellate court chastised the trial court for improperly substituting its judgment for that of the commission and making its own interpretation of the commission's rules. "An agency's view of a regulation that it enforces is entitled to great weight unless clearly erroneous or unauthorized," the court remarked, and "the commission's interpretation was neither." (*Munroe v. Los Angeles County Civil Service Commission* [2009] 173 Cal.App.4th 1295.) \*

## State Employment

### Government Employee Rights Act Abrogated States' Sovereign Immunity From Constitutional Claims

WHEN EMPLOYEES allege discriminatory conduct that violates the Fourteenth Amendment to the constitution, sovereign immunity does not shield states from claims under the Government Employee Rights Act, the Ninth Circuit Court of Appeals held in *State of Alaska v. EEOC*. The en banc decision vacates the prior decision by a three-judge panel reported in *CPER* No. 188, pp. 48-50.

#### Race and Sex Discrimination

Margaret Ward and Lydia Jones were assistants to the governor of Alaska. Ward reported that Jones had complained of sexual harassment. While an investigation was being conducted, Ward and Jones held a press conference criticizing the governor. They were placed on administrative leave while the investigation was completed, and were then fired based on disloyalty to the governor.

Ward and Jones filed complaints with the Equal Opportunity Employment Commission. Jones alleged sexual harassment and pay discrimination based on race and sex. Ward alleged pay discrimination on the basis of sex. Both alleged retaliation for reporting harassment. The EEOC classified the

case as falling under the GERA. The GERA was enacted in 1991 to eliminate an exemption from Title VII coverage for members of a state's elected officials' personal staff, immediate advisors, and policymaking assistants.

During a hearing before an administrative law judge, the governor's office challenged the discrimination charges under the Eleventh Amendment to the U.S. Constitution, which prohibits citizens from suing states in federal courts. The EEOC denied the sovereign immunity defense, and the governor's office appealed.

#### Intent to Abrogate

The Eleventh Amendment bars suits against a state by the state's own citizens unless the state consents, the Ninth Circuit Court observed. In 2002, the United States Supreme Court extended Eleventh Amendment immunity by holding that a citizen could not use a federal entity, such as the EEOC, to sue a state.

Congress can override state sovereign immunity, however, if it relies on proper constitutional authority. To determine whether Congress has abrogated sovereign immunity, the courts examine whether Congress unequivocally

expressed its intent to abrogate immunity and whether it used a valid grant of constitutional authority.

The court had no trouble finding that Congress intended to override sovereign immunity when it passed the GERA. The act states it was intended to give anti-discrimination rights to employees of elected state officials. It expressly covers state employees, the court observed, and, by reference to Title VII remedy provisions, gives them a

*Congress can override  
state sovereign  
immunity if it relies  
on proper constitutional  
authority.*

right to collect damages "payable by the employer." The court found the wording of the GERA more clearly intends to abrogate immunity than the language of either the Age Discrimination in Employment Act or the Family and Medical Leave Act, both of which the Supreme Court has found were intended to override sovereign immunity.

#### Fourteenth Amendment Authority

The Fourteenth Amendment bars the states from violating the rights of citizens or depriving them of due process or equal protection of the laws. It authorizes Congress to pass legislation to enforce these rights and to abrogate state sovereign immunity in that legislation, the court instructed.

Congress can enforce the Fourteenth Amendment by prohibiting and providing a remedy for conduct that violates the amendment. It can also enact a law that deters and remedies constitutional violations even if the legislation bars conduct that is not unconstitutional, the court explained, if the legislation is congruent and proportional to the harm that it seeks to prevent. The requirements of congruence and proportionality do not apply, however, when the legislation provides a remedy for unconstitutional conduct, the court advised. The court therefore examined whether Jones and Ward were alleging that Alaska violated the Fourteenth Amendment.

Both plaintiffs claimed that they were paid less than male coworkers, and Jones alleged she was paid less due to her race. Intentional race discrimina-

tion violates the equal protection clause unless narrowly tailored to serve a compelling state interest, and sex discrimination violates equal protection rights unless there is an exceedingly persuasive justification. Since Alaska had not provided a justification, the court held the pay discrimination claims alleged direct violations of the Fourteenth Amendment's equal protection clause.

Whether Jones' sexual harassment claim alleged a constitutional violation required greater discussion. Jones claimed she was the butt of sexual jokes and unwanted physical contact, and that she suffered retaliation when she filed a harassment complaint. The Supreme Court has not considered whether sexual harassment violates the equal protection clause, the Ninth Circuit court observed, but other courts have held that it does. The court agreed.

Because the suit was against the state, not just the man who had harassed Jones, the court examined whether the allegations were sufficient to make a claim that the state intentionally discriminated against her. It is not necessary to allege that the governor's office had a policy to promote sexual harassment, the court advised, as long as the office intentionally refused to redress the sexual harassment she reported. Since Jones alleged that the governor's office responded to her report by punishing her, rather than her harasser, she alleged facts that would constitute intentional sex discrimination by the state, the court held, even without evidence of a practice of retaliating against others who complained of harassment. The sexual harassment claim therefore alleged unconstitutional conduct.

*cper*

**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>

As the Fourteenth Amendment bars the states from violating the rights of their citizens, it protects First Amendment rights from state infringement. The court examined Ward's claim of retaliation to determine whether she stated sufficient facts for a First Amendment claim. Ward alleged that she was threatened with termination after she was interviewed at work about Jones' harassment claims. She then held a press conference. The governor's office placed her on leave while it investigated whether her statements were disloyal and then terminated her.

The First Amendment protects speech made as a citizen on a matter of public concern, and courts have held that harassment complaints can meet these criteria, the court observed. Because Ward's statements about sexual harassment in the governor's office were made publicly and could have affected the gubernatorial race, the court reasoned that the public interest in the allegations was plain. Ward's duties did not require her to report the conditions of Jones' employment or bring the harassment to the public's attention. The governor's office acknowledged that she was placed on leave in part because of her statements contrary to the governor's interest. The allegations therefore stated a First Amendment claim.

Since each of the plaintiffs' claims alleged actual violations of the Fourteenth Amendment, the state did not prevail on its defense of sovereign immunity. The court remanded the case to the EEOC.

Judge Diarmuid O'Scannlain concurred in part with the majority and dissented in part. He disagreed that Ward's speech was protected by the First Amendment since Ward was a policymaking employee of the governor's office. As a result, the GERA would constitute prophylactic legislation as applied to Ward's retaliation claim. He analyzed whether the GERA was enacted as a proportional and congruent response to a perceived harm and found

that it was not. Judge Sandra Ikuta dissented from the majority opinion, finding that the GERA did not explicitly state its intent to abrogate sovereign immunity and did not incorporate by reference any statutes that define a state as a permissible defendant. She found the incorporation of Title VII remedy provisions insufficiently clear to abrogate state sovereign immunity. (*State of Alaska v. EEOC* [9th Cir. 2009] 564 F.3d 1062.) \*

---

## Merit System Intended to Prevent Cronyism, Not Pay Disparity

IN A HARSHLY worded opinion, the Court of Appeal dismissed the contentions of the state attorneys union that their comparatively low pay violates the merit principle of the California Constitution and prevents the Attorney General from fulfilling his constitutional duty to adequately and uniformly enforce the law. The court in *California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment v. Schwarzenegger* affirmed the trial court's decision that the governor's dealings with the union did not amount to an unconstitutional application of the Dills Act to the attorneys' bargaining unit. (See story in *CPER* No. 188, pp. 44-46.) In a concurring opinion, one judge noted the irony of Attorney General Jerry Brown's negative assertions about the Dills Act, given his role as governor in its enactment. CASE is planning to ask the California Supreme Court to review the appellate court's decision.

### Dills Act Failure

Article VII of the California Constitution mandates that civil service employees be appointed and promoted based on merit. It also provides that the State Personnel Board "shall enforce the civil service statutes and...shall prescribe probationary periods and classifications,...and review disciplinary actions." The ballot argument in favor of the civil service initiative stated, "Having by constitutional mandate prohibited employment on any basis except merit and efficiency, thereby eliminating as far as possible the 'spoils system' of employment, the Legislature is given a free hand in setting up laws relating to personnel administration."

In 1977, the legislature enacted the law now known as the Dills Act to regulate labor relations between the state and its employees. In *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d

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

Now, firefighters have a new resource.

## Pocket Guide to the Firefighters Bill of Rights Act

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

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

The FBOR guide provides:

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

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

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

<http://cper.berkeley.edu>

168, CPER SRS 16, the Supreme Court held that “the collective bargaining process established by [the act] does not on its face conflict with the basic constitutional principles” of Article VII, although it theorized that “the product of the collective bargaining process may possibly in specific instances conflict with the merit principle of employment.” CASE seized on this theory for its attack on the Department of Personnel Administration, the governor’s bargaining representative. The union argued that the significant disparity between salaries paid to its members and the pay of other public employees performing similar work violates the constitutional merit principle.

CASE represents 3,500 employees in bargaining unit 2, including nearly 1,000 deputies in the A.G.’s office. It presented the court with evidence that collective bargaining has resulted in large pay differences between its members and attorneys in other public sector and non-profit employment. An expert asserted that the state is essentially an “employer of last resort” for attorneys because inexperienced attorneys in large counties like Los Angeles are paid about 48 percent more, and those in non-profits 60 percent more, than state attorneys with the same amount of experience. Senior attorneys in the educational, government, and nonprofit sectors make 85 percent to 165 percent more than state senior attorneys.

The A.G. filed a friend-of-the-court brief which asserted that low

compensation levels have made it difficult to attract new employees and have undermined his ability to abide by the merit principle. For example, the A.G. disclosed that his office hires entry-level attorneys at the mid-level salary range for the classification as long as the applicant can show that he or she previously earned or has been offered a job at that salary. The office seldom denies an annual merit increase to employees because the pay is so low that managers fear losing the employees they have.

*Bargaining agreements reached by DPA have ignored the classification system, CASE argued.*

The Deputy A.G. Level IV examination, which previously was a truly competitive promotional examination, also has lost its competitive nature due to the need to pay competitive salaries to employees.

CASE’s initial petition in the trial court was denied, with the comment that the union was essentially complaining about bad faith bargaining. The union amended its court petition, and it filed an unfair practice charge, which PERB denied for failure to state a prima facie case. The trial court denied the amended petition, and CASE appealed.

### Article VII Limited

CASE contended that the constitutional merit principle includes a pay scale that is consistent with the State Personnel Board’s classification system, and referred to the similar reasoning of the dissent in *Pacific Legal Foundation*. Bargaining agreements reached by DPA have ignored the classification system, CASE argued, pointing out that correctional officers often earn more when supervising inmates than the lawyers who successfully prosecuted the inmates.

The Court of Appeal found this interpretation of the constitution overly expansive and declined “to mediate salary disputes.” The court reviewed the history leading to the civil service initiative and the accompanying ballot information. Rather than find a link between salaries and merit inherent in Article VII, the court reiterated the basic teaching of the majority opinion in *Pacific Legal Foundation*, and concluded that “the ‘sole aim’ of the merit principle is to eliminate, as best as possible, political favoritism in the state civil service.” Not only could the court find no support in the text, ballot arguments, historical context, or court decisions for the union’s constitutional salary argument, but it expressed practical concerns:

Nor does the union define what the parameters of such a fluid merit principle would be or how, as a practical matter, such a slippery definition would not subvert the separation of powers and would not lurch us into the role of labor arbitrator.

The aim of Article VII was “not to equate merit with meritorious,” the court held.

### Like Pay Not Required

The union’s next argument raised a question left open in *Pacific Legal Foundation*. The Supreme Court did not decide whether the concept of like pay for like work, which is found in the Government Code, was constitutionally based. The dissenters in *Pacific Legal Foundation* asserted that the SPB’s constitutional responsibility to classify civil service positions was “inseparable” from its responsibility to ensure like pay for like work. For that reason, the dissenters concluded that the Dills Act conflicted with Article VII. The court castigated CASE for quoting the

dissent’s belief that the like pay principle is constitutionally based without acknowledging the implications of the dissent’s ultimate conclusion that collective bargaining for state employees would be unconstitutional.

The union’s reliance on a dissenting opinion in a Supreme Court case was not persuasive to the Court of Appeal. The court observed that the principle of like pay for like work is found in statutory law. No matter how laudable the principle, the court could not find any basis on which to conclude that Article VII requires the state to pay its attorneys at levels commensurate with attorneys in other public jurisdictions.

CASE also contended that the effects of low pay threatened to undermine the civil service system. It argued

that the pay disparity should be viewed in the same way as hiring contractors for work performed by civil service employees. While contracting out civil service work is not expressly banned by the California Constitution, the courts have interpreted Article VII to limit it because of the danger that the civil service would be diminished by routine contracts made solely on the basis of politics or favoritism.

The Court of Appeal, however, did not find the effects of low pay on the civil service analogous to the effects of contracting out work. “It is one thing to recognize that private contractors can elude the merit principle and quite another to micromanage the collective bargaining process and for a court to dictate how wages are to be calcu-

*cper*

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

**-- John Cage, composer**

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

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

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

## **Pocket Guide to the Basics of Labor Relations**

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

<http://cper.berkeley.edu>

lated,” the court said. The suggestion that low wages were causing the state to contract with outside counsel for expertise that its own attorneys lack did not persuade the court. The state has always maintained the right to hire contractors under some circumstances, it reminded CASE. And, while CASE contends the A.G. has difficulty hiring and keeping competent lawyers, the

*CASE also contended that the effects of low pay threatened to undermine the civil service system.*

A.G. still commends his lawyers for the quality of their work, the court remarked. There is insufficient evidence to support CASE’s claims and none to show that contracts with outside counsel have been politically motivated, the court said.

#### **A.G.’s Duty Fulfilled**

The court also turned aside CASE’s assertion that low pay had undermined the A.G.’s ability to meet his constitutional duty to adequately and uniformly enforce the law. The court characterized this contention as an effort to have the court staff the A.G.’s office with more experienced and talented lawyers. The court did not doubt the evidence of significant pay disparities. But, it observed, CASE cited no authority defining the

scope of the A.G.’s constitutional duty and provided no evidence that the A.G. has been unable to adequately enforce the law. Without evidence of a current, “catastrophic brain drain,” the court was unwilling to hold that CASE’s col-

---

### **Decertification Effort in Unit 21 Fails**

SERVICE EMPLOYEES International Union, Local 1000, succeeded in fending off a decertification attempt among education consultants and librarians in state bargaining unit 21. The Association of Education Consultants and Librarians wished to represent the 600-employee unit, contending that the interests of the small unit are ignored by Local 1000, which represents about 95,000 state employees in nine units.

The election was held in spite of Local 1000’s complaint that the association had misled unit 21 employees when gathering support for the decertification petition. Local 1000 contended that the association falsely claimed it would reduce dues and win increases in salaries that would reach parity with similar employees in other public jurisdictions, while those gains would never be made if represented by Local 1000.

lective negotiations with DPA amount to an unconstitutional application of the Dills Act. (*California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment v. Schwarzenegger* [2009] 175 Cal.App.4th 424.) \*

The Public Employment Relations Board rejected the contentions. It said that unit members would be able to judge the campaign propaganda.

The decertification attempt was rejected by 63 percent of the voters. After the election, the union pledged to continue its efforts to pass A.B. 755 (Brownley, D-Woodland Hills). The bill would limit to four years the amount of time a visiting education consultant from another public jurisdiction could work for state education entities like the California Department of Education or the Community College Chancellor’s Office. The union contends that the state borrows and retains workers to do the normal work of state employees, not just for purposes authorized by statute — training state employees or providing special expertise to meet a compelling state need. \*

---

### **Another Pension Initiative Circulating**

AFTER ONE pension reform initiative died, another has risen to take its place. The proponent of both, accountant Paul McCauley, was persuaded that his first proposal, aimed at renegotiating

pension agreements, would violate the United States Constitution. So, his next move is a way to recoup the money paid out to retired public employees — taxes.

In January, McCauley began circulating an initiative that would have amended the California Constitution to eliminate the protection for promised retirement benefits. The contract clause of the state constitution forbids the government from impairing an obligation of contract. California courts have interpreted the clause to prohibit changes that would decrease employee pension rights, since employees work for a public employer in return for the promised future compensation. Because of the contract clause, lawmakers and public employers must make any changes that would negatively affect employees applicable to prospective hires only. The effect is that any pension cutback, such as decreasing benefit formulas, increasing the age for a full benefit, or lengthening the time for vesting, has little fiscal impact in the near term. McCauley's first initiative would have amended the contract clause to allow renegotiation of pension agreements. He was advised, however, that California voters could not change the federal constitution, which would likely be applied to provide the same protection.

McCauley turned his attention to drafting an initiative statute that would impose what he termed a "confiscatory" tax on excessive pensions. The first \$40,000 of pension income would be exempt from taxes. The initiative would tax higher pension incomes at progressively higher rates to the point that the tax on the amount of pension income exceeding \$150,000 would be nearly 100 percent. A retiree with

a \$150,000 pension would enjoy less than two-thirds of his or her retirement benefits.

McCauley has until October 15, 2009, to collect 433,971 signatures.\*

---

## Fired Up Over Furloughs

MOST STATE employees will be furloughed three days a month for the next 12 months, and they are livid. A myriad of union challenges are in the courts, before the Public Employment Relations Board, or in arbitration. At least two unions were gauging support for a potential strike as *CPER* went to press.

### Third Furlough Day

On July 1, Governor Schwarzenegger issued an executive order adding an additional day of furlough each month to the two days mandated last December. (See story on the December order in *CPER* No. 194, pp. 40-43.) Citing the failure of budget-related propositions in the May special election, the state's inability to borrow money, and continued declining revenue, he declared an emergency and asserted it was necessary to furlough employees to improve the state's ability to pay for essential services that ensure Californians' health and safety. Regardless of whether employees are paid with moneys from the general fund or special fund, he ordered all employees placed on unpaid leave three days a month beginning in July. The three unpaid days off amount to a 14.2 percent pay reduction each month. For supervisors and managers, the Department of Personnel Administration was directed to implement an "equivalent furlough or salary reduction."

The governor's order stipulated that employees use accrued furlough days prior to using vacation or annual leave, personal holidays, holiday credits, compensatory time off, or personal leave plan credits. Unlike many other forms of leave, the furlough days have no cash value and become worthless when an employee resigns or retires.

Employees represented by SEIU Local 1000 will be taking the same number of furlough days as everyone else, despite their union having reached agreement last February to limit unpaid time off to one day a month. Legislative approval of the agreement stalled when Republicans delayed any action on the bill until after the special election. No action has been taken since then.

Limited exemptions to furloughs will be allowed. Highway patrol officers have not been furloughed, in part because they have a memorandum of understanding in effect until July 2010.

### Legal Limits

Even without exemptions, some employees will not be furloughed due to union legal battles. Although a court decided in February that the governor had authority to furlough most employees in an emergency, lawsuits will delay and may prohibit furloughs for employees of constitutional officers and the State

Compensation Insurance Fund. The governor argued successfully in the trial court that he had authority to furlough employees of constitutional officers, but the trial court's order was stayed on appeal. (See story in *CPER* No. 195, pp. 58-59.)

The California Association of Attorneys, Administrative Law Judges and Hearing Officers in State Employment successfully challenged furlough days for SCIF based on a statute that exempts it from hiring freezes and staff cutbacks. In May, CASE asked another

### *The state is refusing to arbitrate the PEGG furlough grievance.*

court to prohibit the governor from furloughing employees paid with special funds since those pay cuts will not save any general fund moneys. One ironic example is the furlough of administrative law judges paid with federal funds, who hear unemployment compensation appeals. The department had a caseload backlog before the furloughs began. The court will hear the CASE matter in early September. The California Association of Professional Scientists and the California State Law Enforcement Association have sued using the same theory for scientists and safety workers employed in special fund agencies.

In addition to a lawsuit pending in the appellate court, the Professional Engineers in California Government

has filed a grievance under its bargaining agreement challenging the furlough orders. The agreement, which expired in July 2008, still governs the employment relationship under the Dills Act. The union claims the contract forbids the furloughs. Although the judge in the original furlough case found that other union agreements allowed the governor to cut hours in an emergency, he did not cite any similar section of PEGG's contract. But the PEGG contract does incorporate two Government Code sections that the court ruled authorize the governor's furlough order. The state is refusing to arbitrate the furlough grievance, requiring PEGG to go to court to compel arbitration.

#### **Unrest in the Ranks**

Before the governor reached agreement with the legislature on a budget

fix, confusion erupted over whether the governor was threatening a 5 percent pay cut or fourth furlough day. DPA spokesperson Lynelle Jolley told *CPER* that the fourth furlough day was a "myth." Nevertheless, Local 1000's council decided to hold a strike authorization vote. "We'll do what is necessary to protect our pay, benefits and jobs," asserted Local 1000 President Yvonne Walker.

Other unions were monitoring member unrest. In mid-July, CDF Firefighters posted a website message trying to stop a rumor of a sickout by employees of the California Department of Forestry and Fire Protection. As *CPER* went to press, the leadership of the California Correctional Peace Officers Association was considering whether to conduct a strike vote. \*

---

### **Legislative Pay Cuts Coming...Later**

STATE WORKERS: legislators and elected officials will feel your pain — but not much, unless they are reelected in 2010. The California Citizens Compensation Commission cut both their salaries and their benefits 18 percent, but the salary decrease cannot be implemented during the current term of any official or legislator. Article III, Section 4, of the state Constitution provides that "salaries of elected state officers may not be reduced during their term of office."

The action will reduce legislative salaries to \$95,290 and the governor's salary to \$173,979, but will not have any effect until after the November 2010 elections, unless a vacancy in elected office is filled before then.

In the meantime, Senate President Pro Tem Darrell Steinberg requested a 5 percent reduction in his \$133,639 salary and asked fellow senators to voluntarily reduce their \$116,208 salaries by 5 percent. All but two senators complied.

Other lawmakers have volunteered for pay cuts ranging from 3 percent to 18 percent.

Elected officials earn between \$159,134 for Board of Equalization members and \$212,170 for the governor, who takes only \$1 of his salary. Of the others, only the insurance commission asked for an 18 percent cut in pay. One Board of Equalization member has voluntarily cut her pay by 5 percent. Controller John Chiang has promised to take the same 14.2 percent pay cut as the employees who work for him if the appellate court upholds a ruling that the governor has authority to furlough employees of state constitutional officers. (See story in *CPER* No. 195, pp. 58-59.) Those furloughs are on hold while the appeal is pending.

The commission also reduced the health insurance contributions, car allowance, and per diem pay of legislators by 18 percent effective December 7, 2009. On top of their salaries, state legislators are paid per diem allowances of \$173 when the legislature is in session, which can add up to \$35,000 annually. They also receive state-paid health insurance and car allowances. The commission cut per diem pay and car allowances despite a legal opinion from the Department of Personnel Administration that its jurisdiction extends only to health benefits and other insurance-type benefits. By statute, the per diem rate is set by the Victims Compensation and Government Claims Board, not the commission.

Legislative staff, which seemed immune from the budget crisis, will also see their salaries and health benefits pruned. The Senate voted to reduce by 5 percent the salaries of any Senate employees earning at least \$50,000 and pare down staff health benefits. The

cuts will trim \$3.5 million from the \$196 million general fund expenditures on legislative staff compensation. The Assembly, however, is not proposing staff compensation reductions, preferring to reduce its budget other ways. \*

---

## State Layoffs to Begin in September

ALTHOUGH ABOUT 28,000 surplus notices went out to state employees in February, none of those employees actually has been laid off. Those were warning notices to the least-senior employees that layoffs might be coming, depending on the state budget agreement that had not yet been reached in February. In response, those employees began applying for jobs with salaries not paid by the general fund.

The layoff notices that were issued to about 4,600 state workers in mid-May, however, will begin to take effect on September 15. An additional 2,000 notices issued in July cannot take effect for 120 days, while employees are allowed to search for— and be given preference for — open positions in other parts of state government. Some employees may be able to find special-fund positions. About 2,500 vacancies available to employees facing layoff were listed in mid-July. And even those who cannot find other employment may keep their jobs: The Department of Personnel Administra-

tion changed the rules in mid-July to allow departments to eliminate vacant budgeted positions to avoid layoffs. If the department can afford to eliminate a position — and lose the funding for it — the amount the department's budget is reduced alleviates the need to achieve budget savings by layoffs.

The California Department of Corrections and Rehabilitation has issued the great majority of layoff notices, as it employs two-thirds of the state workforce compensated with general funds. Of the first 4,600 layoff notices, 3,600 went to correctional department employees, including about 1,800 to correctional officers. As *CPER* went to press, CDCR's budget was reduced by \$1.4 billion as the result of the budget pact the governor reached in July. \*

## Higher Education

---

### Parking Location at CSU Campuses Not Within Scope of Representation

THE PUBLIC Employment Relations Board revisited the issue of the negotiability of employee parking location, on remand from *California Faculty Assn. v. Public Employment Relations Bd.* (2008) 160 Cal.App.4th 609, 189 CPER 51, and reached the same result. After its conclusion that employee parking location had no impact on the employment relationship was overturned, PERB found that the subject of parking location at the California State University did not meet other elements of the scope test laid out in *Trustees of the California State University* (2001) PERB Dec. No. 1451-H, 149 CPER 76. The California Faculty Association has petitioned the Court of Appeal to review the new PERB decision.

#### New Structure Off Limits

CSU has negotiated the cost of parking with CFA and the California State Employees Association, CSU Division, the former representative of four staff bargaining units. But the parties have not negotiated the issue of locations where employees are permitted to park or the allocation of the percentage of parking spaces available to employees. Provision of parking lots for students and employees is a self-sustaining function at CSU for which the university cannot use state funding.

In 2000-01, administrators at the Northridge and Sacramento CSU campuses decided that additional parking was needed and that fees would be raised to pay for the new parking structures. CFA and CSEA, however, would not reopen their contracts to negotiate a fee increase.

### *The Court of Appeal held that parking location did implicate the employment relationship.*

In September 2001, CSU Northridge increased parking fees for students and unrepresented employees, but not for CFA or CSEA unit members. In March 2003, the administration told the two unions that their unit members would not be permitted to park in the new structure. The structure, as well as 127 new spaces next to the structure, became available in September 2003.

In August 2002, a few days before the new CSU Sacramento structure opened, the president informed employees that the structure would be available only to students.

For at least a decade, faculty and staff had been allowed to use student parking areas. CFA and CSEA charged that the university had made an unlawful unilateral change in parking location policy. PERB dismissed the allegation on the grounds that the issue of parking location did not involve the employment relationship, the first criterion in deciding whether an issue is within the scope of bargaining. CFA appealed. The Court of Appeal held that parking location did implicate the employment relationship and remanded the case to PERB to complete its analysis of the remaining elements of the scope test.

#### Practice Altered

The memoranda of understanding between the parties did not address where faculty and staff were permitted to park. The board found, however, there had been a practice for at least a decade that allowed employees to park in student lots, although students could not park in employee lots. There was no dispute that this practice was altered when the university restricted parking in the new structures to students.

The board held that CSU Northridge had not provided adequate notice of the proposed change in policy, since the announcement came only a few days before the structure opened. At the Sacramento campus, however, the intention to make the new structure off limits to employees was announced six months before it was implemented. The unions did not demand to bargain the issue, and claimed that a demand to bargain would have been futile.

PERB found no evidence, however, that indicated the March 2003 announcement constituted a firm decision which would have been futile to try to change through negotiations.

### Student Interests Involved

Since the university had made a unilateral change in practice without adequate notice to the unions at the Northridge campus, the board confronted the question whether the university had a duty to bargain the subject of parking location. It decided parking location at CSU was not a mandatory subject of bargaining.

As the court already had ruled that parking location involved the employment relationship, the board examined the second prong of the scope test —

whether the subject “is of such concern to management and employees that conflict is likely to occur, and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict.”

The board found no history of conflict over the subject of parking location. Parking lots have changed frequently as buildings were constructed and student enrollment grew. Significant parking location changes occurred after the Northridge earthquake, but at no time have the unions filed grievances or unfair practice charges. The percentage of parking spaces allocated to employees and students also has changed without challenge. Neither of the parties has addressed these issues of allocation or

location of spaces in bargaining. As this was the first instance of conflict, the unions failed to meet this criterion of the scope test.

*The board held that bargaining was not appropriate because students and employees compete for parking.*

In addition, the board held that collective bargaining was not the appropriate means of resolving the dispute because students and employees compete directly for access to parking

*cper*

**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.

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>

### EQUITABLE TOLLING DOCTRINE IS AVAILABLE UNDER HEERA

The Public Employment Relations Board decided that the doctrine of equitable tolling can be applied under the Higher Education Employer-Employee Relations Act to toll the statute of limitations for an unfair practice charge while the same claim is pending in another dispute resolution procedure. In *Onkvisit v. Trustees of the California State University [San Jose]*, Onkvisit claimed he was demoted to associate professor in retaliation for his refusal to follow a directive, which he contended was in violation of HEERA. The university had demoted him when he refused an order to provide a student's grades to a committee that was convened when he would not allow the student to take a make-up exam. His demotion was effective in May 2005.

Onkvisit filed a grievance against the university, alleging procedural errors and abuse of procedures in the collective bargaining agreement. The union told Onkvisit in April 2006 that it would not arbitrate the case.

Onkvisit filed his unfair practice charge in May 2007. It was dismissed as untimely. He claimed that his charge was timely because it should have been equitably tolled while his demotion was on appeal to the State Personnel Board.

The board noted that HEERA, unlike the other six public employment relations laws, does not include a provision

for tolling the statute of limitations while a party pursues other remedies. No legislative history explains why HEERA has no tolling provision. Citing the rationale in *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 173 CPER 18, the board decided to apply equitable tolling in HEERA cases in order to have a coherent and harmonious system of public employment relations laws. The board noted the importance of allowing parties to resolve disputes using their own procedures.

Onkvisit's case did not qualify for equitable tolling, however. His appeal to the SPB did not meet the prerequisites for equitable tolling because an SPB hearing is not a negotiated procedure. Although the time limits are tolled during grievance processes if the grievance and unfair practice charge are based on the same dispute, Onkvisit's grievance was about procedural errors, not retaliation for protected activity. In addition, equitable tolling would not make the charge timely in this case because Onkvisit waited more than a year after the grievance process concluded to file his unfair practice charge. The board dismissed the charge. (*Onkvisit v. Trustees of the California State University [San Jose]* [5-29-09] PERB Dec. No. 2032-H.)

spaces. In fact, students have demanded more parking at both campuses. Since collective negotiations would address only the needs of the employees, it would not resolve the larger problem of sufficient access to parking for both students and employees.

The unions argued that parking location should be within the scope of representation since parking fees were found a mandatory subject of bargaining in *Regents of the University of California* (1983) PERB Dec. No. 356-H, 60 CPER 65. PERB disagreed that the *Regents* decision applied. Parking fees "have a direct pecuniary impact

on employees. Access restrictions for parking facilities...have no such direct impact." The facts in this case reflected no prior conflict with employees over parking location and involved students' interests, while there was no direct competition between employees and students in the parking fee dispute in *Regents*.

The effect of parking location decisions on students also weighed heavily in the board's determination that imposing an obligation to negotiate over parking locations would significantly abridge the university's exercise of managerial prerogatives essential to the employer's

mission. The board compared this case to *California State University* (1990) Dec. No. 799-H, 85 CPER 55, in which the board held that fee hikes for daily-use lots used by employees, students, and members of the public were not within the scope of bargaining. As in that case, an obligation to bargain parking location "would carry the bargaining process beyond the bargaining unit and into CSU's overall mission and its relationships with third parties."

The board turned aside CFA's contention that viewing students as third parties would absolve CSU from bargaining, since any subject — even

wages — can have an impact on students. The effects of raises on students are indirect, and students would not be properly identified as third parties, the board advised. Here, the students and employees are in direct competition for the same limited resource.

The board concluded that the Northridge and Sacramento administrations did not commit an unlawful unilateral change when they failed to negotiate the decision to restrict employee access to the new parking structures. The board found that the unions had failed to demand bargaining over the effects of the decision in Sacramento, although they had six months to negotiate before implementation of

the policy change. In fact, there was no evidence that the parking restrictions had any negative effect on employees.

Nor was there a violation of the duty to engage in effects bargaining in Northridge, even though the administration had given inadequate notice of the policy change. There was no evidence of a negative impact on employees. There were more spaces for everyone to park, and the same percentage of spaces was available to employees as before. The board dismissed the allegations of unlawful unilateral change. (*CSEA, CSU Div., and California Faculty Assn. v. Trustees of California State University* [4-15-09] PERB Dec. No. 1876a-H.) \*

faculty. Seventy percent of state funds and student fees is spent on employee compensation. As state tax receipts fell and the electorate looked ready to reject several budget measures in the May special election, President Yudof decided he needed authority to reduce payroll costs to enable the university to ride out a lengthy budget squeeze. He requested input from the academic senate, which represents the faculty in its role as participant in governing the university.

The academic senate was not happy. U.C. faculty salaries already lag behind the pay of faculty at peer universities and cause continual problems with recruitment and retention. Among many suggestions, the academic senate advised that furloughs and salary cuts “not reinforce existing patterns of inequalities,” and be implemented temporarily while other strategies are studied. The academic senate recommended that senior administrators follow the lead of other universities and take cuts in supplemental compensation like incentive pay before forcing cuts on lower-paid employees, pointing out that “administrative compensation has grown excessively vis-à-vis faculty and staff salaries.”

In June, the university calculated its state funding would be cut by \$813 million. To close some of this gap, Yudof's initial plan was to reduce salaries, furlough employees, or implement a plan of mixed salary cuts and furloughs that would decrease pay by 8 percent for all workers. He requested feedback from all sectors of employees. He got it.

---

## U.C. Implements Sliding Scale Furloughs While Employees Point to Reserves

LIKE OTHER California public entities, the University of California is forcing furloughs on unrepresented employees. But in contrast to other employers, U.C. is imposing smaller cuts to the work and salaries of its lowest-paid employees than it is to those at the top of the scale. An initial plan for uniform furloughs or paycuts across the board underwent major changes after U.C. President Mark Yudof gathered feedback from employees. The University Professional and Technical Employees led several unions charging that the university has unrestricted reserves which could be used to avoid furloughs. Despite these claims, the U.C. regents

amended a standing order to allow the president to implement furloughs or salary reductions if the regents declare an extreme financial emergency, which it promptly did. The regents also approved Yudof's plan to furlough employees on a sliding scale from 7 to 26 days off, depending on salary level and whether they are faculty or staff.

### Furloughs Necessary?

State funding comprises less than 20 percent of U.C.'s operating budget, which includes grant-funded research and medical center operations. But state funding pays for most of the teaching and core research performed by

Some questioned the need for furloughs. One retired physics professor who has studied the budget extensively for years, Charles Schwartz, asserted that the university had at least \$13 billion in unrestricted funds in 2007-08, only \$5 billion of which came from state funds and student fees. His calculations showed \$347 million in private gifts, grants, contracts, and endowment funds that was unrestricted. The university

*The academic senate suggested that furloughs and salary cuts 'not reinforce existing patterns of inequalities.'*

had \$14 million in unrestricted reserves and \$1.7 billion in unrestricted funds from other sources. In addition, there were unrestricted revenues from sales and services at the medical centers, auxiliary enterprises like parking, and educational activities like CPER.

Among the unions, UPTE in particular objected to any compensation cuts, contending that proposed decreases in state funding amounted to less than 3 percent of the university's budget. They asserted U.C. has nearly \$9 billion in donations and other unrestricted funds that could be used to bridge a shortfall of less than \$800 million.

Without specifying any amounts, U.C. countered that most of its funds

from non-state sources are restricted and that only 2 percent of donations are unrestricted. In a letter to Schwartz, Vice President for Budget and Capital Resources Patrick Lenz did not address the availability of unrestricted funds except those received from sales and services. Revenues from sales and services are of limited use in funding other sectors of university operations, he explained, because the medical centers, auxiliary enterprises, and educational services needed the funds for their own operations. In response to UPTE's claims, the university issued the following explanation on July 14:

Endowments are restricted in purpose and in annual payout. And what are typically referred to as UC "reserves" actually are committed to particular purposes....[T]he University's Annual Financial Report displays (for 2007-08) a figure of \$5.38 billion in... 'unrestricted net assets.' Under generally accepted accounting principles, net assets that are not subject to externally imposed restrictions governing their use must be classified as "unrestricted." But in reality these funds are typically dedicated to particular purposes: They may support specific academic and research initiatives, or be dedicated to construction projects that are only partially completed, or be dedicated to future repayment of principal and interest on bonds, or represent funds functioning as endowments dedicated to specific uses....

#### **Feedback Heeded**

Many responses to Yudof asked for changes to the 8 percent plan. The majority of employees did not favor salary reductions without furlough days. They feared that reduced salaries

would not rise again for years. They also lobbied for greater cuts for higher-paid employees. Employees at the five medical centers protested that cuts or furloughs at the hospitals would affect patient care.

UPTE strenuously objected to imposing salary reductions or furloughs on the 90 percent of its unit members who are paid from contracts and grants rather than state funds. A majority of campus academic senates concurred that cuts to those funded by contracts and grants would likely reduce U.C.'s future funding. Contractual conditions often disallow carryover of funds or require return of unused funds or sometimes repayment of all monies if stipends are paid only partially. The faculty body also recommended that furloughs not affect student employees, graduate students, post-doctoral fellows, or health science trainees due to their very low salaries and the educational nature of their appointments.

The academic senate suggested that no furlough days be taken on paid holidays, preferring instead to make the effects of diminished state funding visible to the public. It also stressed that each campus was unique and should be granted flexibility in how to impose furloughs or salary reductions.

The final plan incorporated many academic senate and employee suggestions. Executive employees already agreed to take a 5 percent pay cut for the 2009-10 year. Beginning September 1, for 12 months all employees will take furloughs except student employees, postdoctoral employees, employees

cper

**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>

whose positions are funded entirely by contracts and grants, foreign national employees hired under H-visas, Lawrence Berkeley National Laboratory employees funded by the Department of Energy, and those whose participation in furloughs is precluded by law. Employees covered by collective bargaining agreements will be covered by the plan, subject to bargaining with unions.

The number of days off varies with income. Pay of faculty and staff earning the same salary will be reduced the same percentage, although faculty will be furloughed fewer days because they work a shorter year. Those earning under \$40,000 will take furloughs that cause a 4 percent reduction in pay. There are seven salary tiers with progressively more furlough days. In the middle,

those with salaries between \$60,000 and \$90,000, will take 18 furlough days and suffer a 7 percent cut in pay. At the top, those who make more than \$240,000 must take 26 furlough days for a salary cut of 10 percent. However, the 285 employees in the senior management group will be restricted to only 10 furlough days, regardless of the percentage of their salary reduction.

For the most part, employees will be able to choose furlough days with a supervisor's approval, but some days may be mandated if a campus decides to close entirely on specified days. Regardless of when the furlough days are taken, an employee's salary will be reduced by the same percentage each month for 12 months.

Some employees already have volunteered to reduce their work time and salaries under a Staff and Academic Reduction in Time program. Those whose START percentage is equal to or greater than their furlough time will not be affected by the furlough plan until the START program ends on June 30, 2010.

### **Fiscal Emergency Declared**

Despite questions about financial alternatives and a letter from hundreds of prominent U.C. scientists warning of a "brain drain" and a blow to the California economy, the regents adopted Yudof's recommendations. They issued a declaration of fiscal emergency that allows the president to implement furloughs and generally to suspend university or regent policies,

consistent with legal restrictions. The president also will be allowed to change the plan in accordance with specified principles.

In addition to approving the furlough plan, the regents amended the U.C. Retirement Plan to allow employees who are furloughed to continue to receive the same level of service credit as before the furloughs and to have covered compensation calculated at pre-furlough amounts so that retirement benefits will not be affected.

The plan will affect about 108,000 of U.C.'s 135,000 employees. It will save about \$184 million in general funds and another \$331 million in other funds. The non-state-funded operations can use the savings to pay increased utility and benefit costs, to mitigate campus budget reductions, and to make retirement plan contributions that will begin in April 2010.

The furlough plan addresses only 25 percent of the state funding reduction. Another 25 percent will be filled by a 9.5 percent student fee increase approved in May. The university is planning to save another \$100 million by refinancing debt and instituting administrative cost controls. The remaining \$300 million shortfall will be cut from campus budgets, which already have been reducing expenditures. Campuses have laid off 724 staff, and anticipate another 10 to 15 percent reductions in positions. Faculty recruitment has been cut by at least half on most campuses, even though enrollment is growing. Class sizes are increasing. Several campuses already have cut programs.

After the regents' meeting, President Yudof and the chair of the board of regents announced formation of a Commission on the Future of U.C., which will "reexamine everything from future funding to delivery of educa-

tional services and the size and shape of the institution." The university, they say, cannot maintain its excellence in the face of cumulative and substantial budget cuts. \*

---

## Modest Gains in U.C. Bargaining Reversed as State Funding Goes South

ECONOMIC proposals the University of California made to employee unions several months ago have disappeared as state revenues shrink. Citing cuts to its state funding, U.C. is claiming it faces a fiscal emergency. The university received about 18 percent, \$3.274 billion, of its operating budget from the state in 2007-08. While that money is less than one-fifth of the total operating budget, it constitutes about 60 percent of U.C.'s general operating funds, which support its academic programs. Other operating funds come from the medical centers and contracts and grants for research.

Last October, the university's state funding was cut approximately \$49 million. In combination with mandatory cost increases like health benefits and utilities, U.C. was \$149 million underfunded. Union contracts that already had locked in raises for 2008-09 provided compensation increases which range from 1.5 percent to 3 percent for non-medical workers and higher for those employed at the five U.C. medical centers. Out of luck were clerical and administrative employees represented by the Coalition of University Employees, librarians represented by

University Council-American Federation of Teachers, and researchers and technical employees represented by the University Professional and Technical Employees.

Despite months of bargaining, U.C. was offering no increases in compensation. The prospect of raises dimmed further in late February when the legislature reached an agreement for the remainder of 2008-09 and 2009-10, cutting U.C.'s funding \$115 million over the 18-month period.

UC-AFT was demanding raises that would have made U.C. librarians' salaries comparable to librarian salaries at California State University. Unable to reach agreement on wages and professional development, UC-AFT and the university declared impasse. The parties are still in mediation.

The UPTTE local union in Berkeley became incensed by the "goose-egg" offer and university pleas of poverty. Pointing to U.C. Berkeley's substantial unrestricted reserve of \$300 million and its increased success in fundraising, the Berkeley local questioned how the campus could threaten layoffs on the basis of a \$70 million budget gap. Besides,

argued the union, nearly 90 percent of researchers and technical employees are paid with money from grants, not state funding. The union announced a strike on May 6. A day before the job action, U.C. offered a 1 percent increase for each of two years, but notified an UPTE bargaining team member from Berkeley of its intention to dismiss him. The next day, during the strike, the university agreed to reinstate the employee with no discipline. Two weeks later,

*A day before the strike, U.C. offered a 1 percent increase for each of two years.*

U.C. offered an additional .25 percent increase with further raises contingent on state funding. The proposed guaranteed increases totaled 2.25 percent over three years. UPTE contends that U.C. must have more money for raises, since it has handed out recent increases in executive compensation.

Just before the UPTE strike, the university offered CUE a package proposal that included a sliding-scale pay increase upon ratification, with 3 percent raises for lowest-paid employees and 1 percent raises for highest-paid workers. Similar wage boosts would have occurred in 2009-10. Unhappy with several aspects of the package, CUE rejected the offer.

The likelihood of any raises has plummeted along with state revenues.

In June, after the failure of budget-related propositions in the May 19 special election, the university calculated that proposed legislative cuts to its funding were \$800 million, and its state funding for 2009-10 will be 20 percent less than in 2007-08. The UAW, which had just begun to negotiate for 2009-10 raises, decided to preserve employee benefits by extending its contract to October 2010. U.C. withdrew its wage offers to CUE and UPTE, and announced a fur-

lough plan to save \$184 million in general funds. (See story on pp. 58-59)

UPTE claims U.C. acted illegally when it withdrew the wage proposal, especially since the union had until June 30 to accept it. The union contends that this is one of many instances of bad faith bargaining over the past year, including a span of 10 months when U.C. presented no counterproposals. As CPER went to press, UPTE members statewide authorized a strike. \*

---

## CSUEU Agrees to Extend Contract, Others at Impasse

IN A MOVE TO LOCK in benefits during the ongoing budget crises, the California State University Employees Union agreed to a two-year extension of its contract with CSU. The union represents 16,000 non-academic employees in four bargaining units. Still negotiating with the university on 2008-09 compensation are the California Faculty Association, the State Employee Trades Council-United, the State University Police Association, and the United Auto Workers, which represents academic student employees. SETC, CFA, and UAW are at impasse in bargaining with the university.

### CSUEU Extension

CSUEU's collective bargaining agreement was not set to expire until June 30, 2009, but the union entered reopener negotiations last fall when it became clear that state funding for the university would fall short of the

amount promised to CSU in a Higher Education Compact the governor agreed to in 2004. The compact guaranteed increases in funding for 2008-09, but the actual funding for the year was \$97.6 million less than the university received in 2007-08.

Things are now worse. In October, Governor Schwarzenegger asked, and CSU Chancellor Reed agreed, to cut an additional \$31.3 million from the 2008-09 budget. CSU demanded reopener negotiations to revisit salary agreements that were contingent on the university receiving the amount of funding in the compact. In December, the Union of American Physicians and Dentists agreed to forgo a 3 percent raise that CSU previously had agreed to pay in 2008-09. CSU demanded that CSUEU give up a 3.942 percent general salary increase as well as market, step, and equity boosts that were contingent on state funding. The university proposed

that CFA agree to negotiate away a series of raises totaling 5 percent in 2008-09, and 6 percent in 2009-10.

CSUEU recognized the dire budget situation but balked at an agreement to cancel 2008-09 raises in an attempt to gain a "me too" clause that would give its unit members the same compensation increases that any other union manages to negotiate for 2008-09. Negotiations dragged out until May 5, when the union agreed to extend its contract until June 30, 2011. The union did not prevail in its attempt to win a "me-too" clause but is free to demand negotiations on salaries with 30 days notice.

CSUEU explained to members that it agreed to the extension to preserve benefits which it feared would be attacked in budget battles over the next two years. In addition, parking fees cannot increase unless there are raises. Some compensation provisions that are not funded from systemwide dollars will remain in effect. In particular, employees will be able to demand in-range progression increases for equity or retention reasons or when the skills needed in their jobs change.

The parties also set up a labor-management committee on compensation strategy. The union hopes to rectify issues such as salary lags and salary inversions, as well as plan joint efforts to garner adequate funding from the state legislature.

### Impasse Procedures

While CSUEU agreed to a contract extension, three other unions reached impasse in negotiations. CFA

is in reopener negotiations for 2008-09. SETC-United and UAW Local 4123 are bargaining with CSU for successor agreements to contracts that expired in July 2008.

UAW is again trying to win a fee waiver provision for academic student employees, such as teaching assistants and graduate assistants. (See story in *CPER* No. 194, pp. 54-56.) In a previous factfinding report, the factfinder declined to recommend that the university waive fees for any classes taken by the academic student employees despite the fact that other union contracts provide for fee waivers for two classes or six units per semester. (See story in *CPER* No. 185, pp. 83-85.)

SETC and CSU entered mediation at odds over 12 articles of the contract. In mediation sessions in January and February, the mediator helped the parties reach tentative agreements on six

articles. Still at issue were contracting out, training and development, apprenticeship, salary and benefits, and duration of the new contract. Factfinding hearings began in late June.

CFA and CSU entered mediation far apart on compensation proposals. The faculty union was insisting on the 3 percent general salary increase for 2008-09, although it was willing to delay it three months to save \$10 million. CFA still demanded the scheduled 2 percent increase on June 30, 2009, as well as equity and step increases. CSU was willing to implement only a merit pay program for full professors who are no longer eligible for step increases. CFA asked to go to binding arbitration on the salary issues, but CSU would agree only to the non-binding factfinding process outlined in the Higher Education Employer-Employee Relations Act. Factfinding begins this month. \*

---

## CSU: Layoffs or Furloughs?

FACED WITH receiving \$584 million less than it received in 2008-09, the California State University is offering its unions a choice to negotiate furloughs or face layoffs sufficient to save \$275 million. CSU plans to furlough 5,000 non-represented, executive, and management employees two days a month starting August 1. Public safety employees will be exempt from layoffs and furloughs. The California State University Employees Union has agreed to two days of furlough per month for the

next year, while the California Faculty Association is pushing tax legislation to boost funding for higher education.

### \$500 Million Less Than in 1999

Since voters rejected Propositions 1D and 1E in the special election, the university has been pummeled with legislative proposals to cut its state funding up to 20 percent. The state provides about 70 percent of CSU's funding. In mid-June, CSU estimated that it was likely to receive \$584 million

less than it received in 2008-09, even after a 10 percent student fee increase for this coming year. Since personnel costs comprise nearly 86 percent of the university's operating budget, the savings could not be achieved without affecting employees. Administrators presented unions with a choice: negotiate the terms of a two-day-a-month furlough, or prepare for layoffs.

CSU will not guarantee that accepting furloughs will prevent layoffs, however. As a result, not all unions have opted for furlough negotiations. The Academic Professionals of California, which represents 2,300 student services employees, was potentially facing the layoff of about 300 unit members. After conducting a poll of its members, APC decided to negotiate the furlough option. Members of CSUEU, which represents about 16,000 staff employees, voted for the same option. CSU warned that union that 2,000 layoffs and non-reappointment of 3,000 temporary workers would occur without furloughs. The Union of American Physicians and Dentists also agreed to furloughs for 117 doctors.

CSUEU reached an agreement with CSA that provides for 24 days of furlough over 11 months ending June 30, 2010. The president of each campus will whether to designate particular days when the campus will be closed. For floating days, employees in the four bargaining units CSUEU represents will nominate favored days, but the campus president will have final say in whether the employee can take a furlough on the chosen day. When

too many employees nominate a particular day, the president will prioritize requests on the basis of seniority. No matter how many furlough days an employee takes in a month, the monthly pay will remain the same; each paycheck for a 12-month, full-time employee will be reduced by 10 percent. Benefits will not be affected by furloughs.

Special provisions apply to part-time employees and those on alternate work schedules. Exempt employees will lose their exempt status in any week they take a furlough day, but the agreement states the parties' intention that no exempt employee will be required to work more than 32 hours in a furlough week. CSU hopes to avoid overtime pay. It also pledged not to increase the hours of student assistants or administrators performing bargaining unit work.

Other CSU employee unions will not negotiate furloughs. The executive board of the State Employee Trades Council-United advocated that its members vote for layoffs. With no guarantee that accepting furloughs would prevent layoffs, the board is not willing to enter a one-year contract for furloughs, even though the university estimates it will lay off 121 trades employees.

The California Faculty Association proceeded very deliberately, trying to force CSU to lay out its complete plan for achieving \$584 million in savings before it agreed to discuss furloughs. CFA fears that furloughs would be difficult to implement for faculty when classes meet five days a week. But CSU has said it would need to lay off 9,000

lecturers and other faculty, on top of the loss of about 1,000 lecturers this past spring. CFA delayed polling of its members, attempting to obtain more information. The union finally began a poll in mid-July without a recommendation from the executive board, but with the warning that Chancellor Reed would not commit to decrease faculty workload or refrain from faculty layoffs. As *CPER* went to press, the faculty voted to negotiate furloughs, but 79 percent of the voters expressed no confidence in Reed's leadership.

CFA also initiated a strategy to secure a funding source for higher education. The union supports A.B. 656, authored by Assembly Member Alberto Torrico (D-Fremont). The bill would enact a 9.9 percent tax on oil and natural gas extracted within the state for a special California Higher Education Fund. Sixty percent of the revenues would go to CSU, 30 percent to the University of California, and 10 percent to the California Community Colleges, which already receive some funding under Proposition 98.

As the board of trustees' July 21 meeting approached, the university indicated it was planning to close the remainder of the budget gap with a 20 percent student fee increase, reduced enrollments in the winter and spring terms, and allocation of \$183 million less revenue to the campuses. CSU already froze vice president and chancellor salaries, and imposed a hiring freeze on non-essential positions. \*

## Discrimination

---

### City Wrong to Discard Test Results Where White Firefighters Tested Better

THE U.S. SUPREME COURT ruled that New Haven, Connecticut, did not have a “strong basis in evidence” to throw out test results for firefighters seeking promotion where white candidates tested better than minority candidates. In *Ricci v. DeStefano*, the court found that the city’s refusal to certify the test results amounted to race discrimination in violation of Title VII of the

*The city’s race-based decision would violate Title VII absent a valid defense.*

Civil Rights Act of 1964. The court split five to four along now familiar lines, with Justice Anthony Kennedy writing the majority opinion in which he was joined by Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito. Justice Ruth Bader Ginsburg wrote the dissent, in which she was joined by Justices Stephen Breyer, John Paul Stevens, and David Souter.

In 2003, firefighters in New Haven took examinations to qualify for

promotion to the rank of lieutenant or captain. Of the 34 candidates who passed the lieutenant exam, 25 were white, 6 were black, and 3 were Hispanic. Under the “rule of three” used by the city, the successful candidate would be chosen from among the top three scorers. The top 10 candidates who were eligible for promotion all were white. Of the 41 candidates who took the captain exam, there were 25 whites, 8 blacks, and 3 Hispanics. Nine were eligible for promotion — 7 whites and 2 Hispanics.

The city decided to throw out the test results, citing their racial disparity and its potential disparate impact liability under Title VII. Some of the white and Hispanic firefighters who passed the exams sued, alleging that discarding the test results discriminated against them based on race in violation of Title VII. The trial court dismissed the case, and the Second Circuit, in a unanimous decision, affirmed summarily.

#### Majority Opinion

Justice Kennedy began with the premise that the city’s express, race-based decision to throw out the test would violate Title VII absent a valid defense. He framed the issue to be

decided as “whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination.”

For guidance, Kennedy looked to cases decided under the Fourteenth Amendment’s Equal Protection Clause. In those cases, “the Court held that certain government actions to remedy past racial discrimination — actions that are themselves based on race — are constitutional only where there is a ‘strong basis in evidence’ that the remedial actions were necessary,” he wrote. The court has recognized “the tension between eliminating segregation and discrimination on the one hand and doing away with all gov-

*The city failed to show strong evidence that it would face disparate-impact liability.*

ernmentally imposed discrimination based on race on the other.” “The same interests are at work in the interplay between the disparate-treatment and disparate-impact provisions of Title VII,” he continued. In other words, the court will “allow violations of one in the name of compliance with the other only in certain, narrow circumstances.”

In this case, the city failed to show it had a strong basis in evidence to conclude it would be found liable

for disparate-impact discrimination if it certified the exam results, according to the majority, even though the racial adverse impact was significant and the city faced a prima facie case of disparate-impact liability. But, wrote Kennedy, a prima facie case of disparate-impact liability is not the same as a strong basis in evidence that the city would have been liable under Title VII had it certified the results. This is because the city only could be liable if the exams were not job related and consistent with business necessity, or if there was an equally valid, less-discriminatory alternative the city refused to adopt.

*Ginsburg said the majority left out 'important parts of the story.'*

"There is no genuine dispute that the examinations were job-related and consistent with business necessity," said the majority. The written questions were devised "after painstaking analyses of the captain and lieutenant positions," and the only witness who reviewed the examinations in detail found the questions for both exams were relevant.

Regarding alternatives, the city argued that weighting the oral and written portions of the test differently or modifying the rule of three would have produced less discriminatory

results. The majority rejected both proposals, finding that taking either of those actions after the fact could well have violated Title VII's prohibition of altering or adjusting test results on the basis of race. The court also rejected the third alternative put forth by the city — that it could have used practical tests that evaluated candidates' behavior in typical job tasks. It found that the city "cannot create a genuine issue of fact based on a few stray (and contradictory) statements," especially when the strong-basis-in-evidence standard applies.

"Fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions," admonished the majority, ruling in favor of the white and Hispanic firefighters.

#### Dissenting Opinion

In her dissent, Justice Ginsburg criticized the majority for leaving out "important parts of the story." In 1972, when Congress extended Title VII to public employment, she observed, racial discrimination in municipal employment was even more pervasive than in the private sector. A report by the U.S. Commission on Civil Rights, considered by Congress, singled out police and fire departments for having barriers to employment greater than in any other area of state or local employment, with African-Americans holding almost no positions in the officer ranks. New Haven's fire department was no exception, said Ginsburg, and it is

against the city's history of "entrenched inequality" that the promotion process should be assessed.

Ginsburg found fault with the city's failure to consider whether the promotion exams would fairly measure the applicants' abilities to perform the job. Rather, it adhered to the testing regime set out in its labor agreement with the union, requiring that a written exam account for 60 percent of the total score, and an oral exam for the other 40 percent.

Ginsburg disagreed emphatically with the majority's application of the "strong basis in evidence" standard. She wrote:

Neither Congress' enactments nor this Court's Title VII precedents... offer even a hint of "conflict" between an employer's obligations under the statute's disparate-treatment and disparate-impact provisions. Standing on an equal footing, these twin pillars of Title VII advance the same objectives: ending workplace discrimination and promoting genuine equal opportunity.

Yet the Court today sets at odds the statute's core directives. When an employer changes an employment practice in an effort to comply with Title VII's disparate-impact provision, the Court reasons, it acts "because of race" — something Title VII's disparate-treatment provision generally forbids.

Employers who reject selection criteria that disadvantages minority groups due to reasonable doubts about their reliability "can hardly be held to have engaged in discrimination 'be-

# **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>

cause of' race," Ginsburg concluded. "An employer who jettisons a selection device when its disproportionate racial impact becomes apparent does not violate Title VII's disparate-treatment bar automatically or at all," she reasoned. The key condition is that the employer must have "good cause to believe the device would not withstand examination for business necessity."

Ginsburg found the majority's reliance on the equal protection doctrine "of limited utility," because it only prohibits intentional discrimination, not disparate-impact discrimination. Further, she explained, application of the strong-basis-in-evidence standard is at odds with prior decisions that view voluntary compliance as the preferred means of achieving Title VII's

objectives. Moreover, she said, the majority decision makes it likely that an employer who discards a dubious selection process will be found liable for disparate-treatment discrimination. She explained that under this new standard, "the employer must make a 'strong' showing that (1) its selection method was 'not job related and consistent with business necessity,' or (2) that it refused to adopt 'an equally valid less-discriminatory alternative.'" "It is hard to see how these requirements differ from demanding that an employer establish 'a provable, actual violation' *against itself*," wrote Ginsburg. (*Ricci v. DeStefano* [6-29-09] \_\_\_U.S.\_\_\_, 129 S.Ct. 2658, 2009 DJDAR 9567.)

in part on age. FBL argued that the reassignment was part of a general restructuring and that Gross' skills were better suited to his new position.

The district court instructed the jury to return a verdict in Gross' favor if he proved that age was a "motivating factor," meaning that it played a part or a role in FBL's decision to demote him. It also instructed that FBL must prevail if it proved that it would have demoted Gross regardless of his age. The jury found in favor of Gross, and FBL appealed.

The Eighth Circuit Court of Appeals reversed, concluding that the district court had incorrectly instructed the jury under the standard set out in *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 81 CPER 72, a Title VII case. The appellate court ruled that, according to its interpretation of *Price Waterhouse*, Gross needed to present direct evidence that his age actually motivated the adverse action before the burden of proof shifted to FBL. Absent any direct evidence, the circuit court reasoned that the mixed-motive jury instruction should not have been given.

### Supreme Court Decision

Justice Clarence Thomas authored the majority opinion, in which he was joined by Chief Justice John Roberts, and Justices Antonin Scalia, Anthony Kennedy, and Samuel Alito. Although the legal issue before the court was whether a plaintiff must present direct evidence of discrimination to obtain a mixed-motive instruction in

## Supreme Court Raises the Bar for Proving Age Discrimination

THE U.S. SUPREME COURT, by a vote of five to four, has just made it much more difficult to establish age discrimination in employment. In *Gross v. FBL Financial Services, Inc.*, the majority held that the Age Discrimination in Employment Act does not authorize a "mixed-motives" claim. That means the employee must prove by direct evidence that the employer would not have taken the adverse action "but-for" the employee's age. It is no longer possible for a plaintiff to prevail by proving that age was one of the factors affecting the decision.

In a blistering dissent, Justice John Paul Stevens accused the majority of ignoring 20 years of precedent and engaging in "an unabashed display of judicial lawmaking."

Jack Gross, at age 54, was reassigned from claims administration director to claims project coordinator. Many of his job responsibilities were transferred to a newly created position that was given to an employee in her early forties. Gross sued, alleging that his transfer violated the ADEA. At trial, Gross introduced evidence that his reassignment was based at least

a non-Title VII discrimination case, Thomas found that the court “must first determine whether the burden of persuasion ever shifts to the party defending an alleged mixed-motives discrimination claim brought under the ADEA.” “We hold that it does not,” Thomas wrote.

The Supreme Court, in its 1989 *Price Waterhouse* decision, instructed that, under Title VII, once a plaintiff proves that membership in a protected

*Thomas: “This Court has never held that this burden-shifting framework applies to ADEA claims.”*

class played a motivating part in the adverse employment action, the burden shifts to the employer to prove that it would have made the same decision even if it had not taken that impermissible consideration into account. That ruling is of no import here, wrote Thomas. “This Court has never held that this burden-shifting framework applies to ADEA claims. And, we decline to do so now.” Thomas noted that, after *Price Waterhouse* was decided, Congress amended Title VII to explicitly authorize mixed-motive cases, but did not add the same language to the ADEA. “We cannot ignore Congress’ decision to amend Title VII’s relevant provisions but not

make similar changes to the ADEA,” he wrote. “When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.”

In fact, concluded Thomas, the text of the ADEA does not authorize mixed-motives discrimination claims at all. The statute provides that “it shall be unlawful for an employer...to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual’s age.” Thomas reasoned that the ordinary meaning of the words “because of” is that “age was the ‘reason’ that the employer decided to act.” Therefore, he continued, “to establish a disparate-treatment claim under the plain language of the ADEA..., a plaintiff must prove that age was the ‘but-for’ cause of the employer’s adverse decision,” either by direct or circumstantial evidence.

In a provocative paragraph, the majority rejected Gross’ contention that the court’s interpretation of the ADEA is controlled by *Price Waterhouse*, adding that “it is far from clear that the Court would have the same approach were it to consider the question today in the first instance.” “Whatever the deficiencies of *Price Waterhouse* in retrospect, it has become evident in the years since that case was decided that its burden-shifting framework is difficult to apply,” wrote Thomas. “For example, in cases tried to a jury, courts have found it particularly difficult

to craft an instruction to explain its burden-shifting framework.... Thus, even if *Price Waterhouse* was doctrinally sound, the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims.”

Justices Ruth Bader Ginsburg, David Souter, and Stephen Breyer joined in Justice Stevens’ dissent. Stevens wrote that “the most natural reading” of the statute’s “because of” language is that it “prohibits adverse employment actions motivated in whole or in part by the age of the employee.” He wrote:

The “but-for” causation standard endorsed by the Court today was advanced in Justice Kennedy’s dissenting opinion in *Price Waterhouse*...a case construing identical language in Title VII...Not only did the Court reject the but-for standard in that case, but so too did Congress when it amended Title VII in 1991. Given this unambiguous history, it is particularly inappropriate for the Court, on its own initiative, to adopt an interpretation of the causation requirement in the ADEA that differs from the established reading of Title VII. I disagree not only with the Court’s interpretation of the statute, but also with its decision to engage in unnecessary lawmaking. I would simply answer the question presented by the certiorari petition and hold that a plaintiff need not present direct evidence of age discrimination to obtain a mixed-motives instruction.

Stevens was particularly outraged by the fact that the question of whether a mixed-motives instruction is ever appropriate in an ADEA case was raised for the first time in FBL’s brief on the

merits when it asked the Court to “overrule *Price Waterhouse* with respect to its application to the ADEA.” This was not the question the court granted certiorari to decide, noted Stevens.

In addition to what Stevens called “the majority’s inattention to prudential Court practices,” he likewise was critical of its “utter disregard for our precedent and Congress’ intent.” Stevens explained that the court in *Price Waterhouse* concluded that the “because of” words in Title VII meant “that gender must be irrelevant to employment decisions.” “As we made clear, when an employer considers both gender and legitimate factors at the time of making a decision, that decision was ‘because of’ sex.” The court in *Price Waterhouse* held that “to

construe the words ‘because of’ as colloquial shorthand for ‘but-for’ causation is to misunderstand them.”

“That the Court is construing the ADEA rather than Title VII does not justify this departure from precedent,” Stevens chastised. The relevant language in the two statutes is identical, he said, and the court has long recognized that the interpretation of Title VII’s language applies “with equal force in the context of age discrimination,” because the substantive provisions of the ADEA were incorporated wholesale from Title VII.

The dissent rejected the contention that the court can interpret the identical language in the two statutes differently because Congress amended Title VII in 1991, without amend-

ing the ADEA at the same time. To the contrary, argued Stevens, those amendments “ratified *Price Waterhouse*’s interpretation of the plaintiff’s burden of proof, rejecting the dissent’s suggestion in that case that ‘but-for’ causation was the proper standard.”

The dissent also challenged the majority’s reasoning that if the 1991 amendments do not apply to the ADEA, *Price Waterhouse* likewise must not apply because Congress effectively codified *Price Waterhouse*’s holding in the amendments.” “This does not follow,” Stevens said. Congress’ endorsement of the court’s interpretation of the “because of” language in *Price Waterhouse* “provides all the more reason to adhere to that decision’s motivating-factor test,” said Stevens.

cper

Facts do not cease to exist because they are ignored.

-- Aldous Huxley, writer

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

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

## Pocket Guide to the Unfair Practices: California Public Sector

By Carol Vendrillo and Eric Borgerson • 4th edition (2006) • \$15

<http://cper.berkeley.edu>

Stevens also noted that the court's decision will further complicate cases where a plaintiff pursues both Title VII and ADEA claims.

"The Court's resurrection of the but-for causation standard is unwarranted," Stevens concluded. "*Price Waterhouse* repudiated that standard 20 years ago, and Congress' response to our decision further militates against the crabbed interpretation the Court adopts today. The answer to the question the Court has elected to take up — whether a mixed-motives jury instruction is ever proper in an ADEA case — is plainly yes."

In his opinion, Stevens also took up the issue the majority declined to address and explained that, in his opinion, a plaintiff need not present direct evidence of age discrimination to obtain a mixed-motives instruction.

Reaction to the court's decision has been strong and swift. Representative George Miller (D-CA), chairman of the House Education and Labor Committee, said that he will hold hearings regarding the decision. Senator Patrick Leahy, chairman of the Senate Judiciary Committee, likened it to the 2007 decision by the same five justices in the *Lilly Ledbetter* case blocking claims of pay discrimination. (See *CPER* No. 185, pp. 61-66.) Congress subsequently reversed the *Ledbetter* decision this year. (See *CPER* No. 195, pp. 13-17.) The *New York Times* editorial board, along with many others, has called for Congress to do the same here. (See *The New York Times*, July 7,

2009, editorial page, asking Congress to "undo the damage" caused by the court's "dreadful ruling weakening the legal protection against age discrimina-

tion.") (*Gross v. FBL Financial Services, Inc.* [6-18-09] Supreme Ct. 08-441, \_\_\_U.S.\_\_\_, 2009 DJDAR 8888.)

---

## Pension Plan That Gives Less Service Credit for Pregnancy Leave Upheld

A PENSION plan that pays lower retirement benefits to women who took pregnancy leave before enactment of the Pregnancy Discrimination Act of 1979 than it pays coworkers who took disability leave during the same time does not violate Title VII of the Civil Rights Act. The ruling by the U.S. Supreme Court overrules a decision by the Ninth Circuit. In *AT&T Corp. v. Hulteen*, the majority reasoned that, because the pension plan was seniority based and this treatment of pregnancy leave was not illegal at the time, the failure to give post-PDA credit for pre-PDA pregnancy leave was not discriminatory.

Before 1977, AT&T employees on disability leave got full service credit for the time they were absent. Those who took "personal leave" were limited to 30 days, and pregnancy leave was treated as personal leave. In 1977, AT&T altered the policy to allow for up to six weeks disability benefits and service credit for pregnancy. According to the court's decision in *General Electric Co. v. Gilbert* (1976) 429 U.S. 125, a disability plan that excluded pregnancy was not sex-based discrimination prohibited by Title VII.

In response to *Gilbert*, Congress amended Title VII and passed the PDA to establish that treating pregnancy-related conditions less favorably than other medical conditions was prohibited discrimination. When the PDA took effect, AT&T changed its plan so that service credit for pregnancy leave would be provided on the same basis as that taken for other disabilities. It did not, however, retroactively adjust the service credit of women who had taken pregnancy leave before then.

Several women whose pension payments were affected because they did not get service credit for pregnancy leave before 1979 sued AT&T, claiming that its failure to recalculate their benefits was a current violation of Title VII.

The majority disagreed, relying on Sec. 703(h) of the act, which states: "It shall not be an unlawful employment practice for an employer to apply different standards of compensation... pursuant to a bona fide...seniority system provided that such differences are not the result of an intention to discriminate because of...sex." AT&T's seniority system was bona fide, said the court, because it had no discrimi-

natory terms. It relied on *Teamsters v. United States* (1977) 431 U.S. 324, where the Supreme Court found that a pre-Title VII seniority system which disproportionately advantaged white employees was a bona fide system because it contained no discriminatory terms and the discrimination resulted from the employer's hiring practices and job assignments. Further, said the court, since *Gilbert* made it clear that the system was not discriminatory at the time, there could be no showing of an intent to *discriminate*. And, it continued, Congress did not make the PDA retroactive.

*The system was not discriminatory at the time so there was no intent to discriminate.*

In her dissenting opinion, in which she was joined by Justice Stephen Breyer, Justice Ruth Bader Ginsburg agreed that the PDA “does not require redress for past discrimination.” It does, however, “protect women, from and after April 1979, when the Act became fully effective, against repetition or continuation of pregnancy-based disadvantageous treatment,” she wrote.

“Congress interred *Gilbert* more than 30 years ago,” she noted, “but the Court today allows that wrong deci-

sion still to hold sway.” The women who brought this case “will receive, for the rest of their lives, lower pension benefits than colleagues who worked for AT&T no longer than they did. They will experience this discrimination not simply because of the adverse action to which they were subjected pre-PDA. Rather, they are harmed today because AT&T has refused fully to heed the PDA's core command: Hereafter, for ‘all employment-related purposes,’ disadvantageous treatment

‘on the basis of pregnancy, childbirth, or related medical conditions’ must cease,” she wrote.

Justice Ginsburg “would hold that AT&T committed a current violation of Title VII when, post-PDA, it did not totally discontinue reliance upon a pension calculation premised on the notion that pregnancy-based classifications display no gender bias.” (*AT&T Corp. v. Hulteen* [5-18-09] Supreme Ct. 07-543, \_\_\_\_ U.S.\_\_\_\_, 2009 DJDAR 7019.)

---

## No ‘Discriminatory Animus’ Where HIV-Positive Instructor Not Allowed to Teach Full Load

IN A DECISION worth reading for the clarity of its analysis, the Second District Court of Appeal ruled that an HIV-positive instructor failed to prove disability discrimination in violation of California's Fair Employment and Housing Act. In *Scotch v. Art Institute of California-Orange County, Inc.*, the court concluded that the employee failed to show that the employer's stated reason for refusing to assign him a full caseload was false or pretextual and that there was a causal link between his disability and the adverse decision. Most interesting is the court's reasoning underlying its ruling that an employee can prevail on a claim of failure to engage in the interactive process, in the face of a finding that the employer did in fact agree to reasonably accommodate his

disability. In this case, the court found that the employer's failure to engage in the interactive process inflicted no remedial injury on the employee.

### Background

In 2003, Carmine Scotch taught a number of courses in different departments. The following year, AIC was concerned that it would lose accreditation if it continued to allow faculty members without advanced degrees, like Scotch, to teach upper-division courses. AIC urged Scotch to pursue an advanced degree, offering to pay tuition and write letters of recommendation, but he never enrolled in a master's degree program.

When Scotch received a poor performance review in March, 2006, he told the academic director that his

poor job performance and unwillingness to pursue a master's degree were linked to health issues and a "long-term illness." Shortly thereafter, he told Jane Marchman, the director of human resources, he was HIV-positive.

In early 2006, when AIC's enrollment declined, it cancelled many courses, terminated some faculty, and changed some full-time instructors to part-time. To keep its accreditation, AIC's plan was to retain as full-time faculty those teachers with master's degrees. Scotch was told that he could not teach an upper-division course until he got a master's degree. As a result, his reduced courseload made him a part-time employee.

Ineligible for medical benefits and life insurance, Scotch resigned in July 2006, and filed a lawsuit alleging disability discrimination, failure to reasonably accommodate and engage in the interactive process, and retaliation. When the trial court dismissed the case, Scotch appealed.

### Court of Appeal Decision

The Court of Appeal fully described the law as it applies to claims of disability discrimination. The opinion is a virtual textbook on current Fair Employment and Housing Act law in this area.

Relying on the test set out in *Kelly v. Stamps.com, Inc.* (2005) 135 Cal. App.4th 1088, 177 CPER 63, the court determined that, where the employer is claiming nondiscriminatory reasons for the discharge, the employer satisfies its burden by presenting evidence

that those nondiscriminatory reasons were, more likely than not, the basis of the termination. The burden then shifts to the employee to present sufficient evidence that intentional discrimination occurred.

Here, AIC met its burden, concluded the court. It presented evidence that Scotch had a poor performance review, did not have a master's degree, and never enrolled in a master's program. It showed that its accreditation standards required all faculty members teaching upper-division courses to

*Scotch failed to demonstrate that the employer's stated reasons were pretextual.*

have graduate degrees. Evidence was also presented that enrollment was declining and it had to cut courses. As a result, 10 full-time faculty members became part-time instructors and seven others were terminated for failing to enroll in a master's program. Once courses were assigned to faculty with advanced degrees, the remaining lower-division courses were not enough to give Scotch a full-time load.

Although Scotch showed that he was disabled and had suffered an adverse employment action, he could not show he was otherwise qualified for the full-time assignment because he

had not enrolled in a master's program. He also failed to demonstrate that the employer's stated reasons were pretextual. He presented no evidence that those who imposed the master's degree requirement had any knowledge of his HIV status. Marchman testified that she told no one, and there is no evidence that she bore discriminatory animus against him, said the court.

The court found that AIC's offer that Scotch enroll in a three-, rather than a two-, year master's degree program and the offer to substitute the master's program for professional development requirements was a reasonable accommodation. It was "a modification or adjustment to the workplace" that would have enabled him to perform the essential functions of the job. For that reason, it met the definition of reasonable accommodation as set out in *Nadaf-Rabrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952.

Scotch, however, claimed that AIC should have given him priority in course assignments so that he would retain his full-time status and keep his medical benefits. "His proposed accommodation is not reasonable under the definition we have adopted because it is not a 'modification or adjustment to the workplace' necessary to enable him to perform the essential functions of his position," said the court. "Scotch explained the limitations created by his disability were that he needed to avoid stress and he could not pursue a master's degree while teaching full time and fulfilling other professional

development requirements — limitations addressed by AIC's accommodation."

Scotch also claimed AIC failed to engage in an "interactive process" in order to identify a reasonable accommodation as required by the FEHA. The court recognized that "the interactive process imposes burdens on both the employer and the employee." In a situation like this, where the disability is not obvious to the employer, the employee must initiate the process by identifying the disability and resulting limitations, and suggesting reasonable accommodations.

Here, the court found that Scotch initiated the process when he made AIC aware of his long-term illness and the need to avoid stress. AIC responded by not scheduling morning classes for Scotch, proposing that he enroll in a three-year master's program, and agreeing that the time spent in the master's program would satisfy professional development requirements.

But, Scotch claimed, and the court agreed, that AIC should have scheduled another meeting before it reduced his courseload and that the accommodation it proposed was meaningless because AIC knew when it made the offer that Scotch would be reduced to part-time status before he could enroll in a master's program.

Given these findings, the question before the court centered on whether AIC's failure to enter into the interactive process was material. The court consulted three somewhat conflicting Court of Appeals' decisions

for guidance, *Wysinger v. Automobile Club of Southern California* (2007) 157, Cal.App.4th 413, *Nadof-Rabov*, and *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 176 CPER 67. Because none of these cases addressed the situation presented here, where the initial accommodation proposed was reasonable but the employer failed to continue the interactive process, it synthesized the three decisions and set out its own analysis of the law:

To prevail on a claim [under the FEHA] for failure to engage in the interactive process, an employee must identify a reasonable accommodation that would have been available at the time the interactive process should have occurred. An employee cannot necessarily be expected to identify and request all possible accommodations during the interactive process itself because employees do not have at their disposal the extensive information concerning possible alternative positions or possible accommodations which employers have. However, ... once the parties have engaged in the litigation process, to prevail, the employee must be able to identify an available accommodation the interactive process should have produced.

Here the court found, although the parties have extensively litigated the case, the only accommodation Scotch could identify was priority in assignment of lower-division courses, which was not reasonable. Therefore, it concluded, Scotch suffered no remedial injury.

Scotch's claim of retaliation met a similar fate. While Scotch established

a prima facie case of retaliation, he could not prove intentional retaliation to refute AIC's showing of a legitimate, nondiscriminatory reason for the adverse employment action. (*Scotch v. Art Institute of California-Orange County Inc.* [2009] 173 Cal.App.4th 986.)

## News From PERB

---

### PERB Chair Tiffany Rystrom Loses Battle with Cancer

TIFFANY RYSTROM, chair of the Public Employment Relations Board, died June 9 at her home in Sausalito. Rystrom, 66, was appointed by Governor Arnold Schwarzenegger to the five-member PERB Board in August 2007 and appointed chair in February 2009.

"Tiffany Rystrom capped a distinguished career by channeling her passion for the law into public service," said Governor Schwarzenegger. "As a member of the Public Employment Relations Board, and most recently its chair, she raised the bar on quality, integrity and consistency with the law for every decision. I was proud to have her serve in my administration. The prayers of both Maria and I go out to Tiffany's family and her partner Angela."

As PERB chair, she instituted changes designed to increase efficiency and issued several important published decisions, including:

- *Escondido Union Elementary School Dist.* (2009) PERB Dec. No. 2019: Rystrom eloquently presented an in-depth legal analysis of the PERB board's standard for retaliation, and decided in favor of the union.

- *Region 4 Court Interpreter Employment Relations Committee and the*

*Superior Court of California, County of Riverside* (2008) PERB Dec. No. 1987-1: In the first PERB decision to interpret the Trial Court Interpreter Employment and Labor Relations Act, Rystrom ruled that the act does not grant collective bargaining rights to independent contractor interpreters.

- *State of California* (2007) PERB Order No. Ad-367-S: In the PERB board's first ruling on card check after the adoption of card check regulations in 2007, Rystrom found PERB case law does not require it to accept signature revocation cards in a card check proceeding.

Rystrom began her legal career in 1977, when she was admitted to the California State Bar. Fresh out of San Francisco's Golden Gate Law School, Rystrom accepted a one-year appointment as judicial clerk to the presiding justice and two other justices of the California First District Court of Appeal. Rystrom then served a year as deputy district attorney in Marin County, followed by four years in the Office of the California Attorney General. Starting in the Criminal Division and within a year moving to the Civil Division, Rystrom pursued civil rights and personal injury lawsuits

against the state at both the trial and appellate level.

Beginning private practice in 1983, Rystrom achieved a seven-figure settlement for neighborhood residents subjected to sulfur pollution from an oil refinery. She also successfully represented former California State Controller Kenneth Cory when Sacramento County sought to condemn his home without fair compensation.

In 2001, Rystrom joined San Francisco-based Carroll, Burdick, McDonough, where she worked until appointed to PERB in 2007. "Tiffany Rystrom was a gifted attorney of the utmost integrity. We, her friends, loved her for her loyalty, thoughtfulness, charm, grace, and generosity of spirit, and were awed by her personal courage," Joyce Kennard, Associate Justice, California Supreme Court, said.

Rystrom is survived by her longtime life partner Angela Bradstreet, California labor commissioner. \*

## Public Sector Arbitration

---

### Grievant Entitled to Supplemental Benefits, But Monetary Recovery Limited to 60 Days

ARBITRATOR Paul Staudohar faced a contract interpretation dispute that involved the refusal by the Alameda County Housing Authority to pay a sick leave supplement to a housing specialist who was injured while inspecting property in Fremont.

The memorandum between the authority and SEIU, Local 1021, provides for supplemental industrial sick leave benefits. The amount of the payment is equal to the difference between 80 percent of the employee's normal salary and the amount of any workers' compensation temporary disability payment "to which such employee is entitled during such incapacity, but not for a period exceeding nine months from the date of sickness or injury resulting in such incapacity." Application of the nine-month duration language was at the center of the dispute.

The grievant was injured in 2000, when she slipped on wet stairs and injured her ankles. She returned to work in a light-duty capacity, but was still troubled by her injury. Her physician placed her on medical leave for two weeks, and she received supplemental industrial disability pay for that period.

She returned to full-time duty but continued to have problems with her

ankles. After consulting a number of doctors and medical examiners, she underwent surgery on her right ankle on November 9, 2006, and was off work until May 30, 2007. During this period of leave, she was not paid by the authority.

The union argued that, because the contract states the employee is "entitled to receive" the supplemental benefit, payment is mandatory. And, in the union's view, the grievant's period of incapacity from her original 2000 injury was from November 2006 through April 2007 because she received workers' compensation benefits during that seven-month period. SEIU also made the point that the grievant should not be punished because doctors and others delayed surgery for so long.

The housing authority pointed to what it viewed as the plain and unambiguous language of the contract, which states that the supplemental benefits are provided for a limited period and end "nine months *from* the date of sickness or injury resulting in such incapacity." By this language, the employer asserted, the parties intended that the supplemental benefits would end at a specified date. Therefore, it reasoned, because her injury occurred in February 2000, the nine-month

eligibility period ended in November of that year. When the grievant took a leave of absence in November 2006, the authority said, she was not eligible for supplemental benefits because the injury to her ankles occurred in 2000.

Arbitrator Staudohar focused his attention on the language of the parties' agreement. First, he said, the grievant was receiving workers' compensation benefits between November 2006 and May 2007 during her incapacity. "This is one of the conditions necessary for payment of supplemental benefits," he said. Then, he turned to the language limiting the supplemental pay to nine months from the date of the injury. This language has remained the same since 1995, Staudohar said, except that the period of entitlement has been reduced from 12 months to 9. He found no past practice to aid his interpretation because there was no evidence that a situation like the grievant's had ever arisen.

The arbitrator then considered why the delay between the injury and the surgery had occurred. He determined that the delay was caused by a disagreement between the authority's doctor and the grievant's. "There is no evidence of a break in causation," he said. "That is, the denial and delays the Grievant faced flowed from the original injury, and there was no fault on her part that the surgery for this injury did not take place sooner than 2006."

Noting that the authority would have paid the supplemental benefit if

cper

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.

This Guide is designed for day-to-day use by anyone involved in a grievance arbitration, interest arbitration, or factfinding case.

## Pocket Guide to Public Sector Arbitration: California

By Bonnie Bogue and Frank Silver • 3rd edition (2004) • \$12

<http://cper.berkeley.edu>

the grievant had undergone surgery right after she injured her ankle, Staudohar found that the employer's position "seems to defeat the purpose of the benefit," which is to supplement the workers' compensation payment and make the employee whole during incapacitation. The authority's position also penalizes the grievant "for unfortunate circumstances beyond her control." Therefore, Staudohar found the grievant was entitled to the supplemental industrial sick leave benefits for the period of incapacitation that followed her surgery.

But, the arbitrator concluded, the parties' agreement limits monetary claims to 60 days. It states: "In no event shall any grievance include a claim for money relief for more than a sixty day period." "This language unequivocally restricts the extent of the remedy," Arbitrator Staudohar said, and awarded

the grievant payment of the supplement benefit for sixty days only. (*SEIU, Loc. 1021, and Alameda County Housing Authority* 1-23-09). Representatives: for the union Alan Crowley [Weinberg, Roger & Rosenfeld]; for the authority Cepideh Roufougar [Liebert Cassidy Whitmore.)\*

# Arbitration Log

---

## • Tenure

**Hartnell College Faculty Assn. and Hartnell College Community College Dist.** (12-1-08; 20 pp.) *Representatives:* Michelle Welsh (Stoner Welsh & Schmidt) for the association; William Brown for the district. *Arbitrator:* William Riker.

*Issue:* Was the decision to deny tenure to the grievant reasonable?

*District's position:* (1) The decision of the board of trustees to accept the unanimous recommendation of the college tenure review committee to deny the grievant tenure did not violate the parties' contract, the Education Code, or college policies and procedures.

(2) Arbitral review of academic tenure decisions should not involve "second guessing" the tenure committee's recommendations.

(3) The grievant was provided adequate notice of the tenure decision as demanded by the terms of the contract and the Education Code.

*Association's position:* (1) The district failed to provide customary notice or a statement of the reasons for its decision.

(2) The tenure review committee considered the grievant's performance of duties outside of his job description.

(3) The tenure decision was based on inaccurate, incomplete, and unauthorized information or unsupported opinions in violation of Education Code Sec. 87663.

(4) The grievant's employment record and personnel file are void of any deficiencies, and there is no evidence that he was ever placed on a remediation plan.

*Arbitrator's decision:* The decision to deny tenure was unreasonable.

*Arbitrator's reasoning:* (1) The decision to deny the grievant tenure was based on inaccurate and incomplete information, as demonstrated through the testimony of witnesses.

(2) The grievant's peer evaluator and the director of counseling observed him and submitted written reports regarding the quality of his performance. The former director said she would recommend the grievant for any position and felt he would be a tremendous asset to any organization.

(3) The unanimous approval rating from the grievant's supervisors and peer evaluations are in direct conflict with the findings of the tenure review committee. The decision to deny tenure is inconsistent with the grievant's work history. He never received a remediation plan citing areas of needed improvement.

(4) The grievant was not evaluated based on his full-time job as a matriculation counselor, which he performed in a competent and professional manner.

(5) The grievant was not afforded proper notice of the tenure decision, which would have allowed him to prepare a timely and adequate defense.

(6) The grievant shall be given full tenure and awarded back pay and benefits.

*(Binding Grievance Arbitration)*

## • Job abandonment

**Central Contra Costa County Transit Authority and Amalgamated Transit Union, Loc. 1605** (7-31-08; 20 pp.) *Representatives:* William Flynn (Neyhart Anderson Freitas Flynn & Grosboll) for the employee organization; Patrick Glenn (Hanson Bridgett Marcus Vlahos & Rudy) for the transit authority. *Arbitrator:* Bonnie Bogue.

*Issue:* Did the grievant abandon her job as a bus operator?

*Employer's position:* (1) The transit authority promulgated the job abandonment policy as a proper exercise of its managerial prerogative, and it does not contradict any term of the parties' MOU. The grievant was given personal notice of the job abandonment policy when she received the employee handbook.

(2) By failing to maintain the required certifications, the grievant demonstrated a clear intent to abandon her job.

(3) The grievant did not put forth a good faith effort to protect her job.

(4) The union failed to establish that in all other cases of job abandonment, the transit authority has offered employees an opportunity to provide an explanation prior to the separation being processed.

(5) Even if the grievant did not intend to abandon her job, the transit authority had just cause to terminate the grievant for violation of the attendance standards.

*Employee organization's position:* (1) When the grievant came to work with an expired DOT medical certification, she told the dispatcher she had a doctor's appointment the following week, and he told her that was "okay." This was the first time the grievant had to renew her certifications.

(2) The job abandonment rule has never been enforced and, in all other cases, the transit authority gave the employee an opportunity to respond before being terminated.

(3) The transit authority did not raise the issue of the grievant's attendance problems until the arbitration.

(4) There is no evidence that the grievant voluntarily resigned from her position, and there is no just cause to support the termination.

*Arbitrator's decision:* The grievance was denied.

*Arbitrator's reasoning:* (1) Because the transit authority viewed the grievant's

separation as a voluntary resignation, it did not provide her with a notice of intent to terminate or provide the procedural rights called for by the contract or under constitutional principles.

(2) The grievant's separation from employment was a reasonable application of the long-standing job abandonment policy. The union was aware the rule had been applied before, and it has not negotiated an MOU provision requiring the employer to follow specific procedures when invoking the rule.

(3) There have been instances where employees on approved medical leave failed to produce a doctor's verification to extend the leave beyond the return-to-work date, and they were given an opportunity to seek an extension before being separated. But that limited past practice cannot be read into the written rule.

(4) Although the grievant did not form the intent to abandon her job, the

rule does not require a conscious decision and defines job abandonment as being "absent without explanation for three or more days." Her absence was created by her own failure to follow the conditions of continued employment of which she had clear, repeated notice.

(5) The evidence shows that the grievant had a fundamental disregard for her obligations as a bus operator, which constituted willful job abandonment. Application of the job abandonment policy was not a subterfuge for discipline. Job abandonment is deemed to be a willful or voluntary resignation, and constitutional principles of due process do not apply.

*(Binding Grievance Arbitration)*

#### • Discipline

**Appellant and Los Angeles County Department of Human Resources, Office of Public Safety (4-12-08; 8 pp.)** *Representatives:* Saku Ethir (Lackie

*cper*

**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 explained. 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.

This Guide is designed for day-to-day use by anyone involved in a grievance arbitration, interest arbitration, or factfinding case.

## **Pocket Guide to Public Sector Arbitration: California**

By Bonnie Bogue and Frank Silver • 3rd edition (2004) • \$12

<http://cper.berkeley.edu>

& Dammeier) for the appellant; Rodney Collins (civil service advocate) for the department. *Hearing officer*: Philip Tamoush.

*Issue*: Was the 10-day suspension of the police officer for just cause?

*Employer's position*: (1) The appellant operated his vehicle at excess speed through an intersection, against a red light, and without proper regard for safety.

(2) A video of the event shows the appellant traveling at 78 miles an hour and reveals a pedestrian at the end of the crosswalk immediately in front of the appellant's vehicle.

(3) The appellant previously was suspended without pay for the initiation of an out-of-policy pursuit.

*Appellant's position*: (1) The investigation did not occur until more than four months after the incident, explaining why the appellant had no recollection of some of the details.

(2) There is no absolute evidence of the speed the appellant was driving.

(3) The appellant was responding to a high-priority call for assistance.

(4) When the appellant continued through the intersection, there was no oncoming traffic and it was 2 a.m.

*Hearing officer's recommendation*: The suspension of the appellant should stand.

*Hearing officer's reasoning*: (1) The evidence clearly demonstrates that the appellant sped through an intersection without slowing down. There were pedestrians in the crosswalk. The investigation was complete and handled fairly.

(2) The appellant's conduct did not conform to basic "common sense"

policies regarding police officers, even in responding to a critical call.

(3) Based on the appellant's prior discipline, he is somewhat reckless in his approach to driving. The 10-day suspension will serve to correct his future behavior before a person is injured or equipment damaged.

(4) The appellant's otherwise good performance record was considered and caused the department not to impose more severe discipline.

*(Civil Service Commission Hearing)*

# Public Employment Relations Board

## Orders & Decisions

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

### Dills Act Cases

#### Unfair Practice Rulings

##### No equitable tolling during impasse mediation: State of California (DPA).

*(California Correctional Peace Officers Assn. v. State of California [Dept. of Personnel Administration], No. 2013-S, 3-13-09, 6 pp. + 10 pp. B.A. dec. By Member Calvillo, with Chair Rystrom and Member Wesley.)*

**Holding:** Impasse mediation did not toll the statute of limitations for a claim of failure to provide information, and mediation communications could not be used as evidence in support of a prima facie case.

**Case summary:** The union filed a charge on December 28, 2007, alleging that DPA failed to provide information the union had requested in April during bargaining for a successor MOU. On May 10, DPA asked PERB to make a finding of impasse before it responded to the union's information request. DPA did not provide any response to the 21-item request until June 25, 2007, while the parties were in mediation. The union alleged that DPA's eight-page response was inadequate and incomplete, but did not claim that it communicated its dissatisfaction with the response to DPA, except through the mediator.

The union charged that DPA's failure to provide information before requesting an impasse determination on May 10 was an unfair practice. The board agent dismissed

this claim as untimely because it occurred more than seven months before the charge was filed.

The board agent dismissed the charge because the union had not stated a prima facie case since there was no admissible evidence that it told DPA it viewed the response as inadequate. Because mediator communications are excluded from evidence under the Evidence Code, communications about the inadequacy of the response made through the mediator could not support the union's charge. For the same reason, the board agent dismissed as untimely the union's charge that DPA's June 25 response was inadequate. Allegations that the union did not know until August that DPA would not provide more information were based on communications through the mediator.

On appeal, the union argued that the statute of limitations should be equitably tolled during the impasse mediation. Board precedent provides that participation in a non-binding dispute resolution procedure tolls the statute of limitations if the procedure is used "to resolve the same dispute that is the subject of the unfair practice charge." Here, mediation of a bargaining impasse was not the same dispute as an alleged failure to respond to an information request. Participation in mediation did not provide notice to DPA of the impending unfair practice charge concerning the response to the information request. The mediation did not meet other criteria for equitable tolling established in *Long Beach Community College Dist.* (2009) PERB Dec. No. 2002.

##### State's failure to request second impasse determination not an unfair practice: State of California (DPA).

*(California Correctional Peace Officers Assn. v. State of California [Dept. of Personnel Administration], No. 2017-S, 4-1-09; 3 pp. + 18 pp. B.A. dec. By Member McKeag, with Members Wesley and Neuwald.)*

**Holding:** Bad faith bargaining allegations were time-barred. The state cannot be compelled to seek a second determination of impasse when negotiations stall during mediation.

**Case summary:** DPA and CCPOA began bargaining in April 2006. CCPOA made information requests in June, August, September, and November 2006. CCPOA alleged

DPA did not respond to the requests before asking for a determination of impasse in May 2007. PERB certified the impasse over CCPOA's objections and appointed a mediator. In August, CCPOA ceased participating in mediation. In September, DPA conveyed a last, best, and final offer of a three-year MOU, which the union rejected. DPA implemented the LBFO.

In a charge filed on September 25, 2007, CCPOA contended that DPA engaged in surface bargaining because it failed to provide information. These charges were time-barred. The continuing violation doctrine did not apply since no new request occurred during the six months preceding the charge. PERB rejected the union's argument that the deadlines for filing a charge should be equitably tolled during mediation.

A charge that DPA discriminated and retaliated against the union based on protected activity contained no factual allegations to support an inference that the state's actions were caused by any protected activity. The discrimination and retaliation charge was dismissed.

PERB also dismissed an allegation that DPA had implemented its offer without a determination of impasse. PERB had made a determination of impasse before mediation, and the statute does not require a second finding of impasse before implementation.

PERB did issue a complaint based on CCPOA's allegation that implementation for a three-year contract denies representation rights of bargaining unit employees and the union's right to represent the unit. The complaint also contained an allegation that DPA's discontinuation of union vice-presidents' leave was not comprehended within the last, best, and final offer.

**Refusal to pay increased mileage reimbursement rate not an unfair practice: State of California (DPA).**

*(California Correctional Peace Officers Assn. v. State of California [Dept. of Personnel Administration], No. 2018-S, 4-7-09; 5 pp. By Member McKeag, with Members Wesley and Dowdin Calvillo.)*

**Holding:** The state's refusal to increase the mileage reimbursement rate in accordance with the state's last, best,

and final offer was not an unfair practice since the legislature had not approved the expenditure of funds.

**Case summary:** The parties' expired MOU had required the state to reimburse employees for business-related travel at 34 cents a mile. After reaching impasse, the state's LBFO provided that employees would be reimbursed at the federal mileage rate. When the federal rate increased, the state increased the rate paid to other bargaining units, but not to unit members represented by the union. The union charged that the failure was a refusal to bargain in good faith.

Once impasse is reached, the employer may implement changes reasonably comprehended within its last offer on a given issue. The state may not implement a proposal that would require the expenditure of funds, however, unless it has been approved by the legislature.

Although an increase in the mileage reimbursement rate was contemplated by the LBFO, the proposal requires an expenditure of funds. Since the increased rate has not been approved by the legislature, the state legally cannot provide it. The state therefore has not violated the Dills Act.

PERB does not have jurisdiction over the union's charge that the state violated Labor Code Sec. 2802.

**No showing of discrimination against chapter president, no interference with protected rights: State of California (DCR.)**

*(California Correctional Peace Officers Assn. v. State of California [Department of Corrections and Rehabilitation], No. 2024-S, 5-13-09; 2 pp. + 16 pp. B.A. dec. By Member McKeag, with Members Neuwald and Wesley.)*

**Holding:** Management statements and conduct did not constitute adverse action against the union chapter president or show union animus. Management's memo to unit members was protected free speech.

**Case summary:** The board upheld the board agent's dismissal of the union's claim that management interfered with the union chapter president's protected rights and retaliated against him for negotiating about bidding of positions and for his communication with unit members. The chapter president sent a memo to unit members about the breakdown in negotiations and his view of the bidding dispute. The union

alleged that management discriminated against the president when it responded with a memo containing false accusations about negotiations and refused to meet with the president. The union contended union animus could be inferred from the superintendent's response to the president's proposal to solve a separate problem by saying, "Put it in a grievance. Send it to Sacramento. That's how it is now. That's how you made it."

The B.A. found the chapter president engaged in protected activity when he negotiated with management and sent a memo to about the negotiations and status of the bidding dispute. Management was aware of the protected activity. However, the allegations did not show that management's memo, refusals to meet, or meeting cancellations adversely affected the chapter president's employment. The union also failed to show that meeting cancellations and refusals to meet were retaliation for the protected activity. The superintendent's statement did not demonstrate union animus because it was general in nature and showed only a lack of enthusiasm about informal problem solving.

The union claimed the superintendent's memo implied that the chapter president sided with management on the bidding issue and put his own interest in a particular bid ahead of the unit's interests. The B.A. found that the memo was protected speech that contained no threat or promise of a benefit and would not chill the exercise of protected rights.

**Alleged facts do not support charge of unlawful interference, retaliation by union: CSEA (Civil Service Div.).**

(*Eisenberg v. Civil Service Div., California State Employees Assn.*, No. 2034-S, 6-4-09; 2 pp. + 11 pp. R.A. dec. By Member Neuwald, with Members McKeag and Dowdin Calvillo.)

**Holding:** An employee's allegations that a union agent interfered with his decertification effort do not state a prima facie case. Allegations that CSEA's president terminated his SEIU Local 1000 union membership in retaliation for an unfair practice charge do not show a causal connection.

**Case summary:** Eisenberg is a state employee in bargaining unit 1, represented by SEIU Local 1000. He began

to solicit support for a decertification petition. A coworker in the same unit volunteered assistance, although he was an officer in SEIU Local 1000 and its parent organization, CSEA. The coworker helped set up a website, [www.dumpseiu.com](http://www.dumpseiu.com). He later told Eisenberg that they had different goals and offered to set up a different website for Eisenberg. Eisenberg declined the offer.

The website was activated. Seven months later, the coworker revealed in an email to bargaining unit members that he was involved in creating the website. He alleged financial improprieties in SEIU Local 1000 and advocated deposing its leadership. He said he was opposed to decertification, and claimed he prevented decertification by collecting petitions that he never filed. Neither Eisenberg nor the coworker filed a decertification petition with PERB.

The R.A. dismissed the charge because Eisenberg did not demonstrate how the coworker's actions interfered with his decertification efforts, since the coworker offered to set up an independent website where Eisenberg could have run a separate decertification campaign. In addition, the coworker's email and website were protected speech criticizing SEIU Local 1000 and its leadership. Since the communications did not contain a threat of reprisal or promise of benefit, it caused no cognizable harm to Eisenberg's rights.

Also, the facts did not show a causal connection between the filing of his unfair practice charge and his membership in SEIU Local 1000. Eisenberg had filed the charge against CSEA, not Local 1000, which terminated his membership. Nor did he not allege facts to show that CSEA's president had influenced SEIU Local 1000 to terminate his membership. Unions may establish reasonable rules for membership and provisions for dismissing members, and Eisenberg did not show that Local 1000's rules were unreasonable or unreasonably applied.

The board adopted the R.A.'s decision and dismissed the charge.

## *Administrative Appeals Rulings*

**Request that board agent disqualify himself must pre-empt claim of bias:** SEIU, Loc. 1000; State of California [Depts. of Personnel Administration, General Services, and Housing and Community Development].

(*Burnett v. SEIU Loc. 1000*; *Burnett v. State of California* [Dept. of Personnel Administration]; *Burnett v. State of California* [Dept. of General Services and Dept. of Housing and Community Development]; No. Ad-377-S, 2-9-09; 9 pp. dec. By Member Rystrom, with Members McKeag and Dowdin Calvillo.)

**Holding:** Charging party's failure to first seek disqualification of the board agents who dismissed his unfair practice charges precludes an appeal to the board based on the board agents' bias and failure to disqualify themselves.

**Case summary:** The charging party filed an affidavit asserting that the board agents who dismissed four unfair practice charges should have disqualified themselves. The PERB appeals office considered this an appeal of the dismissals, but denied it.

PERB Reg. 32155(c) authorizes disqualification of a board agent "whenever it appears that it is probable that a fair and impartial hearing or investigation cannot be held by the Board agent to whom the matter is assigned." It requires that the party makes the request in writing and under oath. It also must set forth all facts in support of the request. In order to appeal a board agent's failure to disqualify himself, this written request must first be made of the board agent in compliance with this regulation.

Here the letters which requested that the board agents disqualify themselves were not under oath and therefore did not comply with Reg. 32155(c).

The charging party also asserted that the board agents deliberately ignored what he said, acted with affinity towards the union representatives, and displayed rude behavior toward him. The board found the appeals of the dismissals of two unfair practice charges were untimely. In the other two cases, the board found the charging party's appeals were timely, but dismissed them based on his failure to first seek disqualification of the board agent under PERB Reg. 32155(c).

## **EERA Cases**

### *Unfair Practices Rulings*

**Partial dismissal of unfair practice charge upheld where allegations occurred more than six months prior to filing:** LAUSD.

(*Adams v. Los Angeles Unified School Dist.*, No. 2011, 3-13-09; 5 pp. dec. By Member Wesley, with Chair Rystrom and Member Neuwald.)

**Holding:** The partial dismissal of the unfair practice charge was affirmed because PERB cannot issue a complaint with respect to allegations of unfair practice occurring more than six months prior to the filing of the charge under EERA Sec. 3541.5(a)(1).

**Case summary:** The charging party, a certificated employee, alleged numerous acts of reprisal for protected activity, including a negative performance evaluation, reassignment, accusations that he struck students and sold textbooks, a mandatory psychiatric evaluation, and termination. The B.A. dismissed all allegations that occurred more than six months before the filing of the charge. On appeal, the charging party claimed the continuing violation doctrine should apply and raised new facts and allegations.

The board found that the untimely allegations of adverse action were separate and apart from the timely allegations and, therefore, the continuing violation doctrine could not be applied. It also found that the charging party failed to demonstrate good cause to allow presentation of new allegations or evidence on appeal as required by PERB Reg. 32635(b).

### **Dismissal of untimely charge upheld: Compton USD.**

(*Hicks v. Compton Unified School Dist.*, No. 2015, 4-1-09; 8 pp. dec. By Member Wesley, with Chair Rystrom and Member McKeag.)

**Holding:** The dismissal of the unfair practice charge was untimely because the allegations occurred more than six months prior to the filing of the charge.

**Case summary:** The charging parties worked as parent involvement specialists and performed the same duties as

community relations assistants. CRAs were included in the bargaining unit represented by CSEA, but the district deemed the PIS classification outside the bargaining unit.

Beginning in 2001, the charging parties complained about the different terms and conditions of employment between the two classifications. The district met with the charging parties, but took no action.

In September 2003, the district consolidated the two classes into a new community relations specialist class, which was included in the CSEA bargaining unit. All PIS employees were required to take a performance test and reapply for positions in the CRS class. During the hiring process, they were regarded as provisional employees. Once hired, the district assigned them seniority dates based on their status in 2003 as provisional employees. The former CRA employees were not required to test for the position, and their seniority was calculated from the date they were originally hired.

The charging parties filed grievances in September and December 2003, which the district rejected, reasoning that the grievance procedure was not available to them because they were not yet in the bargaining unit.

The charging parties filed a complaint pursuant to the district's complaint procedure in 2004. The district advised them to seek relief through a government agency or retain an attorney.

The charging parties filed an unfair practice charge on October 21, 2005. The board agent noted that since 2001 the district declined to discuss terms and conditions of employment with the charging parties, and the decision to change seniority dates was made in September 2003. On appeal, the board found that the B.A. correctly concluded the charge was filed outside the six-month statute of limitations.

The board found that tolling was not applicable. Under EERA Sec. 3541.5(a)(2), the statute of limitations may be tolled for the time it takes the charging party to exhaust a contractual grievance procedure that ends in binding arbitration. Tolling is also permitted during recourse to a non-binding dispute resolution process if that procedure is contained in a written negotiated agreement, is being used to resolve the same dispute that is the subject of the unfair practice charge, the charging party reasonably and in good faith pursues the

procedure, and tolling does not frustrate the purpose of the statutory limitation period by causing surprise or prejudice to the respondent.

As PERB recently noted in *Long Beach CCD* (2009) No. 2002, 195 CPER 84, the charging parties bear the burden of demonstrating a charge is timely filed. Here, the charge does not allege facts demonstrating that the charging parties were covered by a negotiated grievance procedure which either ended in binding arbitration or constituted a non-binding dispute resolution procedure. And, even if the statute of limitations had been tolled during the pendency of the grievance procedure, the grievances and complaint were denied more than six months before the charge was filed.

The continuing violation theory does not apply because charging parties did not allege a new violation, sufficiently independent of the original act, that occurred within the six months prior. The fact that the district continued to maintain the position that the PIS employees were exempt until they were reclassified does not demonstrate a continuing violation. A continuing violation is not found where an employer simply maintains during the statutory period the original position or action it took outside the limitations period.

The board refused to consider new documents submitted on appeal that were not previously presented to the B.A. but were available to the charging parties when they filed their charge. The charging parties did not show good cause to present new supporting evidence on appeal.

#### **Dismissal of charge upheld where allegations occurred more than six months prior to filing: Compton USD.**

(*Hicks v. Compton Unified School Dist.*, No. 2016, 4-1-09; 9 pp. dec. By Member Wesley, with Chair Rystrom and Member Neuwald.)

**Holding:** The unfair practice occurred more than six months prior to the filing of the charge.

**Case summary:** The charging party alleged that the district violated EERA when it revised his seniority status. The charging party originally was hired as a parent involvement specialist. After the district consolidated the PIS class and the community relations assistant classification into a new community relations specialist class, all of the PIS employees

were required to take a performance test and reapply. Once hired, the district assigned them a seniority date based on when they were hired as provisional employees.

The charging party joined with the other charging parties in *Hicks v. Compton USD* (2009) No. 2015 (see pp. 79-80). In this case, however, the charging party received a “corrected copy” of examination results on August 23, 2006, which changed his seniority rank and his date of hire to a date in 2003. The unfair practice charge was filed on February 15, 2007.

The board agent found that the issue of adjusted seniority was known to the charging party since at least 2003, and the corrected copy of the exam results received in 2006 was consistent with the district’s prior actions. Therefore, the charge was not filed within the six-month statute of limitations.

The charging party also alleged that, because the district had labeled the PIS classification exempt from EERA coverage and excluded employees from union membership, he could not avail himself of union representation. Therefore, the charge was filed outside the statute of limitations period because he had to learn the law on his own. Relying on *Empire Union School Dist.* (2004) No. 1650, 168 CPER 92, the B.A. found that the limitations period begins on the date the conduct constituting an unfair practice is discovered, not the date the legal significance of that conduct is discovered.

On appeal, the board adopted the B.A.’s decision.

**Dismissal of charge alleging retaliation, unlawful interference upheld: Alvord USD.**

(*Bussman v. Alvord Unified School Dist.*, No. 2021, 4-30-09; 19 pp. dec. By Member Wesley, with Members McKeag and Dowdin Calvillo.)

**Holding:** The charging party failed to establish that the district retaliated against him because of his union membership or that it interfered with his protected rights.

**Case summary:** The charging party has been a high school history and government teacher since 2001. He was a member of the Alvord Educators Association, the exclusive representative of certificated employees.

In October 2006, the union announced that it had reached a settlement agreement with the district. Prior to the ratification vote by union members, the charging party learned that the salary step level of teachers with 3-14 years of experience would be reduced by two steps. Those with 19 or more years of experience would be unaffected. Members with two or less years would be shifted back to level 1.

The charging party complained to union representative Meg Decker about what he believed to be the inequity of the contract. Decker told him the contract was “a good deal.” The charging party also complained to union representative Craig Adams.

The charging party also complained to the California Teachers Association but was told it could not intervene.

The charging party requested union representation but Decker refused.

In March 2007, the union advised its members that a contract had been reached. The charging party continued to raise concerns about violations of the Education Code and other inequities in the contract. He was denied access to a meeting by Adams.

CTA subsequently advised AEA that the contract included illegal provisions. New district hires were told that they would have to pay back part of their salaries. Adams laid the blame on the charging party.

On August 16, 2007, the charging party was notified by principal Santos Campos that, if he had not yet received notice of a schedule change, his schedule would remain the same. He had received no notice as of that date.

On August 23, 2007, the charging party received a notice of a schedule change from the district. For the prior three years he had taught three sections of American Government and two sections of A.P. U.S. History. His revised schedule provided for two sections of American Government, two sections of A.P. U.S. History, and one section of U.S. History.

During August, September, and October 2007, Campos and Decker failed to provide the charging party with basic resources for his new class.

The charging party filed an unfair practice charge alleging that the district changed his schedule and withheld resources in retaliation for complaining about the contract.

The board agent found that the charging party engaged in protected activity when he raised concerns about the contract, but that he failed to allege sufficient facts to show that the district had actual knowledge of his protected activities. He provided no evidence that Decker was an agent or representative of the district. And, the first communication between the charging party and any district representative was the August 16 letter from Campos. The charging party's request to Campos for resources does not allege that the charging party expressed concerns about the contract.

The B.A. also concluded that the charging party failed to demonstrate any adverse action. According to *Compton Unified School Dist.* (2003) No. 1518, 161 CPER 88, where an employee's duties and compensation remain the same following a transfer, an employee must allege facts demonstrating that an objective, reasonable employee would consider the transfer an adverse action. No allegations showed why the different class in the new schedule or the failure to provide adequate resources would be considered an adverse action by a reasonable employee. Even if the district's actions could be considered adverse, the charging party provided no information that the district took those actions because he complained about the contract.

The B.A. also dismissed the allegation that the district's actions unlawfully interfered with his employee rights under EERA. The B.A. found that the charging party failed to allege facts which showed that the actions in any way inhibited, or would tend to inhibit, his expression of concern over the contract negotiations between the union and the district.

The board adopted the B.A.'s decision dismissing the charge. It also refused to consider new evidence submitted for the first time on appeal, finding that the charging party was aware of the newly provided information prior to filing his charge. PERB Reg. 32635(b) states, "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence."

**District initiated discipline in retaliation for filing unfair practice charge: Escondido Union ESD.**

(*California School Employees Assn. and Its Chap. 150 v. Escondido Union Elementary School Dist.*, No. 2019, 4-30-09;

34 pp. dec. By Chair Rystrom, and Members Neuwald and Wesley.)

**Holding:** Three disciplinary actions were initiated in retaliation for protected activity.

**Case summary:** The union alleged that the district violated EERA by retaliating against Lance Barry, a carpenter, for filing a government tort claim against the district in May 2004, and for filing an unfair practice charge on June 3, 2005. The acts of retaliation referred to documents dated December 6, 2004, March 3, 2005, July 12, 2005, July 18, 2005, August 30, 2005, and September 13, 2005.

In his proposed decision, the administrative law judge determined that the first two memos were not issued in violation of EERA, but that the other disciplinary actions, and a September 27, 2005, action plan, were in retaliation for the filing of the unfair practice charge. The district appealed.

The board agreed with the ALJ that the July 12 memo critical of Barry's work, the August 30 notice of disciplinary action, and the September 13 decision recommending suspension were retaliatory. The board did not agree that the July 18 letter of reprimand was retaliatory and found that the September 27 action plan was not referenced in the complaint.

Regarding the July 12 memo, the board found that the ALJ had improperly placed on the district the burden of affirmatively denying knowledge of Barry's involvement in the protective activity. However, it found knowledge on the part of the district because one of the district's disciplinary agents signed a notice of appearance in response to the unfair practice charge and worked with another district employee to prepare the July 12 memo.

The board agreed with the ALJ's finding that there was a nexus between the protected activity and the adverse action because the July 12 memo was issued five weeks after the filing of the charge. It also found that the district conducted a cursory investigation of the incidents described in the July 12 memo, but disagreed that the failure to conduct an independent investigation of charges of misconduct cast suspicion on the district. Rather, the board found no factual support that Barry had organized an "unauthorized and secret barbeque" conducted near flammable materials.

The board also found that the district's adverse action in issuing the July 12 memo would not have occurred but for the protected activity. The district offered no evidence to support its justification for the memo. The criticisms contained in the memo were hearsay and, without independent evidence, insufficient to prove that it would have issued the memo if the charge had not been filed.

Neither party appealed the ALJ's findings that the July 18 letter of reprimand constituted an adverse action and that the filing of the charge was protected activity. The ALJ did not specifically find that the district knew of the protected activity. However, the board found employer knowledge because the reprimand criticized Barry for stating that PERB had issued a complaint at a staff meeting. However, the union failed to demonstrate a nexus between the filing of the charge and the reprimand, concluding that the ALJ had incorrectly placed the burden of proof of unlawful motivation on the district.

The board rejected the ALJ's finding that unlawful motivation was established by the fact that Barry already had been disciplined for the incidents raised in the August 30 notice and the September 13 recommendation. This was consistent with the district's progressive disciplinary system. However, the board found a nexus based on temporal proximity and that the district failed to produce independent evidence of the criticisms cited in the memo. Therefore, it found no support for the district's claim that it would have issued the notice and made the recommendation even if the charge had not been filed.

The September 27 revised improvement plan was not included in the complaint. According to *Fresno County Superior Court* (2008) No. 1942-C, 189 CPER 83, an unalleged violation may be reviewed by the board only where adequate notice and opportunity to defend has been provided the respondent, the acts are intimately connected to the subject matter of the complaint and are part of the same course of conduct, the unalleged violation has been fully litigated, and the parties have had the opportunity to examine and be cross-examined on the issue. The September 27 plan did not meet this test.

#### **Association's request to withdraw exceptions granted; ALJ decision stands: Cottonwood Union ESD.**

(*Cottonwood Teachers Assn. v. Cottonwood Union Elementary School Dist.*, No. 2026, 5-15-09; 4 pp. dec. By Member Neuwald, with Members McKeag and Dowdin Cavillo.)

**Holding:** The purposes of EERA are effectuated by permitting withdrawal of exceptions to the administrative law judge's decision in this case.

**Case summary:** The Cottonwood Teachers Association filed exceptions to an ALJ's proposed decision in an unfair practice case. After the exceptions were filed, the parties reached a settlement. The association asked to withdraw the exceptions.

The board asked the parties to clarify whether they also intended to vacate the proposed decision. The association said the settlement agreement did not vacate the proposed decision, but only sought withdrawal of the exceptions. The district asked the board to withdraw the charge in its entirety.

When a party requests to withdraw a case at the board level, PERB determines whether granting the request would be consistent with the governing statute and in the best interest of the parties, citing *Orange Unified School Dist.* (2001) No. 1437, 149 CPER 66. The board has discretion to grant or deny the request, and to allow withdrawal of a charge and complaint. Referring to PERB Reg. 32320 and *ABC Unified School Dist.* (1991) No. 831b, 88X CPER 15, the board said it can also vacate a decision. Here, the association's request was to withdraw its appeal to the ALJ's proposed decision. However, the board concluded, the decision itself stands.

#### **Representation Rulings**

##### **Petition to stay decert election denied, but impounding of ballots ordered following appeal: Grossmont-Cuyamaca CCD.**

(*Grossmont-Cuyamaca Community College Dist., Grossmont-Cuyamaca Community College District Faculty Assn., and United Faculty of Grossmont-Cuyamaca Community College Dist.*, No. Ad-378, 5-4-09; 2 pp. dec. By Member McKeag, with Members Neuwald and Dowdin Cavillo.)

**Holding:** The petition to stay a scheduled decertification was denied, but the board ordered ballots to be impounded pending PERB's decision on the faculty association's appeal of the dismissal of its decertification petition.

**Case summary:** The faculty association filed a petition to decertify the incumbent representative of the faculty unit, United Faculty of Grossmont-Cuyamaca CCD. The petition was dismissed by a board agent, who found it was not accompanied by a sufficient showing of support. The B.A. found that a second decertification petition filed by AFT Local 1931 was timely submitted and accompanied by a sufficient showing of support.

After the B.A. scheduled the election, the faculty association appealed the dismissal of its decertification petition and requested that the election be stayed pending the board's decision on the merits of its appeal.

The board denied the faculty association's request and ordered that the election proceed as scheduled. However, it directed that the ballots cast in the decertification election be impounded pending its decision of the merits of the faculty association's appeal.

### *Duty of Fair Representation Rulings*

**No DFR breach absent showing that union's actions were arbitrary, discriminatory, or in bad faith: UTLA.**

(*Adams v. United Teachers of Los Angeles*, No. 2012, 3-13-09; 2 pp. + 15 pp. R.A. dec. By Member Wesley, with Chair Rystrom and Member Neuwald.)

**Holding:** The charging party failed to demonstrate arbitrary, discriminatory, or bad faith conduct by the union; failed to show that the allegations occurred within the six-month statute of limitations; and failed to allege facts sufficient to state a prima facie case.

**Case summary:** The district issued the charging party a "Notice of Unsatisfactory Acts" and a five-day suspension in January 2008. At the charging party's request, the union agreed to challenge the disciplinary actions through the appeal process. The charging party also requested union assistance concerning the district's denial of seven days of "filer time" pay, its requirement that he undergo a psychiatric

evaluation before returning to work, and the district's alleged failure to abide by student discipline policies.

The union representative informed the charging party that he would address the notice of unsatisfactory acts, five-day suspension, psychiatric evaluation requirement, and student discipline policies during the discipline appeal hearing.

The charging party filed an unfair practice charge alleging that the union had repeatedly breached its duty of fair representation.

He accused the union of misconduct regarding an election in 2006 which the board agent concluded was untimely. Moreover, the charging party failed to state a prima facie case because he did not explain the union's role in the election or what it refused to do.

In *Service Employees International Union, Loc. 99* (1979) No. 106, 44 CPER 56, PERB held that matters concerning internal union affairs are immune from review by the board unless they have a substantial impact on the relationship of unit members to their employer. Here, the charge did not include sufficient facts to determine whether the elections concerned internal union activities and, if so, how the loss of a union position impacted his relationship with the district.

The charging party alleged that the union withdrew a 2006 grievance that he filed over the district's refusal to allow him to "assign standards" to students. The B.A. found the charging party did not establish that the allegation was timely filed, or facts to support his contention that the grievance was "legitimate."

The charging party contended that, in July 2006, the union refused to file a grievance alleging that he was denied an out-of-class assignment for having complained about the district's incompetence and discrimination. The B.A. found the charging party failed to establish that the allegation was timely filed and, even if timely, he did not explain how the employer's alleged misconduct violated the contract.

The charging party alleged that the union delayed arranging a Step 1 meeting, but the B.A. found he did not demonstrate that the union's action foreclosed his ability to achieve a favorable result from the grievance.

The union's refusal to take his grievance over "filer time" pay to arbitration was alleged to be a duty of fair

representation violation. However, the B.A. noted, a union is not required to pursue a grievance it reasonably believes is unmeritorious and, a disagreement over whether to take a grievance to arbitration does not, in itself, establish a breach of the duty of fair representation.

The charging party also alleged that the union should have filed a grievance over the district's insistence that he undergo a psychiatric evaluation before returning to work. The union planned to address this during the appeal of the five-day suspension. A union is not required to file a grievance where it reasonably believes the issue can be resolved outside the grievance process, the B.A. stated, and the allegations did not address how the union's determination not to pursue the grievance was arbitrary, discriminatory, or in bad faith.

Nor did the union's decision not to pursue a grievance concerning a notice of unsatisfactory acts amount to a breach of the duty of fair representation.

The charging party's allegation that the union representative failed to present certain documentary evidence does not state a prima facie case. A union's failure to pursue a grievance in the manner requested by a grievant is insufficient to demonstrate a violation. Similarly, the union did not breach its duty by failing to grant the charging party's request for a different representative because a union is not required to provide an employee with the representative of his or her choice.

The union did not breach its duty by failing to reimburse the charging party for legal expenses incurred in the unfair practice charge against LAUSD. The duty of fair representation does not apply to a forum over which the union lacks control or in extra-contractual proceedings before government agencies, including PERB.

The charging party alleged that the union breached its duty to represent other certificated personnel, not named as charging parties and who did not sign the charge form. The charging party did not establish that he was authorized to represent the other employees.

In an amended charge, the charging party alleged that the discipline hearing still had not been held, even though he informed the union of his termination on July 28, 2008.

The B.A. found the charging party did not show the union was responsible for the delay. It is not a breach of the duty of fair representation to delay the resolution of grievances where the union preserved the timeline for filing and where the length of the delay did not foreclose the employee's ability to obtain a remedy.

The charging party alleged he was incorrectly told by the union that the district had the authority to require a psychiatric evaluation before returning to work. The B.A. found no factual allegations to conclude that the statement was inaccurate, notwithstanding his lawyer's statement to the contrary. Even if the information was incorrect, it was no more than mere negligence.

The B.A. found that the union's failure to take some unspecified action within the three-day period following his termination does not breach the duty of fair representation because it did not foreclose his ability to obtain assistance from the union.

The B.A. found the charging party did not show how the union's treatment of another member was relevant to his claim. And, he said, the union has discretion when deciding to pursue grievances and complaints from unit members.

On appeal, the board adopted the B.A.'s decision.

#### **Union had rational basis for not taking grievance to arbitration: CSEA/Chap. 379.**

*(Dunn v. California School Employees Assn., Chap.379, No. 2028, 5-27-09; 12 pp. dec. By Member Dowdin Calvillo, with Members Neuwald and Wesley.)*

**Holding:** The charging party failed to allege facts sufficient to show that the union had no rational basis for withdrawing the grievance or acted in bad faith when it did so one week before the arbitration.

**Case summary:** In early 2000, the district notified the union of possible layoffs. The charging party, a job developer, was deemed to have seniority over another job developer hired at the same time pursuant to the tie-breaking provision of the contract. On June 5, 2000, the district advised employees that the seniority lottery applied only to the current layoff, not to any future layoff. A copy of this memo

was attached to a memorandum of understanding regarding rehiring preferences for laid-off employees.

A new contract that took effect on July 1, 2003, had different provisions for breaking seniority ties. In October 2003, when the district reduced the charging party's hours as the least-senior employee in his classification, he filed a grievance claiming that his seniority was determined "once and forever" by the drawing in 2000.

The district denied the grievance, asserting it had properly applied the tie-breaking procedure set out in the new contract. The union requested arbitration, and a hearing was scheduled. While preparing for arbitration, the union representative discovered the June 2000 memorandum of understanding and the attached June 5, 2000, memo. The union decided the grievance was without merit and withdrew it one week before the scheduled hearing.

The charging party alleged that the union withdrew his grievance in bad faith because the 2000 lottery established his seniority for all time. He argued that the June 5, 2000, memo could not change the tie-breaking procedure because it was not negotiated with, or signed by, the union. And, he challenged the union's claim that it did not know about the 2000 documents until one week before arbitration.

The board agent dismissed the charge, and the charging party appealed, asserting that the union breached its duty of fair representation when it incorrectly interpreted the June 5, 2000, memo and the MOU to which it was attached.

A union does not breach its duty of fair representation by erroneously interpreting a collective bargaining agreement when the interpretation is reasonable. Here, the board said, the MOU was signed by a union representative. And the board concluded the memorandum and MOU could reasonably be read as an agreement between the union and the district that seniority would be determined each time a layoff occurred. Therefore, the union's interpretation was not irrational.

The board explained that there is no breach of the duty of fair representation where a union fails to pursue a grievance that may be beneficial to the grievant but would not benefit the majority of the unit members, referencing *Castro Valley Unified School Dist.* (1980) No. 149, 48 CPER

65. Because a favorable result for the charging party could invalidate seniority determinations made under the new contract, the union could reasonably have determined that pursuing the grievance was not in the best interests of the bargaining unit as a whole.

The board also concluded that the charge failed to show that the union acted in bad faith by withdrawing the grievance one week before arbitration. A union does not breach its duty of fair representation by withdrawing a grievance after it discovers facts that cast doubt on its merits, said the board, referring to *AFT Loc. 1521 (Paige)* (2005) No. 1769, 174 CPER 89, and *California State Employees Assn. (Coben)* (1993) No. 980-S, 99 CPER 47. The charge failed to allege facts that the union representative was aware of the June 2000 memorandum and MOU earlier.

While the board was troubled by the union's late discovery of the documents and the effect the grievance would have on the rest of the bargaining unit, it held that the alleged facts established nothing more than negligence. A union's negligent conduct breaches the duty of fair representation only when it completely extinguishes the employee's right to pursue his claim. Here, the board noted, the contract allows an individual employee to take his case to arbitration.

**No DFR breach absent showing that union's actions were arbitrary, discriminatory, or in bad faith: CSEA, Chap. 410.**

(*Payne v. California School Employees Assn. and Its Chap. 410*, No. 2029, 5-27-09; 12 pp. + 8 pp. R.A. dec. By Member Neuwald, with Members McKeag and Calvillo.)

**Holding:** The charging party failed to show that the allegations occurred within the six-month statute of limitations or that the union's refusal to file a grievance was arbitrary, discriminatory, or made in bad faith.

**Case summary:** The charging party alleged that the union breached its duty of fair representation by refusing to file a grievance charging she was performing out-of-class work.

In May 2000, the charging party informed a union representative that she had been working outside her

designated job classification since 2005 and was entitled to receive bilingual pay. In July 2007, she asked the district to provide her with additional compensation for performing bilingual duties.

On March 19, 2008, the district informed the charging party that she was reclassified to a position that warranted bilingual pay; it increased salary retroactive to November 28, 2007. The charging party claimed she had been performing bilingual duties prior to that date.

The board agent dismissed all allegations of wrongdoing by the union that occurred more than six-months prior to the filing of the charge.

The B.A. also concluded that the charging party did not establish that the union's failure to file a grievance seeking bilingual pay retroactive to a date prior to November 28, 2007, was arbitrary, discriminatory, or in bad faith. In negotiations with the employer, the union was responsible for creation of a new classification at a higher salary level and obtained retroactive compensation for several months. She had no evidence to support her claim that she had performed bilingual work prior to that date. The B.A. concluded that the union may have reasonably believed that a grievance would have been unsuccessful and that negotiating with the district would achieve a more favorable result. A union is not required to process a grievance where it believes that the chances for success are minimal. Nor is it required to pursue a grievance it reasonably believes is unmeritorious or can be resolved outside the grievance process.

## HEERA Cases

### *Unfair Practice Rulings*

#### **Equitable tolling doctrine available under the Act: Trustees of CSU (San Jose).**

(*Onkvisit v. Trustees of the California State University [San Jose]*, No. 2032-H, 5-29-09; 12 pp. dec. By Member Neuwald, with Members Wesley and Dowdin Calvillo.)

**Holding:** The doctrine of equitable tolling can be applied under HEERA to toll the statute of limitations for

an unfair practice charge while the same claim is pending in a negotiated dispute resolution procedure. (See Recent Developments, p. 52, for complete coverage of this decision.)

## MMBA Cases

### *Unfair Practice Rulings*

#### **Union has basic statutory right to file grievance in its own name: Omnitrans.**

(*Amalgamated Transit Union, Loc. 1704 v. Omnitrans*, No. 2010-M, 3-10-09; 3 pp. + 10 pp. ALJ dec. By Chair Rystrom, with Members McKeag and Neuwald.)

**Holding:** The employer's refusal to process grievances the union filed in its own name denied the union its right to represent employees and interfered with employees' rights under the MMBA.

**Case summary:** The union filed an unfair practice charge alleging that Omnitrans refused to process grievances filed in the union's name. Relying on PERB precedent, an administrative law judge found that, absent an express waiver, an exclusive representative has a basic statutory right to file grievances in its own name. The parties' MOU does not define "grievant" or "grievance" in a manner that limits the union's right to file grievances in its own name. In fact, the ALJ noted, the MOU grievance procedure is available to settle a dispute "which may arise between the *parties*," in this case, ATU and Omnitrans.

The ALJ acknowledged that the language of the MOU refers to the grievant as "the employee." However, this did not clearly and unmistakably preclude the union from itself being the grievant. In fact, the ALJ added, at least seven articles in the MOU concern rights conferred to the union, not rights of individual employees. If a grievant must be an employee, he reasoned, those contractual provisions could not be the subject of a grievance.

On appeal, the board summarily affirmed the ALJ's conclusion that ATU has a basic statutory right under the act to file grievances in its own name and it did not waive that right. Therefore, Omnitrans's refusal to process grievances

filed by ATU denied the union its rights under Sec. 3503 and interfered with the rights of employees in violation of Sec. 3506 of the MMBA.

**Reversing dismissal, PERB orders issuance of complaint on charge of premature impasse declaration: Kings In-Home Supportive Services Public Authority.**

(*California United Homecare Workers Union v. Kings In-Home Supportive Services Public Authority*, No. 2009-M, 3-10-09; 16 pp. dec. By Chair Rystrom, with Members McKeag and Neuwald.)

**Holding:** The factual allegations are sufficient to demonstrate a prima facie case that the public authority prematurely declared impasse. The allegations do not support the assertion that the public agency failed to comply with the local impasse procedures.

**Case summary:** The union filed an unfair practice charge alleging that the public authority, the employer of record in Kings County, violated the MMBA and local rules by prematurely declaring impasse, refusing to schedule further negotiations, denying it the right to participate in mediation, and unilaterally implementing a wage increase without first scheduling an impasse meeting.

A board agent dismissed the union's charge, finding that the public authority's adamant position on the wage increase was permissible hard bargaining. The B.A. also found that the union failed to allege sufficient facts to support the claim that the public authority had failed to schedule an impasse meeting as required by local rules. Finally, the B.A. found no unilateral change to wages had been made without notifying the union or providing it an opportunity to request bargaining.

On appeal, the board reaffirmed that, at the charge-processing stage, the burden rests on the charging party to provide specific factual allegations sufficient to demonstrate that an unfair practice has been committed and that it is capable of providing admissible evidence in support of its allegations.

PERB set out a detailed summary of the chronology of the parties' negotiations and found support for the allegation that the public authority improperly declared impasse under

local rules. The board noted that the parties had engaged in a series of productive bargaining sessions during which they both made significant concessions. At the time the public authority declared impasse, according to the allegations in the charge, future meetings would not have been futile. Additional bargaining would have allowed the union to consider and respond to the public authority's final offer.

Considering the totality of the circumstances, the board also found from the allegations that the public authority had not merely maintained an adamant bargaining position on wages. To the contrary, by declaring impasse without affording the union the opportunity to respond to its wage offer, the public authority demonstrated an intent to subvert the bargaining process and showed a lack of genuine desire to reach agreement. The board cautioned that a charging party does not state a prima facie case merely by asserting that the employee organization was willing to keep negotiating.

**Charging party's appeal of dismissal lacked any reference to grounds for appeal: San Bernardino Public Employees Assn.**

(*Coelho v. San Bernardino Public Employees Assn.*, No. 2014-M, 3-23-09; 3 pp. dec. By Member Dowdin Calvillo, with Members McKeag and Neuwald.)

**Holding:** The charging party's appeal of the dismissal of his unfair practice charge failed to comply with PERB Reg. 32635(a) concerning the required contents of such an appeal.

**Case summary:** The charging party alleged that the association breached its duty of fair representation. A board agent dismissed the charge and the charging party appealed.

Regulation 32635(a) requires that an appeal of a dismissal must state the specific issues of procedure, fact, law, or rationale to which the appeal is taken; identify the page or part of the dismissal to which the appeal is taken; and state the grounds for each issue stated.

Here, the appeal stated: "I am appealing the dismissal of my charge." Attached to the appeal was a copy of the amended charge.

The board concluded that the charging party's appeal failed to state specific issues or parts of the dismissal to which the appeal was taken or to state grounds for the appeal.

**No nexus between protected activity and adverse reassignment: County of Yolo.**

(*Gilley-Mosier v. County of Yolo*, No. 2020-M, 4-30-09; 18 pp. dec. By Chair Rystrom, with Members McKeag and Neuwald.)

**Holding:** The charging party failed to demonstrate a nexus between her protected activity and her involuntary transfer and, even if a nexus were established, the county would have taken the same action in the absence of protected activity.

**Case summary:** The charging party, a social worker, alleged that she suffered retaliation for engaging in activity protected by the MMBA.

The board found that the charging party engaged in protected activity when she sought the assistance of her exclusive representative with regard to a reassignment memo. The director of human resources and the department head were aware of the union's role as the charging party's representative. The county's decision to reassign the charging party to another position precluded her from working an alternate work schedule and, therefore, was an adverse action even though the two positions received the same compensation.

In assessing the necessary nexus, the board noted that the involuntary reassignment occurred less than one month after she engaged in protected activity and therefore could support a finding of nexus. However, timing alone is not sufficient. A charging party must demonstrate at least one additional factor. Here, she failed to show disparate treatment or instances where the county departed from established procedures or standards. Nor was there evidence that the county offered inconsistent or contradictory justifications for its action. It consistently explained that the purpose of the transfer was to reconcile the charging party's salary differential with the terms of the parties' MOU.

PERB also found no evidence that the county conducted a cursory investigation or harbored union animosity.

Based on these findings, the board concluded that no nexus had been established and no prima facie case of retaliation was shown.

The board further noted that the county's decision to affect the reassignment was taken in order to avoid having to pay the higher salary differential to other social workers and in consideration of employee morale. The board concluded, therefore, that the county would have taken the adverse action regardless of her protected activity.

**No right to union representation absent reasonable belief that discipline will result: City of Modesto.**

(*Modesto City Employees Assn. v. City of Modesto*, No. 2022-M, 5-12-09; 6 pp. + 18 pp. ALJ dec. By Chair Rystrom, with Members Neuwald and Dowdin Calvillo.)

**Holding:** The charging party's appeal of the dismissal of his unfair practice charge failed to comply with PERB Reg. 32635(a) concerning the required contents of such an appeal.

**Case summary:** The charging party alleged that the city violated the MMBA by refusing a member's request for union representation at two meetings with his supervisor and discriminating against the employee for doing so by failing to investigate his complaint of hostile work environment.

The administrative law judge dismissed the complaint. Relying on PERB precedent, the ALJ noted that the right to union representation arises where there is a reasonable basis that discipline may result from the meeting. In this case, she concluded, the right was asserted based on personal subjective feelings and speculative unsolicited comments. Moreover, any right to representation ended when the employee was told that discipline would not result at the interview. No inquiries were made about any matter that could result in discipline. In fact, the interview did not go forward based on the employee's unwillingness to proceed without a representative.

The ALJ also found that coaching sessions are not investigatory or disciplinary interviews. During coaching sessions, employees are given work performance direction by their supervisors. In contrast, administrative investigations are conducted by personnel or labor relations specialists outside

the employee's chain of command. And, the ALJ added, the employee was repeatedly told by his supervisors that discipline would not result from the coaching sessions.

In assessing the claim of retaliation, the ALJ found that the employee's request for union representation was protected activity, even if the employee was not entitled to representation at the referenced meetings. And, she found, agents of the city were aware of this activity. However, the ALJ found no evidence that the city failed to investigate the employee's complaint. The evidence revealed that the city was willing to meet with the employee, but he chose not to respond. In essence, she said, the employee blocked further investigation of his complaint when he refused to discuss it without a union representative.

The board affirmed the ALJ's proposed decision and upheld her decision that denied the association's request to amend the complaint during the hearing. PERB referred to Reg. 32648, which directs an ALJ to consider prejudice to the respondent when ruling on a request to amend the complaint. Here, the board said, the ALJ acted properly because the sought-after amendment would have resulted in a new charge of discrimination that was based on a different set of facts.

The board likened the analysis to PERB's consideration of unalleged violations, including the provision to the respondent of adequate notice and an opportunity to defend. Noting that the association waited until late in the second day of a two-day hearing to ask for the amendment, the board concluded that the city would not have had an opportunity to defend against the additional discrimination charge.

**Honest mistake is good cause for late filing: County of San Bernardino.**

(*Roeleveld v. County of San Bernardino*, No. 2023-M, 5-12-09; 4 pp. dec. By Member Wesley, with Neuwald and Dowdin Calvillo.)

**Holding:** Good cause for late filing of the amended charge was demonstrated where the charging party's lateness was based on an honest mistake and the delay did not cause prejudice to any party.

**Case summary:** The charging party made a conscientious effort to file a timely amended charge. She mailed the charge on the filing deadline, assuming this would satisfy the requirement to timely file the charge. This resulted in a brief delay based on the manner of filing the requested information with PERB.

The board reversed the board agent's dismissal of the charge and remanded the case to the general counsel's office for further processing.

**Unilateral change to criteria for bus driver promotions: City of Riverside.**

(*Service Employees International Union, Loc. 1997, v. City of Riverside*, No. 2027-M, 5-19-09; 17 pp. dec. By Member Dowdin Calvillo, with Members Neuwald and Wesley.)

**Holding:** The city unilaterally changed the criteria for promoting mini-bus drivers without providing SEIU with notice and an opportunity to request to meet and confer.

**Case summary:** The charging party alleged that the city violated the MMBA when it unilaterally changed the criteria for promoting mini-bus drivers.

To determine whether a change had occurred, the board first looked to the parties' MOU to assess whether it superseded a prior 1999 agreement that made promotions based on seniority. The board found that the language of the MOU was ambiguous and turned to bargaining history to ascertain the meaning of the agreement. The board reasoned that, given the importance of the mini-driver promotion issue, it was "implausible" that the city's lead negotiator could have gone through the entire negotiation process without learning that SEIU considered the prior agreement controlling.

The board also found that the city failed to provide SEIU with notice or the opportunity to meet and confer before implementing the change in the mini-bus driver promotion criteria. The parties did not dispute that the matter was within scope.

To remedy the violation, the ALJ ordered the city to retroactively promote the mini-bus drivers according to the terms of the 1999 agreement. The board concluded that it would not effectuate the remedial purpose of the act to in-

validate the promotions it inappropriately granted to some drivers. Instead, the board ordered the city to restore those drivers who would have been promoted based on seniority to the position they would be in but for the unilateral change. To achieve this, the board directed the city to reinstate the promotion criteria set out in the 1999 agreement, thereby moving those drivers with the most seniority to the top of the promotion list and paying the drivers wages and benefits they would have received had they been promoted under the prior policy to the date the driver is or was promoted to the higher time-based position.

assistance more than six months before the charge was filed. The charging party's continued requests for assistance did not cause the statute of limitations period to begin anew.

### ***Duty of Fair Representation Rulings***

#### **DFR charge untimely filed: SEIU, United Healthcare Workers West.**

(*Rivera v. SEIU, United Healthcare Workers West*, No. 2025-M, 5-15-09; 6 pp. dec. By Member Dowdin Calvillo, with Members Neuwald and McKeag.)

**Holding:** The duty of fair representation charge was untimely because the charging party was aware that the union would provide no further assistance more than six months prior to the filing of the charge.

**Case summary:** The charging party alleged that the union breached its duty of fair representation by failing to challenge his termination and, instead, encouraging him to accept the hospital's offer of reassignment in lieu of termination. The board agent dismissed the charge as untimely because the charging party had been aware that the union would not provide him further assistance more than six months before the charge was filed.

On appeal, the charging party raised new allegations and provided supporting documentation concerning issues not presented to the B.A. and which were known to the charging party prior to the dismissal of the charge.

Moreover, the new allegations relate to the charging party's termination by the hospital, not to the union's alleged failure to provide fair representation.

The board also commented on the timeliness of the charge. It reiterated the B.A.'s conclusion that the charging party had been aware the union would not provide further

## Activity Reports

### ALJ Proposed Decisions

#### Sacramento Regional Office — Final Decisions

*California Correctional Peace Officers Assn. v. State of California (DPA)*, Case SA-CE-1681-S. ALJ Shawn P. Cloughesy. (Issued 3-24-09; final 4-21-09; HO-U-958-S.) Two correctional institutions unilaterally changed the schedules of correctional counselors without prior notification and meeting and conferring with the union. Both institutions admitted to the facts and the violation. Both parties requested that PERB issue a posting only to one institution as the other one rescinded the scheduling change within 21 days of its effective date. The ALJ granted limited-locational posting due to PERB's discretion to withhold, as well as pursue, the various remedies at its disposal and the overall intent of the Dills Act.

*SEIU Loc. 1000 v. State of California (Dept. of Health Care Services)*, Case SA-CE-1661-S. ALJ Shawn P. Cloughesy. (Issued 5-26-09; final 6-23-09; HO-U-962-S.) The job steward was issued a counseling memo for admitting labor representatives to the unit without advance notice and for escorting them to the supervisor's cubicle. The supervisor testified that the counseling memo was issued because of the "disruption" caused by the labor representatives, and that a memo would not have issued for the job steward's failure to provide advance notice alone. Retaliation was found. The job steward did not have control over the labor representatives' actions. He had a good faith belief that advance notice was given, and he was not aware of the level of disruption that would subsequently follow. His conduct was not so opprobrious as to cause substantial disruption to the work area's operation and lose its protected status under the Dills Act. The supervisor's reason for discipline was a pretext for disciplining him for his protected activities.

*Beeck v. State of California (Dept. of Corrections and Rehabilitation)*, Case SA-CE-1669-S. ALJ Shawn P. Cloughesy. (Issued 6-17-09; final 7-14-09; HO-U-965-S.) A job steward working in the prison provided representation to a teacher who was suspected of being impaired by alcohol/drugs. To maintain constant visual contact with the suspect to prevent any tampering with urine specimens, the sergeant ordered the job steward and the suspect out of the private office and into the reception area for monitoring. The job steward shut the

door on the sergeant, but exited after a number of directives to do so. The job steward was terminated for insubordination, which was reduced to a salary reduction at the *Skelly* hearing. No violation was found as the sergeant's orders were based on a legitimate need to maintain visual contact with the suspect.

#### San Francisco Regional Office — Final Decisions

No final decisions.

#### Los Angeles Regional Office — Final Decisions

*Amalgamated Transit Union Loc. 1277 v. SunLine Transit Agency*, Case LA-CE-413-M. ALJ Ann L. Weinman. (Issued 04-02-09; final 04-28-09; HO-U-959-M.) The transit agency refused to continue a retirement committee meeting in the presence of a union attorney. The meeting was found to be a committee meeting, not a bargaining session, and the attorney was not a committee member. The union had not demanded bargaining or made clear its intent to bargain at the meeting. No bargaining obligation was found, and the case was dismissed.

*AFSCME Loc. 1902 v. Metropolitan Water District of Southern California*, Case LA-CE-435-M. ALJ Thomas J. Allen. (Issued 6-10-09; final 7-7-09; HO-U-964-M.) An employee posted a rebuttal to an evaluation just inside her cubicle and her supervisor asked her to take it down. She did, but later reposted it and was reprimanded. Evidence showed that the employee was disciplined for insubordination, not protected activity.

#### Sacramento Regional Office — Decisions Not Final

*Edelen v. California Statewide Law Enforcement Assn. and Lewis v. California Statewide Law Enforcement Assn.*, Cases SA-CO-434-S and SA-CO-437-S. ALJ Bernard McMonigle. (Issued 6-25-09; exceptions filed 7-13-09.) A violation was found where the union refused to allow employees to withdraw from membership. The memorandum of understanding between the California Statewide Law Enforcement Association and the State of California expired June 30, 2008. The MOU contained a maintenance of membership clause that permitted employees to withdraw from CSLEA during the last 30 days of the MOU. Edelen and Lewis submitted withdrawals from membership in November 2008 that were not honored by CSLEA. In early

2009, they were expelled from CSLEA. Past board decisions (*California State Employees Assn. [Fry]* [1986] PERB Dec. No. 604-S; *California Union of Safety Employees [Trevisanut et al.]* [1993] PERB Dec. No. 1029-S) found the Dills Act defines maintenance of membership so that the requirement for continued membership is a creature of the contract and does not exist when no MOU is in place. These board decisions were not affected by a 2000 amendment to the Dills Act that continued the effect of other contract provisions (i.e., agency fees and arbitration). The status quo of permitted membership withdrawal continues after MOU expiration.

*Morgan v. California Statewide Law Enforcement Assn.*, Case SA-CO-439-S. ALJ Bernard McMonigle. (Issued 06-25-09; exceptions filed 07-13-09.) A violation was found where the union refused to allow employees to withdraw from membership. (See *Edelen v. California Statewide Law Enforcement Assn. and Lewis v. California Statewide Law Enforcement Assn.*, above.)

#### San Francisco Regional Office — Decisions Not Final

*Regents of the University of California and Coalition of University Employees*, Cases. SF-UM-620-H; SF-UM-621-H. ALJ Donn Ginoza. (Issued 3-23-09; exceptions filed 5-01-09.) The university proposed reclassifications of 14 employees in the clerical and allied services bargaining unit, exclusively represented by the union, to positions outside the unit. Pursuant to a contractual procedure, the union presented the reclassifications to PERB for determination as to their appropriate placement. The proposed reclassifications were to classifications within the administrative staff professionals unit. One was proposed for placement in the technical unit. The ALJ determined that all 14 positions ceased to qualify as clerical positions based on the assignment of duties that are professional or technical in nature, even though the positions continue to perform administrative functions. No presumption in favor of placement in the clerical unit was afforded.

*Menaster v. State of California (Dept. of Social Services)*, Case SF-CE-240-S. ALJ Donn Ginoza. (Issued 5-01-09; exceptions filed 5-19-09.) The agency did not deny an employee the right to representation during an investigatory meeting following a tentative decision to reject the employee on probation. After the employee called his union steward and complained in a profanity-laden tirade, the supervisor called the employee to

determine if he wished to provide his account of the disturbing call. The employee refused to confirm or deny the steward's version of the call, without his union representative being present. The ALJ found the supervisor did not interfere with the right to representation because the employee invoked his right to silence and the agency thereafter dispensed with the interview. The agency also did not retaliate against the employee for seeking union representation. The employee had been warned about his disruptive behavior, and the agency was justified in proceeding to terminate his employment.

*Gregory v. Oakland Unified School Dist.*, Case SF-CE-2636-E. ALJ Shawn P. Cloughesy. (Issued 5-06-09; exceptions filed 5-26-09.) A paraprofessional was terminated for abandoning her job. Prior to the termination action, Gregory sought the assistance of her union in transferring to another position. Because the supervisor who initiated the termination was unaware that she had sought union assistance, Gregory failed to demonstrate a prima facie case of retaliation. OUSD was not bound by determinations in a prior board decision that Gregory alleged a prima facie case of discrimination. Findings in a board decision regarding whether to issue a complaint are not prejudicial during the hearing process. (*Service Employees International Union, Loc. 221 [Meredith]* [2009] PERB Dec. No. 1982a.)

*Sonoma County Law Enforcement Assn. v. County of Sonoma*, Case SF-CE-456-M. ALJ Donn Ginoza. (Issued 6-23-09; exceptions due 8-10-09.) In 1985, the county began of "linking" annual changes in health insurance premium contributions for bargaining unit retirees to those for unrepresented management employees, which were made and implemented without negotiations. Based on language in its MOU, the union believed the linkage was to bargaining unit employees. In 2007, the county unilaterally changed its policy when it refused to bargain regarding a cap on its contribution, implemented by a like change to contributions for management employees. The ALJ found the linkage practice was implemented without adequate notice to the union, and therefore the charge was not untimely. The MOU language thought by the union to express the linkage to the unit could not be construed as a waiver or as the linkage to management positions.

*Scott v. Mount Diablo Education Assn.*, Case SF-CO-722. ALJ Donn Ginoza. (Issued 6-30-09; exceptions filed 7-24-09.) Following a history of complaints of unprofessional conduct, the employer issued the teacher a notice of incompetency and unprofessional conduct. The union grieved the two underlying incidents cited in the notice as violating the contract, despite believing they were beyond the scope of the contractual provisions. After the teacher was placed on a three-month administrative leave, the principal issued a negative evaluation. The union grieved, and the employer agreed to withdraw the evaluation from the teacher's personnel file. The union also grieved the employer's refusal to allow the teacher to inspect his personnel file. The teacher discovered the evaluation had not been purged. Fearing it might trigger dismissal proceedings, the union declined to file a grievance. The union declined to appeal all of the grievance responses, with one exception. The ALJ found that the union did not breach its duty of fair representation.

#### Los Angeles Regional Office — Decisions Not Final

*Meredith v. Grossmont Union High School*, Case LA-CE-5133-E. ALJ Thomas J. Allen. (Issued 4-08-09; exceptions filed 5-04-09.) No retaliation was found. The employee filed charges against both the employer and the union. In *Service Employees International Union, Loc. 221* (2008) PERB Dec. No. 1982, PERB dismissed allegations that the union caused the employer to retaliate against an employee, on the grounds that the employer had decided to take adverse action as of July 17, 2007, several days before any protected activity. In the case against the employer, the allegations failed to support the assertion that on July 18, 2007, the employer verbally agreed to delay the adverse action.

*Committee of Interns and Residents/SEIU v. County of Riverside*, Case LA-CE-469-M. ALJ Bernard McMonigle. (Issued 06-12-09; exceptions filed 7-15-09.) A violation was found. Resident physicians have never been part of any of the 11 existing county bargaining units. A majority of resident physicians signed a petition requesting recognition of the Committee of Interns and Residents/SEIU as their majority representative. The county would not recognize CIR/SEIU and process the petition because of a county employee relations rule that permitted recognition only of a union with members in an existing

bargaining unit. The county initially denied the petition in December 2007. The county denied the CIR/SEIU request to reconsider on January 14, 2008. An unfair practice charge was filed on July 14, 2008. The unfair practice charge was timely filed, as application of an illegal county rule on January 14, 2008, reflected a continuing violation. The Meyers-Milias-Brown Act establishes the definition of an "employee organization" and requirements for granting recognition. Those requirements were met by CIR/SEIU. The county rule, which added requirements for exercising the right to representation, was unreasonable and a violation of the MMBA.

*SEIU Loc. 721 v. County of Riverside*, Cases LA-CE-443-M, LA-CE-447-M, LA-CE-482-M. ALJ Ann L. Weinman. (Issued 06-18-09; exceptions filed 07-08-09.) The county operates the Temporary Assistance Program (TAP), which maintains a roster of temporary employees assigned to county departments. Jobs on the roster ranged from psychiatrist to food service worker. SEIU filed a petition to represent TAP employees in a single unit. The county rejected the petition. The complaint alleges that the county unlawfully applied its local rules to reject the petition, that its agents threatened SEIU would never become the TAP representative, and that the county would consider closing the TAP program. Although several of the county's grounds for rejecting the petition were found unlawful, the community of interest, as employees' qualifications and working conditions are too diverse. It was also found that the county made unlawful threats as alleged. The county was ordered to cease and desist and to post notice. It was not ordered to process the petition or recognize SEIU as the TAP representative.

*Gutierrez v. SEIU Loc. 221*, Case LA-CO-77-M. ALJ Thomas J. Allen. (Issued 06-26-09; exceptions due 08-10-09.) In an effort to get the union to pay more attention to his unit, a union steward encouraged others to drop full membership. Later, the union president called the employer and asked that the steward be held "accountable for [his] whereabouts"; the matter was dropped when the steward established he had been on jury duty. After a hearing, at which the steward admitted encouraging others to drop membership, the trial body imposed a two-year suspension of his membership. There was no finding of union retaliation or unreasonable suspension of membership.

## Report of the Office of the General Counsel

### Injunctive Relief Cases

Seven requests for injunctive relief were filed from March 1 through June 30, 2009. Six of these requests were denied by the board and one was withdrawn by the filing party.

#### Requests denied

*Siskiyou County Employees Assn. v. Siskiyou County Employees Assn./AFSCME Loc. 3899*, IR No. 566, Case SA-CO-72-M. On March 19, 2009, the union filed a request for injunctive relief to prohibit and compel actions relative to a disaffiliation dispute. On March 26, the board denied the request.

*Siskiyou County Employees Assn. v. County of Siskiyou*, IR No. 567, Case SF-CE-590-M. On March 19, 2009, the union filed a request for injunctive relief to prohibit and compel actions relative to a disaffiliation dispute. On March 26, the board denied the request.

*Stationary Engineers Loc. 39, IUOE v. State of California (DPA)*, IR No. 568, Case SA-CE-1777-S. On April 2, 2009, the union filed a request for injunctive relief to prohibit the state from implementing an enacted statutory change regarding overtime calculations. On April 8, the board denied the request.

*SEIU Loc. 521 v. County of Monterey*, IR No. 569, Case SF-CE-645-M. On May 1, 2009, the union filed a request for injunctive relief to prohibit the county from processing certain petitions for decertification. On May 8, the board denied the request.

*Los Angeles Unified School Dist. v. United Teachers Los Angeles*, IR No. 570, Case LA-CO-1375-E. On May 6, 2009, the district filed a request for injunctive relief to prohibit the union from causing/encouraging/condoning a planned work stoppage. On May 12, the board denied the request.

*Solano v. San Bernardino City Unified School Dist.*, IR No. 571, Case LA-CE-5340-E. On June 23, 2009, Solano filed a request for injunctive relief to prohibit the district from including certain materials in a personnel file. On June 30, the board denied the request.

#### Requests withdrawn

*SEIU Loc. 6434 v. San Bernardino County In-House Supportive Services*, IR No. 565, Case LA-CE-522-M. On March

17, 2009, the union filed a request for injunctive relief. On March 18, the union withdrew the request and its underlying unfair practice charge in this matter.

### Litigation Activity

Four new cases were opened during the period of March 1 through June 30, 2009.

*California Correctional Peace Officers Assn. (CCPOA) v. PERB*, Sacramento County Superior Court, Case No. 34200980000187. (PERB Case SA-CE-1621-S.) In March 2009, CCPOA filed a petition for writ of ordinary mandamus with the superior court, seeking to compel PERB to decide the appeal pending in SA-CE-1621-S. In April, CCPOA requested — and the court granted — a dismissal of this action in its entirety.

*California Faculty Assn. (CFA) v. PERB; California State University*, California Court of Appeal, Third Appellate District, Case No. C061905. (PERB Cases SA-CE-191-H and SA-CE-194-H.) In May 2009, CFA filed a writ petition with the appellate court, alleging the board erred in Dec. No. 1876a-H. The appellate court summarily dismissed the petition.

*Hicks v. [Respondent(s) To Be Determined]*, Los Angeles County Superior Court, Case No. BS120977. In June 2009, Hicks filed a notice of appeal with the superior court that references PERB Dec. No. 2015.

*Omnitrans v. PERB; Amalgamated Transit Union, Loc. 1704*, California Court of Appeal, Fourth Appellate District, Case No. E048660. (PERB Case LA-CE-323-M.) In June 2009, Omnitrans filed a writ petition with the appellate court alleging the board erred in Dec. No. 2030-M.

### Personnel Changes

In May 2009, the Governor designated Board Member Alice Dowdin Calvillo as acting chair. Dowdin Calvillo was originally appointed by the governor to the Public Employment Relations Board in January 2008 and confirmed by the State Senate in January 2009.

## Precedential Decisions of the

*Fair Employment and Housing Commission***Termination after pregnancy leave is sex discrimination and retaliation.**

(*DFEH v. Acosta Tacos*, No. 09-03-P, 6-16-09; 1 pp. + 16 pp. ALJ dec.)

**Holding:** The employer's refusal to reinstate an employee to her position after her return from pregnancy disability leave is sex discrimination in violation of the Fair Employment and Housing Act. Its decision to terminate the employee after she insisted on her right to be reinstated is retaliation in violation of the FEHA.

**Case summary:** Marina Chavez worked as a cashier for Acosta Tacos. After taking a month off for pregnancy disability leave, she called her manager, Jaime Acosta, and told him she was ready to return to work. Acosta said he had filled her position but would try to find her another. Two days later, he called her in to cover for an absent employee. While at work, Chavez nursed her baby in her car during her lunch break.

The following day, Chavez was called to work. When Acosta found out, he told Chavez that he had learned she had breastfed her baby on her break and that he did not want her working there until she stopped lactating. When Chavez objected, Acosta fired her.

Following issuance of an accusation by the Department of Fair Employment and Housing, Administrative Law Judge Ann M. Noel found that Acosta Tacos violated the FEHA by refusing to reinstate Chavez to her position when she returned from pregnancy leave. Under the FEHA, an employer is required to do so unless it can show the employee would not otherwise have been employed in her same position for legitimate business reasons unrelated to the leave, or that preserving the job during the leave period would substantially undermine the employer's ability to safely and efficiently operate the business. The ALJ found Acosta Tacos made no showing that Chavez's position was eliminated for business reasons.

The ALJ ruled that Chavez was fired because of her sex in violation of the FEHA, citing unequivocal testimony that Acosta fired her after she objected to his comment that she could return to work only after lactation. "Chavez's breast-

feeding, performed on her own break time, is an activity intrinsic to Chavez's sex, female," wrote the ALJ.

The ALJ rejected Acosta's claim that Chavez was terminated because of poor job performance before she took her pregnancy leave.

The employer retaliated against Chavez by firing her for insisting on her right to return to work immediately, concluded the ALJ. "An employee opposing any restriction on her FEHA rights, including the right to take a pregnancy disability leave and return once no longer disabled, is a 'protected activity'" under the FEHA, the ALJ instructed. The fact that Acosta fired Chavez immediately following her insistence on her right to return to work indicates a retaliatory motive, said the ALJ.

The ALJ also found that Acosta Tacos had failed to take all reasonable steps to prevent discrimination from occurring, as required by the FEHA. "Acosta Tacos had no policy prohibiting pregnancy discrimination and did not provide its employees with any information about their rights to take pregnancy disability leaves and thereafter, return to their jobs," she said. Although Acosta had a policy that referenced disability leaves, it was written in English only and was not shared with employees.

The ALJ awarded Chavez back pay to compensate her for her lost wages from the date of her firing through the date of the hearing, and ordered Acosta Tacos to pay her \$20,000 for her emotional distress, as authorized by the statute.

The DFEH also asked the commission to levy an administrative fine under Government Code Sec. 12970(d), which requires clear and convincing evidence of "oppression, fraud, or malice." "Here, the DFEH proved, by clear and convincing evidence, that Acosta Tacos willfully, and in conscious disregard of Chavez's rights, failed to provide a discrimination and retaliation-free workplace, and to take reasonable steps to prevent such conduct, in violation of the Act," said the ALJ, ordering an administrative fine of \$5,000.

The commission, in a 4 to 0 vote, adopted the ALJ's decision as final. The commission also designated the decision as precedential.