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LETTER FROM THE EDITOR

CPER Readers:

It's impossible to know whether the president's economic stimulus measures will have a lasting effect on the nation's economic well-being. Have we have turned the corner and begun to rebuild on a more sound financial base? "Cash for clunkers" boosted auto sales, but now what? On the national stage, predictions by economists and financial analysts offer no clear-cut assurances that the recession is over. Ditto as to the stock market.

But one thing is certain. The level of unemployment in this county has hit a 26-year high of 9.8 percent, and experts predict that the newest figures may push that number over the 10 percent mark.

In California, unemployment reached its highest level since 1940, at 14.7 percent, according to the California Department of Employment Development. And the national Bureau of Labor Statistics reported that California lost more jobs in September than any other state except New York and Texas.

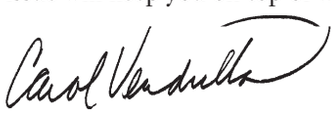
To see what's happening in the public sector, look no further. Unprecedented layoffs have hit all segments of our workforce. At the local government level, efforts to trade furlough days for layoffs have not been successful. Even law enforcement has not gotten a pass.

In the state sector, where employees are being furloughed three days a month, real questions exist as to the effectiveness of the strategy. Does it make sense to furlough those state employees whose work enriches state coffers? In this issue, you'll read that the struggle to curtail spending by cutting labor costs may not save as much money as predicted. Also, as furloughed employees have less money in their pockets, there can be collateral damage to the local economy.

And, when is a furlough not a furlough but a pay cut? In the higher education setting, the argument is, if the furlough day does not fall on an instructional day and reduce teaching responsibilities, it's a pay cut dressed up as a furlough.

Our two main articles provide a refreshing look at subjects outside the realm of layoffs and furloughs. Cynthia O'Neill and Suzanne Solomon review the status of employment testing after *Ricci v. DeStefano* and stress that *any* selection procedure must be validated by predicting success on the job. Attorney Stacey Leyton outlines the federal and state labor law protections that extend to employees' electronic communications, a medium now used more than ever.

I can't offer you much good news this time around. But I can promise that this issue will keep you on top of what's happening here in California.



Carol Vendrillo
CPER Editor

Employment Testing: Avoiding the Pitfalls of *Ricci v. DeStefano*

Suzanne Solomon and Cynthia O'Neill

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What would you do if your agency gave a promotional exam only to find out that the white candidates had a higher pass rate than some minorities? Faced with that situation, the City of New Haven, Connecticut, decided it could avoid a discrimination lawsuit if it did not certify the test results. However, a group of white and Hispanic firefighters who had performed well on the test did sue the city, alleging that it discriminated against them by discarding the results. In June 2009, the U.S. Supreme Court decided in *Ricci v. DeStefano*,[1] that New Haven was wrong not to certify the results of the promotional exam.

Ricci provides a cautionary tale about a fundamental premise of employment testing: any selection procedure is appropriate only if it predicts success in performing the duties of the position. A test that does not measure an applicant's ability to do the job makes it harder for the employer to select the most qualified person. And, it leaves the employer vulnerable to discrimination lawsuits. New Haven could have avoided a lawsuit, and received a qualified candidate pool, by designing a better test.

This article explains the basic rules regarding discrimination in employment testing, describes how those rules were implicated in the *Ricci* case, and outlines how employers can ensure that tests and other selection procedures will not prompt a lawsuit and better predict successful job performance.

The Law on Disparate Impact Discrimination

Title VII of the U.S. Civil Rights Act prohibits employers from using tests or selection processes that, though they appear to be neutral, have the effect of disproportionately excluding persons on the basis of race, color, religion, or sex.[2] The Age Discrimination in Employment Act[3] and the Americans with

Disabilities Act[4] contain the same prohibitions on age and disability. Under these laws, if a seemingly neutral test/selection process disproportionately excludes persons in protected categories, the process has a "disparate impact." That disparate impact is considered illegal discrimination, even though unintentional, unless the employer can show that the test/selection process measures for skills, traits, or characteristics that are important to successful performance of the job.[5]

If the employer can make that showing, no liability attaches and the test is legal despite its disparate impact. If the employee can establish that an alternative test exists and it would have less of a disparate impact but would still test for success on the job, the employer is liable for disparate impact discrimination.

Employers should evaluate whether the test focuses on, and accurately measures, criteria that are relevant to the job.

Under these rules, the first thing an employer should do to win or avoid a disparate impact lawsuit is to evaluate whether the test focuses on and accurately measures criteria that are relevant to the job. This is called test validation. In 1978, the federal Equal Employment Opportunity Commission issued *Uniform Guidelines on Employee Selection Procedures*.[6] They identify three ways employers can show their tests and other selection processes are job-related and consistent with business necessity:

- *Criterion-related validity*: proof that there is a relationship between test scores and job performance on a sample of employees;
- *Content validity*: proof that the content of a test (or other selection procedure) represents important aspects of job performance; and
- *Construct validity*: proof that the test measures a trait or characteristic that is important to successful job performance.

In *Ricci*, the city did not validate whether the test helped predict success on the job. As a result, the city could not justify why it used a test that yielded racially disparate results.

The Testing Process in Ricci

The *Ricci* case involved two promotional tests used by the city's fire department: one to promote to a captain, and the other to promote to a lieutenant. Each test had both a written and an oral component. The written, multiple-choice test accounted for 60 percent of the candidate's overall score; the oral exam accounted for the remaining 40 percent. The exam results were used to identify and order those candidates who would be considered for promotion during the following two-year period.

Like most public entities, New Haven had civil service rules that required it use practical examinations which fairly and accurately measure the fitness and capacity of candidates to discharge the duties of the job. The city hired a consulting firm to design both tests. To create a comprehensive list of job functions, knowledge, and abilities essential to perform the positions, the firm interviewed incumbents, gave them questionnaires, and rode along with them to observe them doing their jobs.

The consultant developed a written exam consisting of multiple-choice questions drawn from a list of source materials that the city's fire officials had approved. It developed an oral exam during which candidates were asked how they would respond to hypothetical situations. The oral exam was designed to test incident-command skills, firefighting tactics, interpersonal skills, leadership, and management ability, among other things. A pool of 30 assessors ranked the candidates' responses on the oral exam. None of the assessors lived in Connecticut, and 66 percent of them were minorities.

The consulting firm's contract called for a validation study of the test based on exam results. After the results were certified, the city was to compile a ranked list of applicants who passed the test. The city's rules required each vacancy to be filled by a candidate who scored among the top three on the list.

For the lieutenant examination, 77 candidates took the test (43 whites, 19 blacks, and 15 Hispanics). Thirty-four passed (25 whites, 6 blacks, 3 Hispanics). Based on the number of lieutenant positions open at the time, the top 10 candidates were eligible for immediate promotions. All 10 of those candidates were white.

For the captain examination, 41 candidates took the test (25 whites, 8 blacks, and 8 Hispanics). Twenty-two candidates passed (16 whites, 3 blacks, 3 Hispanics). Nine vacant positions were available, and of the top 9 candidates, 7 were white and 2 were Hispanic.

When the disparities in the test results were revealed, city officials feared that the tests discriminated against minority candidates. A vigorous public debate ensued about the validity of the tests, and whether the city should certify the results and use them in awarding promotions. Some employees threatened lawsuits if the test results were certified; other employees threatened to sue if the results were not. Hearings of the civil service commission showed that the city had limited information about whether the tests had a disparate impact on minorities. The city had not examined whether the tests were valid. However, it did receive a raft of conflicting testimony, including statements from people with little or no knowledge of the tests that were used. Ultimately, the city decided not to certify the results, and was sued by a group of white and Hispanic candidates who had scored high on the exam.

The city had limited information about whether the tests had a disparate impact on minorities.

Avoiding the Pitfalls Exemplified by Ricci

Select a test that is designed to measure the skills required by the job. In *Ricci*, New Haven's memorandum of understanding with the union directed that the final ranking of candidates would be based 60 percent on a written exam and 40 percent on an oral exam. The city, perhaps understandably, instructed the testing consultant to develop a written and oral exam that would be weighted 60:40 in the final ranking. The city did not evaluate whether — or how — the weight given the two exam components would affect the test's validity. In fact, the city had told the examination development companies that it would entertain only those proposals consisting of the 60:40 ratio.

U.S. Supreme Court Justice Ruth Bader Ginsburg, in a dissenting opinion, cited the city's decision to use that same 60:40 weighing as a significant misstep. The MOU provision had been in place for decades, and the city should have sought expert advice about whether an exam that used the 60:40 ratio was valid, and whether alternative testing methods or ranking formulas would better measure the qualities of a successful fire lieutenant or captain.

This analysis is particularly important in the public safety arena, in which a police officer or firefighter's job involves interpersonal skills, command presence, the ability to make decisions under pressure, and other traits that cannot be effectively measured by a written, multiple-choice test. Justice Ginsburg cited testimony that another city in Connecticut saw a decrease in racial disparities in test results for firefighters when it switched to a selection process that placed primary weight on the oral exam. Justice Ginsburg also noted a survey which showed that the median weight that municipalities assigned to the written portion of exams was 30 percent.

Many municipalities use "assessment center" tests, or simulations of real-work situations, as part of their promotional processes.[7] An expert who testified during the civil service commission hearings in the *Ricci* case explained that assessment centers are valuable because they allow candidates to demonstrate how they would address a situation instead of merely verbalizing an answer during the oral exam. Courts have been critical of promotion exams for being "more probative of the test-taker's ability to recall what a particular text stated on a given topic than of his firefighting or supervisory knowledge and abilities."[8] This is an issue of construct validity; an employer must be able to establish that the test is designed to measure the traits and

characteristics that are central to successful performance of the job.

For of these reasons, New Haven was unable to prove that its test measured job-related criteria, and therefore it was vulnerable to a charge of disparate impact. Employers are therefore on notice that an agreement in an MOU to use a particular test or selection process does not guarantee its validity, or preclude a lawsuit. Nor should an employer assume a test is valid because it has been used for a long time. Employers should design selection systems that are based on sound testing validation principles, and not on negotiated agreements or past practices.

An agency must assess the relevance of questions developed by outsiders. During the civil service hearings in *Ricci*, some firefighters said that certain exam questions were not germane to New Haven's practices and procedures. City officials had not allowed the outside testing consultant to seek input from the city's fire department about the relevance of the test questions because it feared the content of the test would be leaked. The consultant therefore turned to a senior firefighter from Georgia to determine whether the New Haven test questions were faithful to its written material. This practice inevitably leads to inquiries which test for procedures that do not necessarily match what a given fire department actually requires of its employees.

Employers should ensure that materials needed to prepare for a selection process are equally available to applicants.

This is an issue of content validity; an employer must prove that a test is a valid predictor of a candidate's success on the job. A test has content validity if its content is representative of important aspects of job performance. Just because a manual outlines a procedure does not mean that those who use the manual will actually follow those procedures. While outside test developers serve a valuable function, they are no substitute for having the agency's own subject matter experts ensure that test questions target the important aspects of the job, and are not based on source materials that either do not apply, or that contradict actual agency practice. Concerns about the secrecy of the test questions can be addressed through a confidentially agreement.

Take steps to ensure equal opportunity of success for all candidates. Some firefighters in the *Ricci* case testified at the civil service commission hearings that the test study materials, which cost $500, were too expensive and too long. Some said the study materials had been on backorder for six weeks; others had the necessary books before the syllabus was issued. It seemed these disparities fell along racial lines. Some firefighters said that many white candidates could obtain materials and assistance from relatives in the fire service, while most minority candidates were "first-generation firefighters." These issues were seen by the Supreme Court as one reason to question the validity of the New Haven test.

Employers should ensure that materials needed to prepare for a selection process are equally available to applicants on a timely basis. This issue often arises in the disability context, where a qualified individual with a disability may need an adjustment in the selection procedure to compete fairly with other applicants.

When in doubt, do a validation study. In the *Ricci* case, the city's contract with the test consultant contemplated that after the tests were administered, the consultant would prepare a technical report describing the examination methodology and analyzing the results. This report would have been a validation study that would have established whether the test was "job related for the position in question and consistent with business necessity," as the law requires.

The city did not ask for the study. Instead, city officials met with the testing consultant and expressed concern that the test was discriminatory. The city then commenced several meetings of the civil service commission where it heard from some of the test takers, the test designer, subject matter experts, city officials, union leaders, and community members. All offered their opinions about whether the test results should be certified and used for the promotions, or

thrown out because of the racial disparities in the scores. This course of action politicized the situation, sharpened divisions, and likely caused the city to be sued no matter what it did. Moreover, once the city was sued, it was without a validation study to defend itself.

A validation study allows an employer to evaluate test results to determine if there is an adverse impact on any protected category of candidates. According to the *Uniform Guidelines on Employee Selection Procedures*, an adverse impact exists when the selection rate for any one group is less than 80 percent of the selection rate for the group with the highest selection rate.[9] Employers that see that level of disparity should hire an expert to conduct a validation study. Valid and legally defensible tests will, at times, have an adverse impact against protected groups. But the only way to be sure a test is valid — and to be able to prove it in court — is with a validation study.

Such a study, in addition to flagging potential discrimination issues, also helps an agency ensure that its hiring and promotional processes actually result in hiring and promoting people most likely to succeed. A validation study can help identify the most critical predictors of performance. This, in turn, has a positive impact on the agency's productivity and organizational effectiveness, as well as on employee retention and hiring and training costs.

Conclusion

Though *Ricci v. DeStefano* made the headlines this year, it did not change the law as it relates to the shifting burdens applicable to disparate impact claims. Instead, the opinion is a reminder of a fundamental premise of public employment: a selection procedure is valid only if it actually predicts success in the particular job at issue. Public agency employers should not assume that a selection process is valid just because no one has complained, the union has agreed to the process, or the process has been used for a long time. Agencies should take care that their selection procedures are valid and, therefore, legally defensible. ✻

1 (2009) 129 S.Ct. 2658, 196 CPER 60.
2 42 USC Secs. 2000e et seq.
3 29 USC Secs. 621 et seq.
4 42 USC Secs. 12012 et seq.
5 42 USC Sec. 2000e-2(k)(1)(A)(i).
6 29 CFR 1607.
7 P. Lowry, "A Survey of the Assessment Center Process in the Public Sector," 25 Public Personnel Management 307, 315 (1996).
8 *Vulcan Pioneers, Inc. v. New Jersey Dept. of Civil Service* (NJ 1985) 625 F.Supp. 527, 539.
9 41 CFR Sec. 60-3.4.D.

Labor Law Protections for Electronic Employee Communications

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As ELECTRONIC mail increasingly becomes the predominant method for workplace communications, its use by employees, and the limitations on employers' attempts to restrict that use, have increasingly become the subject of debate. This article discusses the protections that state and federal labor law afford to employee electronic communications.

Federal Labor Law Protections

As email emerged as a major means of employee communications in the 1990s, the National Labor Relations Board made clear that general anti-discrimination principles, which prohibit disparate treatment of communications that are protected by federal labor law (such as union-related solicitations), apply in this context.[1] During the same period, the NLRB general counsel advised that even non-discriminatory restrictions on employee use of email would violate the National Labor Relations Act under some circumstances, namely, when they prohibited all non-work-related uses of email and employees regularly used email to communicate.[2] In reaching that conclusion, the general counsel deemed email analogous to oral communication (known as "solicitation" in NLRB parlance) as opposed to written communication ("distribution") because of its interactive nature, and applied longstanding precedent requiring employers to permit solicitation in work areas during non-working time.[3]

However, in a relatively recent 3-2 decision, *The Register Guard*,[4] the NLRB rejected the general counsel's approach and significantly narrowed anti-discrimination protections in a case involving electronic communications. The NLRB held that employees have no statutory right to use email for protected purposes, that the NLRA does not limit an employer's discretion to restrict employee use

of its computer network, and that restrictions on the use of email for protected purposes are lawful so long as analogous communications (defined more narrowly than in previous cases) are also restricted. In *The Register Guard*, the employer's policy prohibited the use of email "to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations." While employees did use email for personal, non-business purposes, including solicitation, the record revealed the use of email to solicit for only a single *outside* cause or organization: the United Way. After the union president was disciplined for using email to solicit support for union activities, unfair labor practice charges were filed.

In evaluating the lawfulness of the policy, the NLRB declined to use a balancing test, and instead based its decision on the principle that employers have the basic property right to restrict the use of their property including their email systems. It acknowledged that an employer may not discriminate against protected email communications, but defined "discrimination" narrowly to include only differential treatment of pro- versus anti-union emails (or emails supporting different unions). Thus, under the NLRB's analysis, it is not discriminatory to permit some (for example, charitable) solicitations while forbidding union solicitations. That represented a significant departure from non-discrimination principles adopted in past cases, which prohibit not only discrimination between pro- and anti-union communications but also discrimination between union communications and other similar types of communications (for example, prohibiting solicitations for union activities but permitting them for outside charities).[5]

Thus, the board held that the employer's discipline of the union president did not constitute unlawful discrimination because there was no evidence that the employer had permitted the use of email to solicit support for any other organizations except an annual charitable solicitation for the United Way. The NLRB did hold that the employer violated the NLRA when it disciplined the same employee for a purely informational email that involved no solicitation, however. The policy at issue prohibited only solicitation, and the board found that the distinction between that email and other informational emails that the employer had permitted was simply that it was union-related.[6]

Two members of the NLRB filed a dissent "in the strongest possible terms, from the majority's overruling of bedrock board precedent about the meaning of discrimination as applied to Section 8(a)(1)." These board members also would have held that when an employer grants employees regular and routine access to email for work purposes, it should be presumptively unlawful (absent special circumstances) for an employer to ban non-work-use solicitations.

PERB has not yet made clear whether it will adopt the more narrow approach to discrimination analysis the NLRB uses in The Register Guard.

While the narrowing of anti-discrimination analysis in *The Register Guard* was not specifically confined to allegations of discrimination in relation to electronic communications, it carries special force in that context because it is common for employers to adopt formal no-personal-use or minimal-personal-use computer or electronic communications policies, and then not to enforce such policies except against union-related emails.

The case is currently on appeal to the D.C. Circuit, and was argued before Judges David B. Sentelle, Merrick B. Garland, and Thomas B. Griffith in December 2008. As of the date of this writing, no decision has been issued. It is not yet clear whether the election of a new president, and the resultant changes to the composition of the NLRB, will lead to the reconsideration or overruling of *The Register Guard* decision.

State Labor Law Protections

The Educational Employment Relations Act and Higher Education Employer-Employee Relations Act both grant employee organizations an explicit right of reasonable access to a public employer's "bulletin boards, mailboxes, and other

means of communication."[7] Those "other means of communication" include employer email systems.[8] Other public employment statutes are silent on the subject, and the Public Employment Relations Board recently decided to construe the silent statutes to grant such a right.[9]

Like the NLRB prior to *The Register Guard*, PERB has prohibited employers from discriminating against union-related email activity, holding that once an employer permits non-business use, "it cannot prohibit employees from using the same forum for a similar level of communication involving employee organization activities."[10] Thus, in *State of California (DPA)*, PERB held that a number of state employers had violated the Dills Act, one by adopting a policy that permitted minimal personal email use only if the subject of the communication did not relate to union matters, and others by applying neutral email policies in a manner that discriminated against emails involving union issues.[11]

After *The Register Guard*, PERB issued a decision holding that an employer did not violate the Trial Court Employment Protection and Governance Act when it disciplined an employee for sending four union-related emails. The first email at issue had announced a union meeting to 55 court clerks who worked in a single courthouse.[12] PERB noted that, although official policy prohibited non-business-related emails, in practice the employer had permitted emails to be sent to small groups of individuals who worked at a single location. Because the email to 55 clerks was of a comparable nature and size to those that had been permitted, the communication "fell within the range of permissible use and was therefore protected activity."

PERB next concluded that, because the notice of suspension told the employee that "it is inappropriate for you to use the Court's computer system to conduct union business," there had been a prima facie showing of discrimination. However, PERB went on to determine that three other emails the employee had sent to all bargaining unit members countywide were not protected because the employer had not tolerated the sending of other, non-union-related emails to similarly large groups of employees; in other words, the prohibition had been applied in a content-neutral manner, based on the number of recipients. Ultimately, PERB decided that the employer had shown it would have imposed the same discipline for the three unprotected emails even if the employee had not engaged in the protected activity, and dismissed the charge. A judicial appeal is pending.

PERB has not yet made clear whether it will adopt the more narrow approach to discrimination analysis that the NLRB uses in *The Register Guard*. In any event, based on PERB's approach thus far, public employers should ensure that email, Internet, and other computer use policies are facially neutral and administered in a non-discriminatory manner. That is, if other non-business uses are permitted, union-related uses should be as well. Restrictions should be content-neutral and, to the extent practicable, consistently enforced.

PERB suggested an employee organization may have the right to use an employer's email system if other methods of communication are ineffective.

Also, while NLRB and PERB decisions have primarily involved employer restrictions on email *use*, these non-discrimination principles should apply equally to issues of employer monitoring. Thus, monitoring policies should not only be facially neutral but also administered in a manner that does not cause the selective monitoring of union activists or emails concerning union-related subjects.

In addition to these non-discrimination principles, there may be other sources of protection for employee electronic communications. For example, in *State of California (DPA)*, PERB suggested that an employee organization may have the right to use an employer's email system if other methods of communication are ineffective to reach employees.[13] Additionally, employer surveillance of employee email may be unlawful if it has a chilling effect on the employee's right to engage in protected, concerted activities.[14]

Bargaining Over Electronic Communications Issues

Increasingly, unions are negotiating specific protections for workers' use of electronic means of communications. For example, some labor agreements contain provisions that permit reasonable personal use of an employer's computer equipment, or that prohibit terminating an employee for off-duty conduct. Even if a collective bargaining agreement does not address the subject, moreover, employers may be required to bargain before making certain unilateral changes in a workplace computer or electronic communications policy.

On the federal level, the NLRB has held that an employer violated the NLRA by implementing a revised email policy without bargaining, even when the collective bargaining agreement did not address email use and contained zipper and management rights clauses.[15]

Increasingly, unions are negotiating specific protections for workers' use of electronic means of communications.

Similarly, PERB has held that an employer that was aware an employee organization used email to communicate with employees committed an unfair practice by unilaterally implementing new computer usage policies that would have restricted such communications.[16] PERB reasoned that, in a large academic institution, computer resources constitute reasonable means of access to communication. It also rejected the employer's reliance on Government Code Sec. 8314, which prohibits the use of state resources for personal purposes, on the ground that Sec. 8314 permits "occasional, incidental or minimal [personal] use." Similarly, but in a case not involving allegations of discrimination against union activity, PERB held that an employer violated the Dills Act by modifying its Internet policies in a manner that restricted permissible employee activities.[17]

More recently, however, PERB held that this precedent does not require public employers to bargain before adopting a computer use policy designed to address matters such as computer viruses.[18] It distinguished *Trustees of the California State University*,[19] which would seem to have compelled a different result, as having addressed the question of whether the subject matter contained in the proposed policies was within the scope of representation, not whether the decision to implement a computer use policy was within the scope of representation. In addressing the latter question, PERB held that in light of the importance of computers to the university's educational mission, the decision to implement a computer use policy was "a managerial prerogative and, therefore, not negotiable." Accordingly, the employer had no duty to bargain regarding the decision. However, in an important caveat, PERB did note that an employer does have

> "the duty to negotiate the effects of this decision on bargaining unit members if it impacts matters within the scope of representation, e.g., discipline and union access rights."

Based on this authority, employers would be well advised to bargain with employee representatives about matters within the scope of representation before implementing a new or modified computer or electronic communications policy.

Other Labor-Related Limitations

Obviously, "just cause" provisions in collective bargaining agreements will apply to discipline for electronic communications absent an explicit exception. Arbitration decisions addressing discipline of employees for electronic communications in both the private and public sectors have reached different results based on numerous factors including, for example, the nature of the emails, whether free speech protections apply, the clarity of the employer's policy, the employee's individual history, and whether procedural provisions of the agreement were followed.[20]

Further, while beyond the scope of this article, there are numerous statutory and constitutional limits on an employer's authority to discipline an employee for communicating, including electronically, regarding certain subjects. The free speech provisions of the federal and state constitutions limit public employer freedom to take adverse employment

actions against public employees based on speech on matters of public concern.[21] Other statutes impose protections against retaliation based on communications about specific topics (for example, disclosure of wages or complaints about discrimination).[22] Finally, in addition to these substantive protections, the procedural protections that apply to the discipline of government employees (for example, the Skelly right to a pre-disciplinary hearing and the Weingarten right to representation in a disciplinary meeting) must be respected.[23] □

1 See *E.I. Du Pont De Nemours & Co.* (1993) 311 NLRB 893, 919 (company's policy prohibiting use of electronic mail to distribute union materials unlawful when other nonbusiness use is permitted); *Timekeeping Sys., Inc.* (1997) 323 NLRB 244, 247-49 (termination of employee who sent email criticizing proposed change in vacation policy unlawful, when employees were allowed to post non-work-related emails and make personal telephone calls on work time); *Richmond Times-Dispatch* (2005) 346 NLRB 74, 74-76, 79-80 (disparate enforcement of email policy to prohibit union communications violated federal labor law).

2 See, e.g., NLRB Office of General Counsel Advice Memorandum (*Pratt & Whitney*), No. 12-CA-18446, 12-CA-18722, 12-CA-18745, 12-CA-18863, 1998 WL 1112978 (Feb. 23, 1998); NLRB Office of General Counsel Advice Memorandum (*Sitel Corp.*), No. 36-CA-8690, 2000 WL 33252020 (Oct. 5, 2000). When employees did not regularly use email for work purposes, the General Counsel opined that the email system was not a work area and so it was permissible to prohibit non-business email use. See NLRB Office of General Counsel Advice Memorandum (*GlassWerks SLB, LLC*), No. 32-CA-17870, 2000 WL 33252017 (Mar. 30, 2000).

3 See *Republic Aviation Corp. v. NLRB* (1945) 334 U.S. 793. In contrast, employers may prohibit distribution of written materials on company property, even on non-working time. See *Stoddard-Quirk* (1962) 138 NLRB 615.

4 (2007) 351 NLRB No. 70.

5 Shortly after the disciplinary incidents at issue, and during bargaining for a new contract, the employer proposed a contract provision that prohibited use of the employer's email system for union business. The NLRB majority did not reach the question whether the employer's proposal was unlawful, because it found that the employer had not insisted on the proposal. The dissent would have held that the employer did insist on the proposal and thereby committed an unfair labor practice.

6 Following *The Register Guard* decision, the NLRB general counsel issued a report explaining that the Division of Advice found lawful an employer rule prohibiting union officials from sending emails to company managers outside of the facility. However, the general counsel deemed unlawful the discriminatory enforcement of facially neutral no-solicitation, no-personal-use, and reasonable-personal-use policies, when the employer in practice had disciplined employees for union-related solicitation but permitted many other non-union-related solicitations including commercial solicitations. See NLRB General Counsel Memorandum 08-07, Report on Case Developments, 2008 WL 2149330 (May 15, 2008).

7 Gov. Code Secs. 3543.1(b), 3568; see also PUC Sec. 99563.2.

8 See *State of California (Department of Personnel Administration, et al.)* (1998) PERB Dec. No. 1279-S, 22 PERC par. 29148, 132 CPER 84.

9 *Id.* In reaching that conclusion, PERB characterized its 1980 decision in *DPA* (1980) PERB Dec. No. 127-S to grant a general right of union access to the worksite, but not to an employer's means of communications. Compare also *Omnitrans* (2009) PERB Dec. No. 2030-M, appeal pending (finding that MMBA grants union implied right of access to workplace).

10 *Id.*

11 *Id.*

12 *Los Angeles County Superior Ct. (AFSCME Local 575)* (2008) PERB Dec. No. 1979-C, 32 PERC par. 151, 193 CPER 85.

13 *Supra*, PERB Dec. No. 1279-S, 22 PERC par. 29148, 132 CPER 84.

14 Cf. *National Steel & Shipbuilding Co.* (1997) 324 NLRB 499, 499 (photographing or videotaping union activity constitutes unlawful surveillance because it tends to cause employees to fear future reprisals and thereby interferes with concerted activity).

15 *ANG Newspapers* (2007) 350 NLRB No. 87.

16 *Trustees of the California State University* (2003) PERB Dec. No. 1507-H, 27 PERC par. 26, 158 CPER 85.

17 *State of California (Water Resources Control Board)* (1999) PERB Dec. No. 1337-S, 23 PERC par. 30136, 138 CPER 66.

18 *Trustees of the California State University* (2007) PERB Dec. No. 1926-H, 31 PERC par. 152, 188 CPER 103.

19 *Supra*, PERB Dec. No. 1507-H, PERC par. 26, 158 CPER 85.

20 Examples of arbitration decisions upholding the discipline of

employees for email misconduct include: *Department of Veterans Affairs* (2003) 118 LA 1543 (employee sent email about union business on work time); *MT Detroit, Inc. and International Union of Operating Engineers, Loc. 547* (2003) 118 LA 1777 (employee sent racially offensive messages); *Southern California Edison and International Brotherhood of Electrical Workers, Loc. 47* (2002) 117 LA 1066 (employee sent offensive materials). Examples of arbitration decisions finding an absence of just cause for the discipline imposed include: *Chevron Products Co. and International Union of Operating Engineers, Loc. 351* (2001) 116 LA 271 (misconduct was accidental and company had not consistently enforced email policy); *PPG Industries, Inc. v. Brotherhood of Painters and Allied Trades, Loc. 579* (1999) 133 LA 833 (sexual harassment emails; termination too severe in light of employee's record); *AlliedSignal Engines and Individual Grievant* (1996) 106 LA 614 (nonunion workplace; offensive newsletter; employee not properly warned of potential for termination). Examples of arbitration decisions finding no just cause for any discipline include: *Snohomish County Public Utilities Dist. No. 1 and International Brotherhood of Electrical Workers, Loc.* 77 (2000) 115 LA 1 (managers condoned inappropriate emails and progressive discipline policy was not followed); *Florida State University and AFSCME Council Loc. 79* (2000) 114 LA 129 (public sector employer; free speech grounds); *Conneaut School District and Connecticut Education Assn.* (1995) 104 LA 909 (public sector employer; protected message and lack of notice to employee).

21 See *Pickering v. Board of Education of Township High School Dist. 205* (1968) 391 U.S. 563, 568; *Gray v. City of Tulare* (1995) 32 Cal. App.4th 1079, 111 CPER 22.

22 E.g., Cal. Labor Code Sec. 232 (prohibiting discipline for disclosure of wages); 42 USC Sec. 2000e-3(a) (prohibiting retaliation for opposition to unlawful discrimination).

23 See *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 27 CPER 37; *NLRB v. Weingarten* (1975) 420 U.S. 251; *Rio Hondo Community College Dist.* (1982) PERB Dec. No. 260, 7 PERC par. 14010, 56 CPER 76. ✻

Recent Developments

Local Government

Legislation Clarifies Nature of Notice Required by Bill of Rights Act

Among the bills signed into law by the governor in October was A.B. 955, which amends the Public Safety Officers Procedural Bill of Rights Act. The act requires that a public agency complete its investigation of alleged misconduct and notify the officer of its proposed disciplinary action within one year of the discovery of the misconduct.

The statute now requires the public agency to tell the officer what discipline is contemplated.

Section 3304(d) provides that no disciplinary action may be undertaken for any act of misconduct if the investigation of the allegation is not completed within one year of the agency's discovery by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct.

In the past, questions have arisen about the nature of the notice that must be provided a peace officer facing discipline. In *Sanchez v. City of Los Angeles* (2006) 140 Cal.App.4th 1069, 179 CPER 37, a Court of Appeal construed Sec. 3304(d) to require the public agency to inform the officer of the specific discipline being proposed, not merely that some disciplinary action was contemplated.

The Supreme Court in *Mays v. City of Los Angeles* (2008) 43 Cal.4th 313, 190 CPER 40, reversed the lower court's ruling that had relied on *Sanchez*. The Supreme Court in *Mays* found that the notice advising the officer that misconduct charges would be adjudicated by a board of rights was sufficient. The notice need not inform the officer of the specific punishment or discipline contemplated, the court concluded.

The Peace Officers Research Association of California, one of the bill's sponsors, argued that *Mays* defeats the original intent of Sec. 3304(d) to have the investigation and notice of proposed discipline be provided within one year of the discovery of the alleged act, omission, or other misconduct.

A.B. 955 abrogates *Mays*. Section 3304(d) now mandates that, in the event that the public agency determines that discipline may be taken, it must complete its investigation "and notify the public safety officer of its proposed discipline by a Letter of Intent or Notice of Adverse Action articulating the discipline within that year…."

As amended, the statute now requires the public agency to tell the officer what discipline is contemplated.

The bill also adds language to that section which clarifies that the public agency "shall not be required to impose the discipline within that one-year period."

The bill was introduced by Assembly Member Kevin de Leon (D-Los Angeles), last February. Those supporting the legislation included the Association for Los Angeles Deputy Sheriffs; California Correctional Supervisors Organization; California Peace Officers Association; California Police Chiefs Association; Los Angeles County Probation Officers Union; Orange County Employees Association; Riverside Sheriffs Association; State Coalition of Probation Organizations; and the California State Sheriffs Association. ✻

Sacramento County Battered by Layoffs, Furloughs

Sacramento County has been hard hit by the current financial downturn. Between May and July, it laid off 700 employees from its workforce of approximately 12,800. All told, said Steve Keil, assistant to the County Executive for Labor Police and Negotiations, the county has had to cut 1,800 jobs.

In August, the board of supervisors was informed that because of lower than expected tax revenues, even more cuts were needed. What had been pro-

jected to be a $68 million shortfall to the general fund grew to $76 million. At that point, county workers who lost their jobs included 200 employees in the Department of Child Protective Services and over 100 in the sheriff's department.

In September, the BOS approved the layoff of an additional 300 employees and forecast that more cuts were likely. Although county budget figures seemed like a moving target, the board felt increasingly pressed to adopt a final spending plan. Unions representing county employees resisted, saying that the layoffs were premature because they were still bargaining with the county over other possible concessions.

Unions said the layoffs were premature because they were still bargaining.

One controversial option the board considered came from County Executive Terry Schuttel. His plan was to layoff thousands of full-time employees and then rehire them as part-timers working 32 hours. Schuttel said the plan would save the county $4.6 million, and he offered it up to the board as an alternative to layoffs. It was seen by the unions as a 10 percent pay cut and branded as the ".908 plan."

United Public Employees Local No. 1 immediately filed a mass grievance contending that the plan, if enacted, would violate several provisions of their contract with the county. UPE characterized the .908 plan as forcing backdoor furloughs and warned, if implemented, the county could expect a legal challenge.

Although the board of supervisors was not quick to embrace the controversial plan, the county's financial health worsened as furloughed state government employees — who work for the county's largest local "industry" — had less money to spend, which, in turn, reduced sales tax revenues.

County officials and union representatives continued to meet, hoping to find ways to match the projected $4.6 million in savings that was linked to the work-hours reduction. While the board openly questioned the legality of the .908 arrangement, alternative concessions proved no match for its projected savings. The plan won tentative approval from the board, which opted to push the effective date to November 1.

Ultimately, political pressure exerted by the labor community convinced the board to abandon the plan altogether. However, in exchange, agreements now in place between the county and most unions include significant concessions. Contracts covering the majority of workers were extended to five-year agreements, with employees currently working under the fourth year of the pacts. These agreements will expire in June 2011.

Deals approved by the board of supervisors with CNA, AFSCME Local 146, and SEIU Local 1021 also are covered by five-year agreements. These groups, who represent nurses, health services workers, and social worker supervisors, have accepted furloughs ranging from 5 to 16 days. They also released the county from its obligation to make the monthly $25-per-employee contribution to the retiree health savings account.

The two units represented by UPE Local 1, which include social workers and office technical workers, have made a good faith offer to the board of supervisors to give up the county's retiree health savings fund through June 2011. Keil said that there will be further discussions with UPE this year. In September, 200 child protective services providers, from one of the bargaining units UPE represents, were laid off.

Political pressure by the labor community convinced the board to abandon the plan.

By extending the terms of existing contracts, the county reached agreements with the union representing county attorneys and with Sacramento County Alliance of Law Enforcement, which represents two bargaining units that include law enforcement support services and a group that includes coroners and criminal investigators. Public defenders and deputy district attorneys agreed to a monthly furlough day back in May. No agreement has been reached with the law enforcement management unit.

An agreement with the Engineering Technicians and Technical Inspectors includes 16 furlough days, one every pay period, through the end of the fiscal year. This deal was struck to avoid the layoff of five building inspectors slated for December 31, 2009. Contracts with the deputy sheriffs and the probation officers are locked in to three-years. This summer, approximately 120 sheriff's deputies were laid off. Negotiations for a contract covering approximately 20,000 IHSS workers, which expires on November 30, are ongoing. (For more on IHSS wages, see story on p. .)

Steve Keil told *CPER* that the county budget is hemorrhaging, and that "no one foresaw such a dramatic downturn." ✻

Legislation Divesting PERB of Jurisdiction in Firefighter Cases Applied Retroactively

In 2008, Senate Bill 1296 amended the Meyers Milias Brown Act and gave the superior courts exclusive jurisdiction over actions involving interest arbitration when the action involves an employee organization representing firefighters. Proponents of the legislation argued that firefighters had been denied the procedural rights enjoyed by law enforcement officers when the officers were exempted from S.B. 739, which conveyed to the Public Employment Relations Board jurisdiction over unfair practice charges brought under the MMBA.

The question in *City of San Jose v. International Association of Firefighters, Loc. 230*, was whether the statutory changes effective January 1, 2009, should be applied to cases pending at the time S.B. 1296 was enacted.

Here, the Sixth District Court of Appeal reasoned that since PERB no longer has exclusive jurisdiction over the underlying dispute, the premise for the lower court's ruling is no longer correct.

The dispute dates back to January 2004, when the parties began negotiations for a new memorandum of understanding. They were unable to reach agreement on certain matters and, under provisions of the city charter, the city and the firefighters association participated in mandatory interest arbitration. During that process, the association presented 36 bargaining proposals, including two that concerned employee retirement benefits. The city took the position that these proposals were outside the scope of representation and refused to arbitrate on either one.

The city filed a complaint seeking an order from the court declaring that the two proposals were outside of scope. The association filed a counter petition to compel arbitration, asserting that its proposals were subject to bargaining and arbitration. The Public Employment Relations Board intervened in the litigation and urged the court to dismiss the entire action based on the board's exclusive initial jurisdiction over the issues. The lower court agreed with PERB and dismissed the claims.

While an appeal was pending, the MMBA was amended by S.B. 1296. Language added to Sec. 3509 now provides that "superior courts shall have exclusive jurisdiction over actions involving interest arbitration…when the action involves an employee organization that represents firefighters…."

The Court of Appeal first rejected the city's contention that because the interest arbitration process has since concluded, the matter is moot and should be dismissed. Even if technically

The premise for the lower court's ruling is no longer correct.

moot, the controversy raises important issues that appropriately should be addressed by the court.

In light of the clear language added to Sec. 3509, the central question before the court was whether S.B. 1296 should operate only prospectively, or apply to the pending case that arose before the statute was amended.

Although new statutes are presumed to operate only prospectively, a statute that affects procedural rights or provides a new remedy to enforce existing rights is properly applicable to actions pending when the statute becomes effective.

The court found no sufficiently clear evidence that the legislature intended the amendment to apply to pending cases. But, the court determined that the amendment did not implicate any legal rights. It left the substantive rules governing public employment rights "entirely unchanged." "The only change is the initial forum in which the parties' substantive rights are pursued," it said.

The decision to apply the amendment in the pending action is proper, the court reasoned, because the lower court's judgment of dismissal was based on PERB's exclusive initial jurisdiction prior to the 2008 amendment to Sec. 3509. Relying on *Governing Board v. Mann* (1977) 18 Cal.3d 819, the court concluded that repeal of PERB's statutory authority by "the plain and unambiguous language" of S.B. 1296 necessarily defeats the judgment of dismissal that was premised on the determination that PERB had exclusive initial jurisdiction. "Since that premise is no longer correct, the judgment cannot stand." (*City of San Jose v. International Association of Firefighters, Loc. 230* [10-14-09] H032097 [6th Dist.] ___Cal. App.4th___, 2009 DJDAR 14835.) ✻

The controversy raises important issues that should be addressed by the court.

Bill Expanding Exclusion of Peace Officers Vetoed

Governor Schwarzenegger refused to sign a bill that would have amended the Meyers Milias Brown Act by broadening the language that excludes peace officers from Public Employment Relations Board jurisdiction. If passed, S.B. 656 would have removed from the board's administrative authority any local bargaining unit comprised of a majority of peace officers.

In 2000, with the passage of S.B. 739, the legislature changed the labor relations landscape by giving PERB the authority to enforce provisions of the MMBA. Before S.B. 739 was enacted, local public agencies and employee organizations representing their employees brought disputes to the superior courts.

The new law gave PERB the same administrative authority over the MMBA as it had with regard to other public sector collective bargaining statutes. However, an exception to the board's expanded authority over local governments was carved out by Sec. 3511. It specified that the board's new power does not apply to persons who are peace officers as defined in Penal Code Sec. 830.1.

S.B. 656 would have added language to Sec. 3511 excluding from PERB's jurisdiction "a local bargaining unit that is comprised of a majority of persons who are peace officers…."

Proponents of the bill argued that there are certain bargaining units which are comprised of both miscellaneous employees and employees with peace officer status. They claimed that problems arise when a peace officer is part of a "mixed unit" made up of both peace officers and miscellaneous employees, such as dispatchers, community services officers, and crime scene investigators. Since existing law is not clear whether PERB or the courts have the authority to resolve disputes, S.B. 656 was drafted to clarify that, if the majority of unit members are peace officers, the unit will fall outside of the board's jurisdiction and disputes affecting these employees will be resolved by the superior courts.

Opposition to the legislation was voiced by the California State Association of Counties. It charged that the bill would inappropriately extend a narrow peace officer exemption from PERB's jurisdiction to a large group of miscellaneous employees. CSAC asserted that, under the current structure, peace officer members of a mixed bargaining unit resolve their disputes in court, while miscellaneous employees take their disputes to PERB.

Opponents also noted that existing law, Gov. Code Sec. 3508(a), permits peace officers to form a separate bargaining unit composed solely of peace officers.

In his veto message, the governor said that the bill treats non-peace officer employees in units with peace officer

majorities differently than non-peace officer employees in units without a peace officer majority. "I do not believe a sufficient case can be made why one group should circumvent the existing dispute resolution process that currently exists through the Public Employment Relations Board," he added. ✻

Federal Judge Blocks Cuts in IHSS Pay and Services

In June, Federal District Court Judge Claudia Wilken issued a preliminary injunction to prevent the implementation of a wage reduction in state funding for in-home supportive services workers. Then, last month, she blocked the state's plan to cut or reduce caregiver services for over 130,000 disabled and low-income elderly and disabled individuals. Both rulings were heralded by unions who represent the workers and by disability rights organizations. IHSS workers provide care for more than 440,000 residents who need assistance to live at home instead of in nursing facilities. In-home services are provided through California's Medi-Cal program. The program receives funding from the state and federal governments and from the counties, which administer the program.

In February, the governor authorized that the state's maximum contribution to wages and benefits be reduced from 65 percent of the non-federal share of an hourly rate of $12.10 to 65 percent of the non-federal share of $10.10 an hour. As a result, counties that pay IHSS providers more than $10.10 an hour would have seen a reduction in the state's contribution to IHSS costs. Of the 22 counties that pay wages and benefits above the $10.10 hourly rate, 12 notified the state of their intent to reduce IHSS wages in proportion to the anticipated reduction in the state's contribution. The remaining 10 counties are covered by collective bargaining agreements that prevented mid-term wage and benefit adjustments.

Service Employees International Union filed a lawsuit against the governor and other state officials to block that part of the 2009-10 budget which would have reduced the state's contribution to IHSS providers' wages and benefits. SEIU also sued Fresno County, which invoked a provision in its memorandum of understanding with the union that permits the reduction of county funding to the IHSS program proportionate to any reduction in state or federal funding.

The state violated procedural requirements of the Medicaid Act by failing to study the impact of its cuts.

Judge Wilken found that the plaintiffs established a strong likelihood of success on their claim that the state violated procedural requirements of the Medicaid Act by failing to study and analyze the impact the state cut would have on efficiency, economy, and quality of care. The state conceded that the California legislature did not consider these factors, noting that the new law only was to address the fiscal emergency declared by the governor's proclamation in December 2008.

The court also rejected the argument that the wages and benefits paid to IHSS providers are set by the counties, often after collective bargaining, and the state has no influence in determining what the wages will be in each county. The reduction in the state's contribution directly influences wages for each county, the judge said, because it reduces the maximum payment the state will make toward wages and benefits.

In issuing the preliminary injunction, Judge Wilken also found that the caregivers would suffer irreparable injuries if the cuts were implemented and, "furthermore, the cuts are reasonably likely to cost the State more money in the long run as individuals currently receiving in-home health services are required to turn to institutionalized care due to the difficulty of finding IHSS providers willing to work for the reduced wages."

Judge Wilken amended her original order, requiring that the state and the counties immediately take specific steps to ensure that the IHSS workers receive their full wage payments.

The state asked the Ninth Circuit Court of Appeal to stay Judge Wilken's order, but that request was denied.

In October, Judge Wilken issued a second preliminary injunction that prevented the state from implementing cuts to IHSS eligibility and services. This lawsuit was filed by Disability Rights California, Disability Rights Legal Center, National Health Law Program, National Senior Citizens Law Center, AFSCME, and SEIU.

The judge's order blocked the state from altering eligibility based on an individual's "functional index score" and reductions in services based on a person's "function index ranking." Neither of these designations is based on an individual's need and, as a result, essential services could be withdrawn arbitrarily, Judge Wilken said. Over 136,000 people would have been impacted by the cuts.

The judge also found that the notices sent to recipients of in-home services did not meet due process requirements because they were confusing, not understandable, and not translated into other languages. She ordered the state to send new notices to all IHSS recipients and workers, informing them of her ruling. ✻

Public Schools

Stimulus Funds Stimulate Changes in California Education Laws

California legislators, union officials, and educators are embroiled in heated discussions about whether to make the adjustments necessary to be considered for approximately $500 million in federal stimulus funds. So far, those in favor seem to be winning.

CTA: 'Get off the merit pay idea, because that ain't gonna work.'

The federal government has announced that it will award $4.35 billion in "Race to the Top" funds for education to selected states. But, to even *apply* for the funds, states must not have any barriers between student achievement tests and teacher evaluations. Legislation erecting just such a firewall was signed by Governor Arnold Schwarzenegger in 2006. That law created a system of two different databases for collecting and storing information about the state's students and public school teachers. It contained a provision, for which the teachers unions lobbied heavily, that read, "data in the system may not be used…for purposes of pay, promotion, sanction, or personal evaluation of an individual teacher or group of teachers, or any other employment decisions related to teachers."

President Barack Obama and U.S. Secretary of Education Arne Duncan made it crystal clear that this law, if not changed, would preclude California from receiving any Race to the Top funds. Duncan called the ban on using testing data "mindboggling," and, during a visit to Sacramento in September, offered California educators a choice: "Either take the steps necessary to do the right thing for children or you'll be on the sidelines." President Obama said, "any state that makes it unlawful to link student progress to teacher evaluations will have to change its ways."

Change it did. California is now a contender.

In October, Governor Schwarzenegger signed S.B. 19, authored by Senator Joe Simitian (D-Palo Alto), eliminating the offending language. Simitian also had authored the 2006 bill that created the prohibition. Simitian's position, supported by State Superintendent of Public Instruction Jack O'Connell, was that the whole uproar was a "tempest in a teapot" because the original language only precluded the state, not individual school districts, from using the data.

The recent change was opposed by teachers unions, who have long argued that student test scores have little to do with a teacher's classroom performance and that, if the two are linked, educators would be forced to "teach to the test." Marty Hittelman, president of the California Federation of Teachers, said he feels betrayed by the new legislation. "It makes you question whether you can trust people," he lamented.

Federal officials view lifting the ban as a step in the right direction.

President of the California Teachers Association David Sanchez also spoke out in opposition to the new law, saying that both the governor and the president should "get off the merit pay idea, because that ain't gonna work." He also voiced the opinion that an award of $500 million in the face of the state's cut of $4.5 billion in education funds was minimal. "If we were talking about significant money, we would probably be more excited about it," he said.

But federal officials view lifting the ban as a step in the right direction. "We applaud California's leaders for making a difficult decision," said U.S. Department of Education spokesperson Justin Hamilton.

Schwarzenegger is pushing additional legislation, known as S.B. X5 1, authored by Senators Gloria Romero (D-Los Angeles), Bob Huff (R-Diamond Bar), Elaine Alquist (D-Santa Clara), and Mark Wyland (R-Carlsbad), that would increase California's chances of receiving the federal grants by bringing it into compliance with the federal rules. That legislation would require that the bottom 5 percent of low-performing schools implement "bold turnaround strategies" and would give parents more freedom to choose schools. It would also repeal the cap on the number of charter schools allowed in the state, and reinforce a school district's authority to use alternative pay schedules to reward teachers and create incentives.

Proponents of the legislation argue that its passage would make California's Race to the Top application more competitive. Those opposed to the legislation, such as Assembly Member Tom Ammiano (D-San Francisco), warn against making major changes in educational policy to go after a few federal dollars. ✻

Parents and Students Cannot Challenge NCLB Highly Qualified Teachers Regulation

The Ninth Circuit Court of Appeals, by a vote of two to one, has thrown out a lawsuit brought by a group of California parents and students against the United States Department of Education. The allegation was that the department failed to provide a quality teacher in each classroom as required by the federal No Child Left Behind Act. (See story at *CPER* No. 186, p. 26.) In *Renee v. Duncan*, the majority ruled the parents and students had no standing to challenge the federal regulation that considers teacher interns as "highly qualified" within the meaning of the act because they could not show that invalidating the regulation would redress the injury they claimed.

Background

The NCLB requires public schools that receive federal funds to "increase the number of highly qualified teachers" so that only "highly qualified" teachers provide instruction in core academic subjects. It also requires new hires to be highly qualified. Under NCLB, all highly qualified teachers must have a B.A. and competence in their subject matter. In addition, the act specifies that the teacher must have obtained "full State certification as a teacher (including certification obtained through alternative routes to certification)." It does not define "full State certification."

The Secretary of Education issued a regulation, 34 CFR Sec. 200.56, which states that a teacher can be "highly qualified" under NCLB if the teacher "is participating in an alternative route to certification program" and demonstrates "satisfactory progress toward full certification as prescribed by the State."

Under California law, there are two levels of state certification, both of which provide a preliminary credential. They are differentiated by years of experience. After two years of teaching with the preliminary credential, a teacher may receive a "clear" credential that is valid for five years but may be renewed. Below the full credentials are a series of subordinate credentials allowing teachers to participate in internships as they advance towards full certification. State law requires that a district hire preliminary or clear credential holders before it hires intern credential holders.

The appellants lacked constitutional standing because their injury is not redressable.

California has enacted "highly qualified" teacher regulations to implement NCLB. They provide that "a teacher who meets NCLB requirements at the middle or secondary levels is one who…is currently enrolled in an approved intern program for less than three years or has a full credential."

The parents and students brought an action under the Administrative Procedure Act alleging that the education secretary's regulation is inconsistent with NCLB. They argued

that they have been harmed by the regulation because California's school districts have hired thousands of "alternative route" participants, allowed these teachers to be concentrated in low-income and minority areas, and treated them as highly qualified. The trial court dismissed the lawsuit, and the parents and students appealed.

Court of Appeals Decision

On appeal, for the first time, the secretary of education argued that the appellants lacked constitutional standing because their injury is not redressable. In order to have standing to sue under the APA, said the court's majority, appellants must show that they suffered an injury, causation, and "likelihood that a favorable decision will redress the injury." In order to meet the last part of the test, appellants must show that it is " 'likely'— not certain — that the injury will be redressed by a favorable decision," said the court.

Where the plaintiff's claimed injury arises from the government's allegedly unlawful regulation of a third party, then causation and redressability hinge on the response of the regulated third party to the government action, the court explained. In such a situation, "standing is not precluded, but it is ordinarily substantially more difficult to establish," said the majority, quoting from *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555. In this case, "redressability turns on whether, absent the regulation, California would consider teachers participating in alternative routes to be fully certified."

"The problem here," said the majority, "is that because the meaning of full certification is a matter of state law, California could still determine, as it has already, that teachers participating in alternative routes to certification were 'highly qualified' even if the federal regulation was declared void."

The court was not persuaded by the appellants' argument that, if the federal regulation were voided, California would be obligated to change its regulation accordingly. "Because California is not a party to this suit, and has therefore not offered its views, this court may only speculate what, if anything, California would do," it said. And, the fact that California changed

its laws once to comply with NCLB and its regulations so that interns could be considered "highly qualified," does not mean that it will do so again, the majority concluded. "Because it is undisputed that the interpretation of 'full State certification' is a matter of state law, and that, therefore, a state can essentially decide what constitutes a 'highly qualified teacher,' it is unlikely that revocation of the regulation will have a 'coercive effect' upon California," it said. "Instead, appellants' injury is likely the result of California's independent action," and California "is not before the court."

Justice William Fletcher, in his dissent, disputed the majority's conclusion that if the court were to hold the federal regulation invalid, California would most certainly change its state law definition of "full credential" to include alternative route participants who are only in the process of obtaining their credential. "There is no basis for that conclusion," argued Fletcher, because, after the passage of NCLB but before the federal regulation was implemented, California did not change its definition of full credential. California promulgated its new regulations only after the federal regulation was promulgated and, when it did, it did not include any change to the state definition of full credential. "To conclude that California would almost certainly change its definition of full credential after the invalidation of Sec. 200.56, when it has not seen fit previously to make that change, is unsupported speculation," he wrote. And, the majority's alternative conclusion, that California could just leave its current regulations in place if the federal regulation were invalidated "is not true," said Fletcher. "If Sec. 200.56 is struck down as inconsistent with NCLB, an alternative route participant would not be fully certified under NCLB unless and until California takes affirmative action to change its statutes or regulations to provide that an alternative route participant is fully credentialed under state law." (*Renee v. Duncan* [9th Cir. 2009] 573 F.3d 903.) ✻

Waiver of Appeal Rights by Terminated Professor Null and Void

In *Farahani v. San Diego Community College Dist.*, the Fourth District Court of Appeal held that a community college professor's "waiver" of his statutory due process rights related to faculty discipline was void as a matter of law.

Background

Sam Farahani was a tenured professor who had worked for the district for 18 years prior to his termination. After investigating numerous complaints from female students and staff about unwanted sexual and social advances, the district gave Farahani a written reprimand and advised that continued misconduct would result in discipline, including termination.

In September 2004, the district sent Farahani a written notice of a pre-disciplinary hearing, recommending a one-year suspension without pay for a continuing pattern of inappropriate behavior towards students and faculty.

In November 2004, the attorney for the California Federation of Teachers, Local 1931, presented Farahani with an agreement and release. It provided for a reduction of pay equivalent to one month's salary and required him to refrain from conduct that constituted sexual harassment and from personal contact with students off campus for a period of 18 months. The agreement also stated that if he did not comply with its terms he could be "terminated at the Chancellor's discretion, without the issuance of charges under the Education Code or District policies and without right of appeal." The release stated that "Farahani waives any and all appeal rights he may otherwise have to challenge the discipline or otherwise pursue any appeal relating to the pre-disciplinary notice." The attorney told Farahani that the district would suspend him for a year without pay if he did not sign the agreement. The attorney also told Farahani that the agreement probably was not valid but advised him to sign it, get through the 18 months, and get it over with. Farahani signed the agreement.

When the district received new complaints about Farahani from female employees, he was terminated pursuant to the agreement. He requested reinstatement and an opportunity to meet but was told by the district that, under the terms of the agreement, he was not entitled to the issuance of formal charges or the right to appeal.

The attorney said the agreement probably was not valid but to sign it.

The trial court granted Farahani's writ of mandate, ruling that the agreement violated the Education Code and his due process rights. The district appealed.

Court of Appeal Decision

The court agreed with the trial court that the agreement was invalid. It noted that the Education Code sets out due process rights for community college district faculty members in disciplinary matters, including notice, a hearing, and a decision by the governing board. Education Code Sec. 87485 states: "Except as provided in Section 87744, any contract or agreement, express or implied, made by any employee to waive the benefits of this chapter or any part thereof is null and void."

The district argued that Sec. 87485 was inapplicable because the agreement was a waiver in response to discipline. The court disagreed, finding that the district read the section "too narrowly." It also rejected the district's contention that, under Civil Code Sec. 3513, Farahani could lawfully waive the statutory due process protections because they were solely for his private benefit. "A law established for a public reason cannot be waived or circumvented by a private act or agreement," said the court, relying on *Covino v. Governing Board* (1977) 76 Cal.App.3d 314. "Teachers are public employees and their tenure rights elaborately regulated by the Education Code reflect the public policy of the state," it continued. "Legislation which is enacted with the object of promoting the welfare of large classes of workers whose personal services constitute their means of livelihood and which is calculated to confer direct or indirect benefits upon the people as a whole must be presumed to have been enacted for a public reason and as an expression of public policy in the field to which the legislation relates."

The court also rejected the district's three affirmative defenses. It found that the district could not claim that Farahani's petition was barred by laches — a delay in filing — because the prejudice claimed by the district as a result of the delay was due to the district's own illegal actions. The district also raised the defense of "unclean hands," arguing that Farahani entered into the agreement with no intention of performing because the union attorney had told him it was illegal. "The difficulty with the District's argument is that the Agreement itself was contrary to the express language of section 87485 and unenforceable as a matter of law."

A law established for a public reason cannot be waived or circumvented by a private act or agreement.

And, regarding the district's argument that Farahani failed to exhaust his administrative remedies, the court agreed with the trial court that the district was precluded from raising this defense since they advised Farahani that he had no rights of appeal. It was not persuaded by the district's contention that the word "appeal" in the chancellor's termination letter applied only to the statutory hearing and appeal rights, and not those contained in the collective bargaining agreement. The court found that the district's denial of "appeal rights" was "unequivocal and encompassed all avenues of appeal." (*Farahani v. San Diego Community College Dist.* [2009] 175 Cal.App.4th 1486.) ✻

West Contra Costa District and Teachers Reach Tentative Accord

After more than a year of contentious negotiations, including imposition of a contract on the United Teachers of Richmond by the district and a strike authorization vote supported overwhelmingly by the teachers, the parties have come to a tentative agreement.

The last contract expired on June 30, 2008. Negotiations, which centered on health care benefits and class size, quickly became contentious.

Several events brought the district back to the table.

Bargaining stalled, PERB declared an impasse, mediation failed, UTR refused to attend the factfinding hearing, and the district imposed a contract on the union. (See full story at *CPER* No. 196, pp. 27-28.)

In response, the union called for a strike authorization vote, and, just five days before school started, the teachers voted "yes" by a margin of 1,114 to 89. Although a strike was not called, over 400 teachers demonstrated in September to bring their message of dissatisfaction to the public.

Also in September, in what UTR called a "desperation ploy," district superintendent Dr. Bruce Harter sent a bargaining proposal directly to each union member and asked that they agree to mediation over disputes that remained after bargaining. This action resulted in the union filing its third unfair practice charge with PERB, arguing that the district's letter constituted direct dealing with bargaining unit members.

In addition to the unfair practice charge, the union filed a lawsuit alleging the district violated the Education Code when it assigned kindergarten teachers to teach fourth, fifth, and sixth grade students. A preliminary hearing in that case is scheduled for December 8, 2009.

On October 21, the Richmond City Council unanimously passed a resolution encouraging the school board to reach an agreement with teachers on the stalled contract talks.

Apparently, these events brought the district back to the table. On October 22, the parties reached a tentative agreement for a three-year contract through June 30, 2012, with no reopeners. It specifies that the issue regarding the kindergarten teachers' assignments would be left to the courts to decide. It sets firm caps for class sizes at the elementary level at 31 students for grades K through 3, and 33 students for grades 4 through 8. It provides that union members with a notice of unprofessional conduct or an unsatisfactory evaluation be allowed to transfer with written approval of human resources. Seniority is reinstated.

The tentative agreement specifies that there shall be no increase to any of the salary schedules for the duration of the contract. In addition, there will be no furlough days for the 2009-10 school year, but two furlough days in each of the following two school years. It eliminates three staff development days, with a 1.5 percent reduction in salary, for all teachers, librarians, nurses, and preschool teachers effective 2010-11. It also reduces the work year of secondary counselors, curriculum guides, psychologists, and speech and language pathologists by three days, with a corresponding reduction in salary.

There shall be no increase to any of the salary schedules for the duration of the contract.

Regarding health benefits, the district is required to contribute $532 for one employee, $625 for one employee and one dependent, and $895 for one employee and more than one dependent. Effective July 1, 2010, through June 30, 2012, the district's maximum contribution for health and vision benefits for the bargaining unit is $13 million. Dental insurance is maintained.

Unit members who retire before June 30, 2010, with a minimum of 10 continuous years of service, can receive benefits under the practice in place at the time of retirement. Effective June 30, 2010, current employees hired prior to January 1, 2007, who attain 10 continuous years of service will receive a maximum district contribution towards benefits of $450 a month; those hired prior to January 1, 2020, who attain 20 years of service by June 30, 2010, will receive a maximum of $750 a month; and, those hired after January 1, 2007, who attain 10 years of service will receive a maximum district contribution equal to the CalPERS Health Benefits Program minimum allowable monthly unequal contribution and will not receive any contribution towards prescriptions, vision, or dental care.

Under the terms of the tentative agreement, joint committees will be formed to study the class-size issue and explore all aspects of educational reform.

Unit members will vote on the agreement this month. ✻

Legislative Round-Up

These bills reached Governor Schwarzenegger's desk during the weeks leading up to the October 1, 2009, legislative deadline.

The governor signed the following bills into law:

S.B. 19. Authored by Senator Joe Simitian (D-Palo Alto), the bill eliminates the "firewall" prohibiting use of student information in determining teacher pay or evaluations. (See story at pp.____.)

S.B. 634. Authored by the Committee on Public Employment and Retirement, whose members are Senators Lou Correa (D-Orange County), Roy Ashburn (R-Bakersfield), John Benoit (R-Bermuda Dunes), Denise Ducheny (D-San Diego), Carol Liu (D-La Canada Flintridge), Alex Padilla (D-Pacoima), and Patricia Wiggins (D-Santa Rosa), the bill makes a number of amendments to the State Teachers' Retirement System Law.

S.B. 751. Introduced by Senator Gloria Romero (D-Los Angeles), the bill authorizes the Commission on Teacher Credentialing to issue a multiple subject, single subject, or education specialist teaching credential to a teacher prepared in a country other than the United States who has earned a valid corresponding elementary, secondary, or special education teaching credential in another state, and who meets specified requirements. It also imposes requirements on school districts, county offices of education, and charter schools that provide preparation courses for subject matter exams.

A.B. 239. Authored by Assembly Member Julia Brownley (D-Santa Monica), the bill allows the Commission on Teacher Credentialing to issue an authorization to provide services to limited-English-proficient students to an applicant who possesses a valid teaching credential and who holds certain certificates issued by the National Board for Professional Teaching Standards.

The bill deletes the provision that limits persons with intern credentials to provide classroom instruction only to pupils in special education classes. It changes existing law that permits persons holding district intern credentials to teach in K through 8 in self-contained programs only if they have completed a subject matter program or have passed the subject matter examination. Instead, the bill authorizes such instruction if a person has met the subject matter requirement. It changes existing law to provide that district interns be issued preliminary credentials upon completion of successful service as a teacher. It requires the Commission on Teacher Credentialing to issue a clear services credential to a teacher in the area in which the person has received national certification.

A.B. 381. Authored by Assembly Member Marty Block (D-San Diego), the bill permits a community college district to become an employer for the purpose of disability compensation coverage with respect to all employees in an appropriate bargaining unit. This must be part of a negotiated agreement between the district and the union. A community college district can also elect to provide coverage to its man-

agement and confidential employees who are not part of the unit and to certain academic employees.

A.B. 506. Introduced by Assembly Member Warren Furutani (D-South Los Angeles County), the bill amends the State Teachers' Retirement Law. It removes limits on post-retirement compensation earned for specified activities during the first months after retirement provided the member is below normal retirement age when the compensation is earned. It exempts from the earnings limitation compensation received by a retired member providing specified types of services, if that retired member retired on or before January 1, 2009, rather than January 1, 2007, as provided previously.

A.B. 544. Authored by Assembly Member Joe Coto (D-San Jose), the bill requires the Commission on Teacher Credentialing, upon recommendation of a tribal government, to issue an American Indian languages credential to a candidate who has demonstrated fluency in that tribal language, and who meets other requirements.

A.B. 1025. Introduced by Assembly Member Connie Conway (R-Tulare), the bill requires non-certificated candidates for a coaching position to obtain from the Commission on Teacher Credentialing an activity supervisor clearance certificate. Each certificate is valid for a period of five years, but may be renewed. The commission must give information about the applicants to the Department of Justice for a criminal history check before the certificate is issued.

The governor vetoed ***S.B. 84***, introduced by Senator Darrell Steinberg (D-Sacramento), that would have provided funding for certain low-performing schools. ✻

Sweetwater and Teachers Agree to Tentative Contract

One of the largest secondary school districts in the state has entered into a tentative agreement with its teachers. The previous contract between Sweetwater Union High School District and Sweetwater Education Association expired in June 2008.

The main disagreements during bargaining revolved around salaries, management rights, work assignments, the retirement health system, and class size. The parties were sent to factfinding on three occasions, and the union filed an unfair practice charge against the district with PERB, alleging that the district increased the class size ratio by two students to reach 30 to 1 without negotiating with the union.

The parties came to an agreement during a marathon mediation session, where 1,000 teachers, students, and supporters demonstrated outside.

The tentative agreement, which runs from June 30, 2008, through June 30, 2011, provides for a student to teacher ratio of 30 to 1 for 2009-10, and 31 to 1 for 2010-11, 2011-12, and 2012-13, at which point the contract calls for a return to the 28-to-1 ratio. Teachers will be capped at 182 students per day. The district had been pushing for a permanent increase. The union agreed to withdraw its unfair practice charge.

The proposed contract does not provide for any wage increases. Other provisions call for ending the block schedule at one high school, keeping break stipends for adult-school teachers, and maintaining retirement health benefits as they are. The district had been pushing for a two-tiered system that would provide new employees with less generous benefits.

The proposed contract does not provide for any wage increases.

The union leadership has recommended that its membership vote to adopt the agreement. If adopted and ratified, the new contract will cover approximately 2,200 teachers and nurses. The district, which serves Chula Vista, National City, Imperial Beach, San Ysidro, and Bonita, serves 42,800 students in 11 middle schools and 13 high schools, and 27,000 adult learners. ✻

Teacher's Refusal to Take English Learner Certification Training Is Cause for Termination

Under Education Code Sec. 35160, a school district has the authority to impose a new condition of employment on its teachers to satisfy a legislative mandate, unless that authority is preempted by state law. In *Governing Board of Ripon Unified School Dist. v. Commission on Professional Conduct*, the Third District Court of Appeal found that the district's requirement that all teachers become certified to teach English learners was not preempted and, therefore, a teacher's refusal to take the training was a cause for termination.

Background

The federal Equal Educational Opportunity Act requires school districts to ensure that its students learning the English language are provided equal participation in its programs. Under state law, students are to be taught English "as rapidly and effectively as possible." The Education Code mandates that all public school teachers who instruct children who are not proficient in English be certified to teach English learners.

The state Department of Education determined that the district was out of compliance with state law because it had assigned EL students to classes taught by teachers who lacked EL certification. In response, the district developed a plan that required all certificated teachers to sign an agreement to obtain an EL certificate. It also negotiated an agreement with the teachers union that all certificated staff obtain EL certification by a specified date or else resign or be terminated.

Theresa Messick, who holds a lifetime teaching credential, was the only music teacher at one of the district's high schools. She refused to sign the agreement or obtain the certification, and the district began proceedings to terminate her. An administrative law judge determined that the district did not have the authority to impose the requirement on Messick, but the trial court disagreed and authorized the district to proceed with her termination. Messick appealed.

Court of Appeal Decision

In addressing Messick's argument that the district's actions were unlawful, the court noted that the California Constitution contains a broad mandate for public education, primary authority over which is vested in the legislature. Both, in turn, have ceded substantial discretionary control to local school districts. Education Code Sec. 35160 provides that "the governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established." It also states that school districts "should have the flexibility to create their own unique solutions." The court concluded that Sec. 35160 clearly authorized the district to impose the EL certification requirement, unless Messick could point to a law that prohibits it.

The district's requirement did not affect the validity of the credential.

Messick claimed that the district's certification requirement violated statutes covering teacher credentialing and made her lifetime credential ineffective. Under Ed. Code Sec. 44355(a), her credential remains in force so long as it is valid under the laws and regulations that were in effect on the date it was issued. The court found that the district's requirement did not affect the validity of her credential. "She remains authorized to teach music by any district that will hire her," it said. "State credentialing law does not prevent the district from requiring a teacher to satisfy additional certification requirements in order to continue in employment."

The court also was not persuaded by Messick's argument that the district violated Ed. Code Sec. 45033, which

prohibits a school district from reducing a tenured teacher's salary because she failed to meet additional education requirements imposed by the district. It concluded that the statute "applies only to salaries, not to termination or dismissal."

Messick next argued that the district's agreement with the teachers union to impose the requirement

The issues over which the parties had bargained were all appropriate subjects of negotiation.

was outside the scope of bargaining and an unlawful waiver of statutory requirements regarding the causes and procedures for dismissing a certificated teacher.

On the first point, the court acknowledged that under the Educational Employment Relations Act, the scope of representation is limited to "matters relating to wages, hours of employment, and other terms and conditions of employment." The court found that the issues over which the parties had bargained — the requirement that all teachers become EL certified as a condition of continuing employment, that teachers will earn a financial stipend, and that the district will pay the cost of obtaining a certificate — all were reasonably related to hours, wages, and conditions of employment, and were thus all appropriate subjects of negotiation. "Even if the certification requirement was not related to hours, wages, or conditions of employment, the District still had the right under the EERA to consult with the union on the requirement," added the court, citing Gov. Code Sec. 3543.2(a).

The court also dismissed Messick's contention that the collective bargaining agreement violates Gov. Code Sec. 3543.2(b) and Ed. Code Sec. 44924 because it involved the causes and procedures for dismissing a credentialed teacher, a matter about which the district may not negotiate and the employee cannot be required to waive. "By statute, the District can terminate a permanent teacher such as Messick only for, among other stated grounds, persistent violation or refusal to obey a District regulation," said the court. "The District's action only added a regulation. It did not alter the statutory causes and procedures for dismissal, nor did it require Messick to waive any protected statutory rights."

The court affirmed the trial court's decision. (*Governing Board of Ripon Unified School Dist. v. Commission on Professional Conduct* [2009] 177 Cal. App.4th 1379.) ✻

Notice of Unsatisfactory Performance Required Before Dismissal of Probationary Teacher

A PROBATIONARY teacher must be given a notice of unsatisfactory performance and an opportunity to correct the deficiencies prior to being dismissed, according to the Third District Court of Appeal. In *Achene v. Pierce Joint Unified School Dist.*, the court determined that the district did not follow the procedures mandated by the Education Code, and overturned the dismissal.

Background

Sarah Achene was hired to teach high school English in August 2006, two months after she received her provisional teaching credential. Doug Kaelin, the school principal, was responsible for formally evaluating Achene's performance during her first-year probation period. Kaelin observed Achene in two of her classes, on two occasions, in October and November 2006. He met with her after each observation and prepared a report. While he had some criticisms and suggested some areas of "refinement," he never told her that her performance was unsatisfactory.

Eight days after the last formal observation, Achene was notified in writing that she was being dismissed. The basis for the dismissal was unsatisfactory performance as documented by Kaelin in his evaluation. Achene appealed the notice to the district's governing board, which affirmed it.

The trial court found the district failed to comply with the procedures

set forth in the Education Code and ruled the dismissal null and void. It ordered the district to reinstate Achene and pay her lost wages and benefits from the date of dismissal through the end of the school year.

Court of Appeal Decision

The district argued that Sec. 44938(b)(1), which requires a 90-day written notice of unsatisfactory performance prior to the notice of termination, applies to permanent employees only. "That is not the case," said the court. "First, it does not say so," it reasoned. Section 44938 applies to "any charges" of unsatisfactory performance. In addition, the court noted that Sec. 44938 is part of Article 3 of Chapter 3 of the Education Code. "Whenever in the article a section applies to permanent employees it says so." Section 44932, which specifies the grounds for dismissal for permanent employees, "is made applicable to probationary employees by section 44948.3," said the court. Section 44948.3 provides that "(a) First and second year probationary employees may be dismissed during the school year for unsatisfactory performance….or for cause pursuant to Section 44932." In incorporating Sec. 44932, Sec. 44948.3 also incorporated the procedures set out in Sec. 44938(b)(1), making them applicable to the dismissal of a probationary employee for unsatisfactory performance, the court concluded.

It is not the cause that a 90-day written notice applies to permanent employees only.

The court also was not persuaded by the district's contention that it substantially complied with Sec. 44664's requirement that each employee be evaluated and assessed at least once a year. The court found that the legislature "plainly intended that an employee who is not performing in a satisfactory manner be notified of that fact and *thereafter* counseled concerning the perceived deficiencies in her performance and be given an opportunity to correct them." "Here," said the court, "while the evaluation notified Achene that her performance was unsatisfactory, the district did not give her the evaluation until it notified her she was being dismissed."

Nor did the district's classroom observations, post-observation meetings, or post-observation reports meet Sec. 44664's standard. The court noted that Kaelin's October report contained many positive comments and did not convey that he considered her performance unsatisfactory. "Telling an employee that she needs to refine her performance is a far cry from telling her that her performance is unsatisfactory," it said. "Telling an employee that her performance needs refinement assumes a level of satisfactory performance, and…, one would expect that a first year teacher would be given areas for refinement." And, while Kaelin did notify Achene that there were serious concerns about her performance following the November observation, the court found that "she was not given sufficient time to improve her performance as contemplated by section 44664."

The court recognized that the code does not set out any specific period of time that a probationary teacher must be given to correct the unsatisfactory performance. But, Sec. 44664 "plainly contemplates that there be some period of time in which to do so," and one week was not enough.

The court upheld the trial court's decision and voided the order dismissing Achene. (*Achene v. Pierce Joint Unified School Dist.* [2009] 176 Cal. App.4th 757.) ✻

Higher Education

No Raises, But Contracting Restrictions Preserved in SETC Agreement

The California State University has reached a three-year agreement with State Employees Trades Council-United, the union representing 1,000 carpenters, electricians, and other trades workers. After big battles over compensation and contracting out led to impasse and factfinding, SETC members ratified an agreement modeled on the factfinders' report. But they rejected furloughs, reiterating their preference to use the layoff procedures of their contract, since CSU would not promise to retain all unit members if the union accepted furloughs.

Flexibility Sought

CSU opened negotiations in April 2008, with the message that it needed more flexibility in the operations of its 23 campuses, specifically when negotiating construction contracts. The parties' previous agreement required the university to make every reasonable effort to perform normal bargaining unit work in-house and to notify SETC of contracts that involved normal bargaining unit work. CSU proposed eliminating the "reasonable effort" clause and making the decision to contract out bargaining unit work the sole and exclusive right of management.

As SETC saw it, however, CSU already had been engaging in too much job order contracting. The union claims the university has spent at least $20 million on contracting out bargaining unit work in the last five years. SETC attributes the growth of job order contracting to two factors: the layoffs of the mid-1990s and the failure to increase staffing necessary to maintain the increasing number of buildings. The union claims that square footage of the campuses has doubled or tripled since 1989, without increases in personnel needed to maintain the properties. According to the university, there was a 16 percent boost in staff between 1989 and October 2008, and a doubling of square footage systemwide.

SETC contends that using outside trades workers increases costs.

The core difference between the parties related to minor capital construction. SETC pointed out that its members have worked on new construction projects of less than $400,000, but CSU views the primary job of carpenters, electricians, plumbers, and other skilled trades workers to be maintenance of existing buildings. SETC contends that using outside trades workers increases costs — CSU must pay prevailing wages — and decreases accountability for doing the job well. CSU counters that much of the work cannot be done by employees because of time constraints, lack of equipment, or lack of qualifications. For example, CSU employs no roofers or elevator mechanics.

In the end, the parties agreed to set out in the contract the results of several arbitration awards concerning the contracting article. The new agreement defines normal bargaining unit work and lists criteria that must be followed when making a reasonable effort to perform work in-house. The definition of bargaining unit work encompasses work for individual departments and minor capital projects, including deferred maintenance, renewal, and energy savings projects of the university, but not projects for independent corporations or auxiliaries like student union or parking entities. The contract also requires joint labor-management training about the new language, and a side letter sets out guidelines for implementing the "reasonable effort" clause.

Money Issues

SETC entered negotiations with the goal of pushing salaries closer to market rate. The parties agreed on the benchmarks and parameters for a study by Mercer Consulting. The survey data from January 2008 show that the average salary in some supervisory classifications lags market pay by as much as 19

percent. While unit salaries overall were 4 to 5 percent below average, the average CSU electrician and painter salaries were 9 percent below the market mean, and the average plumber pay was 7 percent below market figures. Trades workers have not received a raise since a 3 percent increase in July 2007.

As the state budget shrank, however, the union recognized that it would be difficult to obtain higher compensation. In the new contract, unit members will remain eligible for in-range progression increases, since those raises are paid from campus budgets. The language governing in-range progressions was expanded to delineate three criteria for the raises — equity, retention, and long-term service. Other types of salary increases, such as the extended performance increase, were not funded, but stipends for high-voltage work and bonuses for obtaining certifications in critical skills were renewed.

A bigger money issue arose as state funding for CSU fell. The university warned that it would need to lay off employees or furlough them, if not both. Against the wishes of the university and in contrast with the other unions, SETC-United chose the layoff option. While the result may seem surprising, the union is banking that a pre-existing sideletter on layoffs will save jobs. The agreement calls for the campuses to meet with union stewards to explore whether employees slated for layoff can be assigned to "normal bargaining unit work that might otherwise be subject to contracting out."

The union believes that most jobs can be saved if CSU follows the supplemental layoff agreement. The university can only lay off employees for lack of work or lack of funds, says SETC-United Chief Negotiator Patrick Hallahan, and there clearly is work. SETC believes that CSU should use money it expends for contracting out minor capital projects to retain employees who would otherwise be laid off. Because employees are not paid prevailing wages, Hallahan asserts the amount the university charges departments for work that unit members do is less than the amount that would be paid to outside workers. SETC-United

points out that there are other funds that CSU could use to save jobs. For example, the university has received state funding for the past five years to operate and maintain new buildings, but little has been used as intended. In addition, there is deferred maintenance funding, as well as savings from using in-house workers.

Some of the funding for minor capital projects dried up as the economy tanked.

CSU doubts that decreasing contracting out would save enough money to prevent the 69 layoffs that it has determined are necessary. CSU Senior Labor Relations Representative Sharyn Abernatha told *CPER* that the campuses are meeting with union representatives to discuss the available work, but some of the funding for minor capital projects dried up as the economy tanked. Money for new building maintenance and operation is intended for energy costs, landscaping, and cleaning costs, in addition to work performed by trades workers, said Abernatha. Sixty percent of the money has been used for energy costs. In addition, many new buildings do not require the same amount of maintenance as the older ones, CSU Labor Relations Representative Bill Candella told *CPER*. New "smart" buildings have centrally controlled systems and may have equipment that can only be serviced by the original contractor under terms of the warranty. The university cautions that any money remaining from deferred maintenance funds must be prioritized carefully as campuses eye the possibility of mid-year cuts to CSU appropriations.

Vote for Layoffs

The parties agreed on essential issues during factfinding, although there nearly was a last-minute rejection of the contracting out article by CSU. The university prevailed on reaching a fiscally neutral agreement. It also convinced the union to conduct a vote to determine whether members preferred layoffs or furloughs. The furlough vote was held at the same time as the ratification vote. Nearly 75 percent of members voted against the furlough plan, while 90 percent voted to ratify the contract. Although the trades workers unit is the only one that will not be furloughed, that does not pose an operational obstacle for campuses that have elected to close on specified days, Abernatha told *CPER*. It is often easier for the workers to perform jobs when no students or staff are present.

The contract extends through June 30, 2011. Either party may reopen the agreement on compensation for the 2010-11 year. As expressed in the contract, the goal will be "to achieve market equity on an across-the-board basis, as per the 2008 Mercer Study Methodology," if the state provides any funding for compensation increases. ✻

U.C. Union Joins Faculty in Walkout

The backlash to the University of California's decision to furlough employees intersected with frustrations at the bargaining table to produce a walkout on September 24, the first day of school at many campuses. Faculty are irate that U.C. President Mark Yudof ignored the academic senate's recommendation to allow furloughs on teaching days. The University Professional and Technical Employees, CWA, called a strike to protest U.C. actions it claims amount to bad faith bargaining.

Shared Governance?

The tenured and tenure-track faculty who constitute the academic senate are guaranteed a role in decisions relating to instruction and research at U.C. The standing orders of the U.C. regents establish a system of shared governance, in which the senate has a say in matters such as who becomes a member of the faculty and who is admitted as a student. The standing orders also authorize the senate to establish committees to give advice on the systemwide budget as well as budgets at the 10 campuses. Through the university president, the senate may present to the regents "any matter pertaining to the conduct and welfare of the University."

In May, when President Yudof sought authorization to furlough employees, he sent his proposal to the academic senate for recommendations. In response to suggestions from the senate and other employee groups, Yudof substantially modified the furlough proposal. (See story in *CPER* No. 196, pp. 53-56.) That plan, which was approved by the regents, gave each campus the power to decide whether to schedule furloughs by closing on specified days or by allowing employees to choose furlough days with a supervisor's approval.

At the end of July, the academic council, the executive committee of the decisionmaking body of the senate, discussed the implementation of furloughs. On August 5, Academic Council Chair Mary Croughan informed Lawrence Pitts, the executive vice president of academic affairs:

> While Council members acknowledge that students are already being negatively impacted through increased fees, staff reductions, and loss of services on furlough days, the Academic Council unanimously supported the concept that furloughs should affect instructional days. In particular, Council members noted that faculty members perform the following three activities — teaching, research and service; excluding furlough days from any one of these areas may unfairly hurt the faculty in merit and promotion reviews. Finally, the Academic Council felt it was important to send a message that budget cuts do in fact negatively impact the University's instructional mission.

The senate recommended that Pitts set a systemwide standard of six furlough days on days of instruction over the nine-month academic year and allow campuses to specify up to 10 instructional days as furlough days while maintaining learning objectives for the students. Otherwise, they reasoned, they would be performing the same amount of work for up to 10 percent less pay.

Pitts declined to schedule any furloughs on instructional days. He assembled a task force that included representatives of the council and staff of the U.C. Office of the President. The task force did not agree on allowing furloughs on instructional days, but did recommend that Pitts permit faculty to engage in compensable outside professional activities on furlough days or be compensated from contracts and grants for research performed while on furlough. With no task force consensus on instructional days, Pitts decided against scheduling furloughs during class time. "Asking the faculty to carry a full teaching load during furloughs is a large request," he acknowledged, "but…is justified by the university's paramount teaching mission." He emphasized that students were already paying higher fees and suffering from larger class sizes and reduced course offerings.

At the end of August, some faculty members began calling for a walkout on September 24. "UCOP has flagrantly erased the difference between a furlough and a paycut, presenting the latter in the guise of the former," they charged in a letter to gather support from other faculty. "Instructional furloughs pressure the state to cease defunding the UC system, and they pressure the Office of the President to confront the fact that its overall approach to budget reform is unsustainable and unjust," the letter continued. "We cannot allow either the California legislature or the Office of the President to proceed as though cuts to public education do not have debilitating consequences."

The organizers of the walkout demanded that U.C. impose no furloughs on those with salaries below $40,000. They also demanded that the university adopt the academic council's recommendation and make a full disclosure of the budget. The 1,232 faculty who signed the letter urged that professors intervene in the decisionmaking process instead of standing by while the university refused to respect their vote. "It has been made evident that we cannot intervene as governors; we are compelled to intervene as workers."

'UCOP has flagrantly erased the difference between a furlough and a paycut.'

While the academic senate did not endorse the walkout, the American Association of University Professors did. "The UC system's historic strength was embedded in substantial public financial

support and a strong faculty voice in governance. Both have deteriorated to unacceptable levels," its general secretary and president stated. The U.C. Students Association passed a resolution supporting the walkout and vowed to participate. Students are angry that the regents raised fees 9 percent in May and are considering another 32 percent hike this month.

UPTE Strike

As faculty began mobilizing, UPTE was considering a strike. U.C. and UPTE have been in bargaining for both the research employees unit and the technical employees unit since March 2008. U.C. made no proposals until December 2008. In January 2009, its offer contained no wage increases for the proposed three-year duration of the contract.

In May, the university offered a total of 2.25 percent increases in pay over three years, even though 85 percent of employees in the two units are paid with money from grants that fund cost-of-living increases. In June, the wage offer was withdrawn and U.C. began planning furloughs. UPTE began discussing a strike.

The union claims that the university has been committing unfair practices throughout the bargaining process. At least two bargaining representatives have been laid off, one in May 2008. After the contracts for both units expired in June 2008, U.C. raised fees it charged UPTE unit members for van pools and daily parking permits at some campuses. Over the following months, U.C. cancelled two multiple-day bargaining sessions and part of a third session, according to the union. In January 2009, U.C. increased employee premium contributions for some UPTE unit members.

In the spring, when U.C. realized that the state was planning to cut $813 million from the funding that pays for academic programs, Yudof sent out emails and posted a YouTube video soliciting ideas on furloughs, salary reductions, and possible layoffs. UPTE charges that these communications are direct dealing with represented employees. In bargaining, the union tried to obtain job security in exchange for an agreement to furlough the 15 percent of the unit that is state-funded

employees, says UPTE President Jelger Kalmijn, but U.C. refused to discuss any proposals not to lay off UPTE unit members.

After a strike was authorized by 80 percent of voting UPTE members, the union decided to join with faculty and students in the September 24 walkout. Employees represented by other unions at U.C. attended lunchtime rallies and walked the picket lines during non-work time. The unions are skeptical of the need for furloughs after the regents approved salary raises for two new chancellors. The recently hired chancellor of U.C. San Francisco will receive $450,000, which is 12 percent greater than her predecessor's pay; the new chancellor at the Davis campus is being paid $400,000, 27 percent more than the outgoing chancellor and 8 percent more than she was paid at her prior job at the University of Illinois.

Since September 24 was the first day of classes on eight of the 10 U.C. campuses, the walkout decision was difficult for some students, who feared losing their spots on class rosters. Many faculty were reluctant to skip the first day of instruction, but used the time to teach about education finance or civil disobedience. At U.C. Berkeley, where classes had been in session for nearly a month, picketing started early in the morning, and the lunchtime rally was attended by over 5,000 employees and students. But rallies at each of the other campuses attracted 1,000 or fewer participants. Systemwide, U.C. estimates only 200 UPTE members struck out of a combined total of 8,800 unit members.

Bargaining relations between UPTE and the university have not improved. UPTE has filed an unfair practice charge that some unit members in Santa Cruz, Davis, Irvine, and Riverside are now being told they will be placed on a temporary layoff if they do not agree to participate in the voluntary Staff and Academic Reduction in Time program, which allows employees to take time off with a pro rata pay cut without losing any benefits. Similar to the furloughs of unrepresented employees, the proposed layoffs range from 10 to 18 days, depending on salary level. The university denies that it has threatened the membership with temporary layoffs. It claims that UPTE has refused to agree to furloughs or to reasonable alternatives that would achieve the same amount of salary savings. UPTE claims that U.C. has withdrawn the furlough proposal.

The university denies that it has threatened the membership with temporary layoffs.

In September, U.C. suggested that the parties jointly petition the Public Employment Relations Board for a declaration of impasse. UPTE refused. "We can't be at impasse," Kalmijn told *CPER*, "because the university has been bargaining in bad faith for months. They keep presenting first, worst, and final proposals and not giving their negotiators authority to bargain over them. U.C. has had three different chief negotiators."

U.C. Vice President for Human Resources Dwayne Duckett says, "Our bargaining commitment with UPTE on the overall contract remains the same, even in light of the recent ad campaign and tactics. But it is difficult to hold constructive talks given the level of attack against the very people they say they are trying to work a deal with. It may interfere with our ability to focus on the real issues." ✻

State Employment

CAHP Contributes Raises to Retiree Health Benefit Fund

The raise would have been automatic, but the California Association of Highway Patrolmen declined a boost to their paychecks. Rather than pocketing a .5 percent increase, the money will prefund the state's obligation to contribute to health care benefits for retired California Highway Patrol officers. What would have been an additional compensation expense will save money over the long run.

As services were slashed, prefunding did not look likely any time soon.

Pay Parity Provisions

CAHP has an advantage in bargaining that no other state employee union enjoys. A provision of the Government Code requires the state to pay rank-and-file highway patrol officers the average total compensation paid to police officers in the cities of Los Angeles, Oakland, San Francisco, and San Diego, and to sheriffs in the County of Los Angeles. Annual surveys conducted jointly by CAHP and the Department of Personnel Administration examine the base salary, educational incentive pay, physical performance pay, longevity pay, and employer retirement contributions in the other jurisdictions to arrive at the compensation increase each July 1. Implementation of the pay boost is subject to collective bargaining, and the union may agree to a smaller raise.

In 2001, CAHP convinced the legislature to amend the statute to require the state to pay the compensation increase automatically if the parties do not reach an agreement. The contracts CAHP and the state have bargained since 2001 incorporate the pay parity statute and provide that the extra compensation is implemented as a general salary increase.

Looming Liability

CAHP was wary of accepting a raise this year, however, when nearly every other state employee is being furloughed three days a month, which amounts to a 14.2 percent pay cut. The union approached the administration with a plan to address the problem of unfunded retiree health care benefits.

Since the Governmental Accounting Standards Board imposed a requirement in 2004 that public entities disclose their obligations to pay for health care and other non-pension benefits in retirement, public employers that have promised benefits have had to assess their liability for future payments. Most employers had been paying contributions for retiree health benefits out of current budgets and not prefunding them. Under this pay-as-you-go method, the State of California's health care contributions had been rising about 10 percent a year and reached $1.36 billion in 2008-09, an amount equivalent to 7.6 percent of its payroll for covered employees.

Neither the administration nor the union thought a pay raise was a good idea.

The state pays 100 percent of the premium for the retiree and 90 percent of the premium for the retiree's spouse and dependents, for those who are fully vested. Prior to 1985, vesting occurred after 5 years of service, but full vesting now requires 20 years. In 2007, State Controller John Chiang estimated that the state had $48 billion in unfunded obligations to pay retiree health care contributions.

In 2008, a commission set up by Governor Arnold Schwarzenegger recommended that public entities begin prefunding retiree health care liabilities, but the state had no money to implement the recommendation. (See

story in *CPER* No. 190, pp. 56-60.) As services and programs were slashed this past year, prefunding did not look likely any time soon.

The opportunity to begin a retiree health care fund arose because neither the administration nor the union thought that a pay raise for 7,000 officers was a good idea while other employees suffered furloughs and layoffs. It took two months, however, for the Department of Personnel Administration and CAHP to agree how to implement the concept of prefunding retiree health benefits for CHP officers.

The new addendum to the 2006-10 CAHP contract provides that the money which would have been used to pay this year's increase of .5 percent, and any increase of up to 2 percent next July, instead will be paid into a fund for post-employment health care benefits for highway patrol members. In addition, this month, officers will begin contributing another .5 percent of pay toward the benefits. Starting in July 2012, the state will match the employee contributions.

Although the money going toward prefunding would have been included in final compensation for pension calculations if paid as salary, the union agreed that the retiree health fund contributions will not increase pay for retirement purposes. The employee contributions will, however, count in the total compensation for officers when the pay parity surveys are conducted. The parties left for later negotiations whether the employer contribution will count toward total compensation in 2012-13.

As is usual, DPA will extend the provisions of the CAHP addendum to the managers and supervisors of patrol members. The retiree health benefits fund will be used to pay only for the benefits of the officers and their family members.

Future Savings

The unfunded liability for CAHP unit members and their supervisors and managers amounts to $2.7 billion. According to the most recent valuation, it would take an annual payment of $52 million in current dollars for the next 30 years to fully fund the retiree health care obligation for officers.

Since a 1 percent increase for patrol officers and their management amounts to about $6.3 million annually, the employee prefunding contribution for

2009-10 amounts to baby steps in the context of a march toward $2.7 billion. Even if the salary survey next July calls for a 2 percent increase, the amount contributed by employees in 2010-11 would be only $19 million. The agreement calls for a maximum of $20 million in employer contributions to the retiree health care fund beginning in 2012-13. Altogether, the possible $40 million in yearly contributions will not cover the estimated $52 million necessary to fully fund the obligation by 2039.

Prefunding now will reduce costs in the future, however, since current contributions can be invested. As the California Post Employment Benefits Commission reported in January 2008, fully prefunding retiree health benefits would save $16 billion, but contributing even 50 percent of the recommended amount would save $9 billion.

Highway patrol officers' compensation is paid primarily from the motor vehicle account rather than the state's general fund. The motor vehicle account, which is funded by vehicle registration fees and driver's license fees, was already strained before the new contractual requirements, the legislative analyst reminded the legislature in its analysis of the CAHP agreement. Although the account will benefit from reduced retiree health care payments by the 2020s, finances will be "less flexible" in the meantime. *

Columbus Day: Holiday or Work Stoppage?

The law says it is not a holiday. Their contracts say it is. When SEIU Local 1000 asked employees not to come to work on Columbus Day, DPA countered that Local 1000's communication violated its "no strike" clause. Other unions advised unit members to obey now and grieve later, which they did. Thousands of grievances and a lawsuit have been filed in the dispute.

Law Changes

In February, as SEIU Local 1000 was meeting around the clock with the Department of Personnel Administration to lock in a new contract, the legislature was working furiously to close a $42 billion budget gap. DPA and the union announced a tentative agreement on February 14 that limited furlough days and gave up two holidays for personal leave days. (See story in *CPER* No. 195, pp. 54-58.) Five days later, the legislature passed a budget eliminating the Columbus Day and Lincoln's Birthday holidays and changing other conditions of employment, such as the right to count sick leave when calculating entitlement to overtime pay. Although some unions filed unfair labor practices, most attempted to obtain the SEIU deal for their own units.

Bargaining has gone nowhere, however, in light of the legislature's refusal to approve Local 1000's tentative agreement. The only union that has a contract with the state is the California Association of Highway Patrolmen. The contracts with other unions have expired. But under the Dills Act, all the provisions of the expired memoranda of understanding, even those "that supersede existing law," continue in effect as long as the parties have not reached a new agreement or impasse. Only the expired MOU of the California Correctional Peace Officers Association has no effect, since the parties reached impasse and DPA imposed its last offer in September 2007.

As Columbus Day approached, the union contracts still had 14 holidays, but the Government Code authorized only 12. Local 1000 advised its unit members that they had the right to stay home and collect holiday compensation. On October 6, Julie Chapman, chief deputy director of policy for DPA, wrote a letter to the union insisting that it retract its communications. DPA informed employees that Columbus Day had been eliminated by the legislature, and that absence without a supervisor's approval would be considered absence without leave. Chapman reminded Local 1000 that the section of the MOU prohibiting work stoppages remained in effect.

DPA informed employees that Columbus Day had been eliminated by the legislature.

Other unions were wary of advising employees to skip work. The California Association of Attorneys, Administrative Law Judges and Hearing Officers in State Employment, wrote its members, "[T]he fact that the State has unilaterally breached one section of the MOU does not permit CASE to breach a different section of that contract." CASE, which had filed a lawsuit in September, wanted to avoid an argument that it had breached the "no strike" clause.

The attorneys union claims the new statute was an unconstitutional impairment of contract.

Professional Engineers in California Government also warned employees about unauthorized absences. Advising unit members of a basic rule of labor relations — "obey now, grieve later" — the union filed a grievance that gives an in-depth explanation of the union's position. Columbus Day is listed as a paid holiday in the contract, says the union, and both the MOU and the Dills Act provide that the contract supersedes Government Code Sec. 19853, the section that lists holidays.

The new bill that eliminated the holidays has its own supersession language. It states that when the statute conflicts with an MOU executed or amended after February 2009, the MOU is controlling without further legislative action unless provisions in the MOU require an expenditure of funds. As its contract was executed long before February 2009, PECG contends this section does not apply to require another legislative approval. The prior supersession statute continues to allow an MOU to supersede Sec. 19853, according to the union.

CASE, Local 1000, CAPT, and the International Union of Operating Engineers also have filed grievances on the Columbus Day dispute. When DPA delayed processing CASE's grievance in August, the attorneys union went to court claiming that the new statute eliminating two holidays was an unconstitutional impairment of contract. Since the court declined to expedite the hearing, it will be months before any of the unions has an answer to the legal riddle.

The Public Employment Relations Board, however, has weighed in on one part of the conundrum, in a related dispute. In dismissing a charge filed by the California Association of Psychiatric Technicians that contended the governor made a unilateral change when he signed the bill altering overtime pay entitlement as part of the February budget legislation, the board agent wrote:

> The Dills Act is a limited delegation of authority by the Legislature to the Governor, allowing DPA…to bargain with the State's unions about terms and conditions of employment….The Dills Act does not, however, preclude the Legislature from enacting a statute that changes terms and/or conditions of employment, even though such changes would otherwise be negotiable. (*State of California [Department of Personnel Administration]* (2008) PERB Decision No. 1978-S.…*State of California [Department of Personnel Administration]* (1988) PERB Decision No. 706-S [Governor's role as "employer" under the Dills Act and Governor's role as Constitutional officer are distinguishable].)

This still leaves the questions whether an expired contract is protected from legislative impairment and whether an old contract can supersede a new law. ✻

Studies Point to Folly of Across-the-Board Furloughs

When Governor Schwarzenegger ordered two days of furlough a month through June 2010, he based it on an emergency — a $15 billion deficit in the state's general fund that would become a $42 billion budget gap over the following 18 months if expenses and revenue continued as projected. But the governor did not limit the salary savings plan to state employees paid with general fund money. All state employees, regardless of funding source, were ordered furloughed, unless granted an exemption. In July, the furlough order was extended to a third day every month, even for employees in agencies that raise revenue, such as the Franchise Tax Board.

An assessment by the University of California at Berkeley concludes that furloughing employees three days a month will save little money over the long run, and examines the loss of revenue from furloughing employees in revenue-generating departments and those not paid with general funds. And another investigation by the California Senate Office of Oversight and Outcomes says the furlough savings from a third of the employees paid with general funds are "illusory."

The projected $1.16 billion in savings dwindles to $738 million once lost revenues are counted.

Only $236 Million Saved

Focusing on the 2009-10 fiscal year, a study by Ken Jacobs at the U.C. Berkeley Center for Labor Research and Education found that the projected $1.16 billion in general fund savings from furloughs dwindles to $738 million once lost revenues are counted. The finding does not include tax revenue losses from the impact of furloughs on the broader economy.

As a direct effect of state employees' loss of 14 percent of their wages, state workers will pay $60 million less in state income taxes, according to the report, which relies on an estimate of the California Budget Project. In addition, the Franchise Tax Board estimates that the loss of work time on audits due to furloughs will reduce or delay the collection of $231 million in 2009-10.

The Board of Equalization estimates furlough orders will affect its revenues also. The BOE was included in the lawsuit that challenged the governor's furlough of employees of constitutional officers. Although the officers lost in the trial court, the furlough order was stayed pending an appeal. In response, the board's budget was cut by $40 million. To reduce its expenses, it asked employees to take a voluntary one-day furlough or other leave, laid off part-time employees, and froze hiring. The BOE estimates that these actions will result in loss or delay of sales taxes and fees it collects totaling $264 million. Of that amount, the general fund will lose $156 million, but will save $24 million in personnel costs.

Future costs and revenue losses reduce the savings to $236 million, according to the Berkeley report. The Franchise Tax Board estimates it will collect $475 million less from audits over the following two years, although $54 million may be recouped later. The BOE will eventually collect some delayed sales taxes and fees but expects a reduction in tax and fee collections of $312 million in the two years following July 2010.

Another major expense will be the amount needed to make up for lower contributions the state and its employees are making to the Public Employees Retirement System. While employees continue to earn retirement benefits as though they were not furloughed, the contributions into the system this year are based on the lower salaries they actually receive. CalPERS is taking in $299 million less in contributions this year, an amount that cannot be invested for future returns. The loss of revenue will be figured into the amount of contributions necessary in future years to keep the pension system fully funded. The Berkeley study estimates that, although $173 million less on behalf of general fund workers is being paid into PERS this year, it will cost $191 million over the next 20 years to "repay" the pension fund.

The Franchise Tax Board estimates it will collect less from audits.

Surprisingly, the author of the Berkeley assessment believes that a one-day-a-month furlough would save more over the long run than three days of furlough, even though general fund salary savings would be only $387 million. Income taxes from state employees would reduce that amount by only $20 million, and the Franchise Tax Board estimates it would fail to collect from audits only $50 million over three years. The amount needed to make up for this year's lower CalPERS contributions would be only $60 million. The resulting $255 million savings would

be higher than the savings from a three-day furlough each month, Jacobs theorizes. There is also support from economics research for a one-day furlough, according to the paper. A study in Europe found that a small decrease in work time increased productivity, as employees had less slack time.

The Berkeley study recommends against furloughing employees in revenue-generating departments and those not paid with general funds because of the adverse effects on revenue. The

CalPERS is taking in $299 million less in contributions this year.

author advocates a one-day-a-month furlough, although he acknowledges that finding savings or revenue elsewhere would be difficult.

Future Liabilities

The Senate Office of Oversight and Outcomes published a report in mid-October that criticized furloughs of employees who work in round-the-clock operations. Correctional officers, medical staff working in the prisons, and nurses and psychiatric technicians in the developmental and mental health centers are seldom allowed time off, even though their pay is being cut every month, the report found. As a result, labor costs will be pushed to future years. In the prison inmate health care system, there are no savings this year because of the court receivership.

Months ago, the California Correctional Peace Officers Association warned that correctional officers would be unable to use all their furlough days by 2012, when those hours will becomes worthless, and would merely bank vacation leave that likely would be paid out at higher wage rates in the future. The Senate report confirmed the prediction.

Correctional officers are one group of employees on self-directed furloughs. The 29,000 officers do not take Furlough Fridays, and are expected to take them as the opportunity arises. Because the corrections department does not have the relief staff to cover all the furlough days, officers work instead and bank those days. In seven months, guards and other prison employees banked 1.5 million furlough hours, the Senate staff found. That many hours accrued even though employees were directed to use furlough hours when they were on vacation or sick leave. The policy was implemented because accrued furlough days cannot be used and have no cash value after June 2012.

Because prison workers used furloughs instead of vacation or sick leave, future liabilities for vacation and sick leave have shot up. Normally, accrued vacation peaks in May and falls off as employees take summer vacation. Not this year. In February 2009, prison employees had 152,500 banked vacation leave hours. By May, that number was 526,500. At the end of August, the department had nearly 989,000 hours of accrued vacation leave on its books.

At present wages of $34.91 an hour for an officer with at least 3.5 years of service, the banked furlough hours are worth $52 million. If officers gain a raise before they use the hours, the cost to the state will be higher.

In the prison inmate health care system, any salary savings from furloughs vaporize. Because the system is in receivership, it is exempt from the provisions of the executive order that

In seven months, guards and other prison employees banked 1.5 million furlough hours.

prohibits agencies from using employees on overtime to cover for workers on furlough. The receiver covers furloughs with overtime and outside contractors, which chews up the projected $108 million in salary savings that the governor expected to achieve in the inmate health care system. Like the rest of the employees in the prison system, nurses, doctors, and custody officers are racking up vacation and furlough hours that the receiver expects will cost at least $37 million in future years.

Worse, the gains made in medical staffing are being eroded. In August, after a third day of furlough was imposed, 59 nurses quit, compared to 115 over the previous six months. And some nurses who were considering job

offers backed out. The receiver told Senate staff that he had not asked for an exemption from furloughs to avoid an even worse morale situation where furloughed guards would be working alongside custody officers receiving full pay.

After a third day of furlough was imposed, 59 nurses quit.

Employees in the developmental and mental health care facilities are also banking furlough hours because there is so little opportunity to use them. By the end of August, they had accrued 269,000 hours of furlough time. Vacation hours on the books of developmental centers jumped from 7,700 in February to 35,500 in July.

Legislation Introduced

State employee unions made some inroads on furloughs even before these papers were issued. Two unions already won a court battle that exempts State Compensation Insurance Fund employees from furloughs and awards them back pay. The governor has appealed that ruling. Lawsuits are challenging the furloughs for employees paid with special funds. Those matters are scheduled to be heard this month. In addition, the administration agreed in August to end furloughs for 911 dispatchers. The response times had fallen below the standard set by the National Emergency Number Association even before the furloughs, but continued to decline throughout the spring.

The rest of the workforce can only hope the economy or the legislature comes to their rescue. In the last week of the regular session Assembly Speaker Karen Bass and Senate President Pro Tem Darrell Steinberg introduced A.B. 181, which would reduce furloughs from three days to two. Assembly Member Hector De La Torre authored A.B. 1215. That bill would exempt all special fund agencies from furloughs. Neither bill passed the legislature, but they will be heard in January. ✻

SPB Spinning Its Wheels Reviewing Services Contracts

The State Personnel Board has the responsibility to review personal services contracts to ensure that they meet exceptions to the law prohibiting the state from contracting out civil service work. But between delays at the board and lack of enforcement mechanisms, it has little effect on unjustifiable contracts, reported the California State Auditor. The auditor also found a multitude of contracting and budgeting violations that are beyond the scope of this article. (See the report at http://www.bsa.ca.gov/pdfs/reports/2009-103.pdf.)

Based on complaints by Service Employees International Union, Local 1000, the Joint Legislative Audit Committee requested the Bureau of State Audits to examine personal services and consulting contracts for information technology services at the Department of Health Care Services and the Department of Public Health. The union was concerned that millions of dollars were being wasted because unjustifiable contracts are not terminated until after the money has been spent.

Existing law prohibits the state from contracting with private entities for services that civil service employees have customarily performed, unless the state meets an exception, such as contracting out services to achieve cost savings. While the state agency must notify the SPB when it enters into a contract justified under the cost savings rationale, there is no reporting requirement for contracts that are based on other exceptions. When an agency believes it must contract for services that are needed temporarily or urgently, or for highly specialized services not available in the civil service workforce, it may enter into contracts without notifying anyone other than the Department of General Services.

Contracts Challenged

Unions have become the primary watchdogs over contracting out. The law allows a union to ask the SPB to review a contract if it can provide detailed information and documents that demonstrate how the contract is not justified under the civil service laws.

Ideally, the SPB executive officer's review should take as few as 45 days unless an evidentiary hearing is necessary. If a party disagrees with the executive officer's decision, however, a lengthy appeal process begins.

State auditors focused on 21 contracts that Local 1000 had challenged over the last five years. All were for information technology services, such as database administration and website development. None of the contracts was based on cost savings. Of the 21 contracts, the SPB approved only 4. The departments were unable to demonstrate that 17 contracts met the exceptions they had invoked to avoid using civil service employees. Only one contract was approved because there were no civil service classifications that had employees with the necessary expertise. Three were approved because the need was so temporary, urgent, or occasional that following the civil service process would have defeated the purpose of obtaining the services.

Of the 21 contracts, the SPB approved only 4.

The bad news is that 11 of the expensive disapproved contracts were not terminated before they expired. More shocking is that the departments sometimes entered into new contracts for the same services subsequent to disapproval of the first contract.

Hampered by Delay

In addition to the 21 contracts the BSA studied, Local 1000 had challenged two others that expired before the union requested SPB review. The union explained to the state auditor that preparation for an SPB challenge requires several time-consuming steps — locating the contract, determining whether the contractors are performing work that is within the scope of civil service classifications, and preparing paperwork for the SPB.

In addition to late union action, SPB delay contributed to ineffective review of contracts. The BSA found that it took from 64 to 152 days for the SPB's executive officer to render a decision which could have been issued after 45 days. Because of the delay at the board and the union's late challenge, seven contracts expired before the executive officer made her decision. Four more contracts expired while the department appealed decisions. Since there are no repercussions for improper contracts other than termination of the arrangement, in those 11 matters the SPB's final decision was moot. The money had been spent.

Out of the six cases where the board disapproved the contract before it expired, the departments terminated only three due to SPB disapproval. The BSA found that the SPB does not always order that the disapproved contracts be terminated.

One disapproved contract continued for 400 days before it expired. The department then entered a new contract for the same services, a week after the first contract expired. The department claimed it did not know the contract had been disapproved because its legal counsel was called to military duty, and the SPB has no mechanism for following up to see that disapproved contracts are terminated.

A second contract was disapproved only 28 days before it expired. Although it was not terminated, no further work was done under the contract. But the contractor was paid after disapproval for services previously rendered, even though state law provides that a disapproved contract is void.

One disapproved contract continued for 400 days before it expired.

A third contract had 150 days remaining when the board found it unjustified. However, the department was unaware of the SPB disapproval. It did terminate the contract for other reasons, but then entered into a new contract with a different supplier for the same services. When it discovered that the original contract had been disapproved, it asked its legal counsel whether it should terminate the new contract. Legal counsel advised against termination.

State law does not prevent a state agency from entering into a new con-

tract for the same services, even with the same suppliers, when the SPB has disapproved the previous contract. The BSA found that in nine cases, the department had entered into contracts for substantially the same services as the disapproved contract. Several of those contracts began during the SPB review process, but 13 contracts were with the same supplier for essentially the same services as in previously disapproved contracts.

The SPB told the state auditor that because it is authorized to review only the contracts challenged by a union, it falls to the unions to police subsequent contracts. A union representative protested:

> The volume of contracts is too high for any union with limited staff and resources to effectively serve as a de facto regulatory agency….The union does what it can to protect its members but this does not absolve the State from the responsibility of establishing mechanisms to uphold the civil service mandate in the California Constitution. The union does not begrudge its role as initial challenger of contracts but once a contract — representing a set of services that the board's decision indicates should be performed by state employees — is overturned, the union's ability to file subsequent petitions or challenges in superior court or with the board should not represent the sum total of the State's followup process. The fact that this is currently the case is evidence that the system now in place is designed to allow these contracts, which are costly and often unnecessary, to continue to exist.

From its examination, the state auditor concluded that board decisions often affect only contracts that will soon expire or already have expired. And the decision does not prevent similar contracts from immediately replacing disapproved ones. The SPB reviews, it observed, "would seem to be an inefficient use of state resources."

Recommended Legislation

The BSA recommended that the SPB state clearly in its decisions when the agencies must terminate disapproved contracts and should follow up to ensure termination. The SPB, however, expressed uncertainty about its legal authority.

While the BSA was not convinced of the SPB's legal powerlessness, it recommended legislation specifying that disapproved contracts be terminated and that agencies provide documentation to the board that termination was accomplished. It also urged that the legislature prohibit agencies from entering into contracts for the same services as those under SPB review without notifying the board and the applicable union. If a contract already has been disapproved by the board, the law should require the agency to obtain preapproval from the SPB of a contract for similar services. The board suggests that the penalty for entering into a contract without preapproval should be to limit the agency's defense to a claim that the services are not substantially the same as covered by the disapproved contract.

Hiring Begins

The departments attributed some of their contracting decisions to difficulty with hiring and retaining IT employees. Only in the last decade have the departments obtained authority to hire employees at salaries above the minimum for the classification. When the SPB streamlined the process for applying for IT positions, the number of applicants increased and the time to hire them diminished. However, a joint labor-management program to consolidate and update IT classifications impeded the process again for a couple of years.

The department entered into contracts for substantially the same services as the disapproved contract.

Eventually, the Department of Health Care Services hired 17 consultants as civil service employees. The BSA estimates that the departments saved $1.7 million over the last two-and-a-half years by eliminating the consultant contracts, since contractors cost $18 to $75 more an hour than state employees, counting all benefits.

The Department of Finance has authorized another 30 IT positions in the two departments to replace contractors, who will be phased out before July 2012. The Department of Public

Health attributed the delay in jettisoning contracts to the need to hire and train new IT employees. Many services contracts have provisions that require contractors to transfer knowledge to state employees for successful transition of responsibility for IT systems and projects. But the report was not very reassuring about a smooth handover of IT functions. The public health department generally has enforced knowledge-transfer provisions, the BSA found, but health care services was unable to demonstrate that its employees had received the knowledge they would need to continue the services the consultants provided.

Legislation Vetoed

Despite the findings in this September report, the governor vetoed legislation that would have created an online database of personal services contracts that the union or members of the public could search if concerned about improper contracts. The governor deemed the provisions "duplicative of current reporting practices" and pointed to the additional costs and workload needed to implement the bill. He asserted, however, the Department of General Services would be incorporating some of the bill's provisions into its operations. ✻

Exclusionary Rule Not Applied to Caltrans Employee's Administrative Hearing

The State Personnel Board erred in applying the exclusionary rule to evidence of drugs and weapons that a California Highway Patrol officer found in an illegal search of a state employee's car, a court has held. The court reasoned that applying the rule in this case would not deter CHP officers from illegal searches when conducting criminal investigations involving state employees.

Arrested for Threats

Lee Kendrick worked for the California Department of Transportation. According to his supervisor, Michael McBarron, he yelled, "You treat me like an apprentice. The way you talk to me, I could knock you out!" When the supervisor asked if Kendrick was threatening him, Kendrick answered, "The way you talk to me, I could pull your hair out."

Another supervisor called the CHP. McBarron told the officer who responded that Kendrick previously had been arrested on weapons charges and had uttered threats before. Kendrick arrived while the officer was present. When he began retrieving objects from his personal car, the officer approached him. Although Kendrick admitted using profanity, he denied making any threats. The officer arrested him for making criminal threats. Searching the vehicle, the officer found a handgun and ammunition in a fanny pack under the passenger seat. He also found drugs.

A criminal case was filed. However, the criminal court suppressed the evidence of drugs and weapons because the CHP officer had illegally searched the car. As a result, the prosecution dismissed the charges.

Eventually, the Department of Health Care Services hired 17 consultants as civil service employees.

Caltrans dismissed Kendrick from his job for being discourteous to a supervisor; inexcusable neglect of duty; willful disobedience of rules prohibiting drugs, violence, and weapons on Caltrans property; and other failure of good behavior that caused discredit to his agency.

Kendrick appealed his termination to the SPB. He asked the board to exclude the illegally seized drugs and weapons. Caltrans argued that application of the exclusionary rule would not deter CHP officers from illegal searches of state employees and would punish Caltrans even though Caltrans did not conduct the search.

In a precedential decision, the SPB held that the evidence should be excluded from the administrative hearing because it believed the CHP officer could reasonably have anticipated both criminal and administrative disciplinary hearings. It reasoned that application of

the exclusionary rule would deter illegal searches by CHP officers when they conduct investigations of employees at state worksites in the future.

Caltrans petitioned the court to overturn the board's decision. The trial court ruled in Caltrans' favor and commanded the board to vacate its decision. Kendrick appealed.

Caltrans had no authority to direct how CHP conducted its investigation.

Balancing Test

The exclusionary rule excludes evidence in criminal cases when the evidence was seized in violation of the Fourth Amendment. The purpose of the rule is to deter law enforcement officers from violating rights by removing the incentive for conducting an illegal search.

The rule is rarely applied to noncriminal proceedings, the appellate court observed, even when severe penalties are at stake. The court explained that the one case in which a court applied the rule in a disciplinary hearing was not comparable to Kendrick's case. In *Dyson v. State Personnel Board* (1989) 213 Cal.App.3d 711, 84 CPER 17, the illegal search was conducted by a security officer employed by the disciplining department, not by an independent police officer.

Here, the search was not conducted by Caltrans, the court stressed, distinguishing the *Dyson* case. Caltrans did not request the search or hold the evidence for use in the disciplinary proceeding. The CHP officer initiated the search, and Caltrans had no authority to direct how CHP conducted its investigation, the court found.

In administrative proceedings, the courts use a balancing test to weigh the benefits of excluding unlawfully seized evidence with the likely social costs of exclusion. The courts consider the egregiousness of the search. Applying a balancing test here, the court decided the board erred by excluding evidence of the drugs and weapons found in Kendrick's vehicle.

The court found that on-the-job drug use and access to a firearm present a life-threatening danger to the public and to coworkers. The need to protect others outweighed the minimal deterrent effect of excluding evidence in this case. There was no evidence the CHP officer fabricated a case or that he coerced Kendrick into admitting that he used methamphetamines. The court pointed out that the officer already had been punished by exclusion of evidence and dismissal of charges in the criminal case.

The SPB argued that the CHP officer could have recognized the likelihood of a disciplinary proceeding, since the officer himself was a civil service employee, and conducted the investigation to benefit Caltrans. The court considered this argument pure speculation. There was no evidence that the CHP was conducting an administrative investigation on Caltrans' behalf.

The court found the board's identification of a possible deterrent effect "illusory" because the CHP was already punished by dismissal of the criminal charges. Nothing further would be gained by dismissing the disciplinary action, the court stated. The court upheld the trial court's judgment and order vacating the board's decision. (*Department of Transportation v. State Personnel Board [Kendrick]* [10-20-09] B210334 [2d. Dist] ___ Cal.App.4th ___, 2009 DJDAR 15003.) ✻

Discrimination

EEOC Presented Adequate Evidence to Infer Discrimination and Retaliation

After reviewing the factual record, the Ninth Circuit Court of Appeals found that the evidence presented by the Equal Employment Opportunity Commission was sufficient for a jury to infer that the employer's stated reasons for laying off two female employees were pretextual. In *Equal Employment Opportunity Commission v. Boeing*, the court held that the EEOC had established prima facie cases of sex discrimination, and the case could go to a jury because there was sufficient evidence to refute the company's claim that the women were laid off because of low test scores.

Background

One of the plaintiffs, Antonia Castron, worked as a liaison engineer. Her supervisor, Bill Charlton, often made derogatory comments about women. He said that he "didn't want any more women" and that "women were not worth a shit." He remarked that he "didn't have good luck with females" and they hadn't been around long enough for his satisfaction. He also commented that he "just didn't have time to train" women, and that his ex-wife, who was also a Boeing employee, "should be at home, not working."

Castron told several supervisors that she felt mistreated and unwelcome by her exclusively male coworkers because she was a woman. When she requested a transfer to the final assembly workgroup, Charlton refused, and instead transferred a male coworker. He finally transferred Castron to a different department where the job required a much higher level of skill. Castron was reluctant to agree to the transfer because her new supervisor, Rick Hobby, previously had called her a "little girl," and joked about her breaking a nail. She was also concerned that in the new department she would be more vulnerable to losing her job in an upcoming reduction-in-force. When Charlton assured her she would be exempted from the RIF, Castron agreed to the transfer. Two months later, Castron was terminated in the RIF based on Hobby's low evaluation of her work.

A jury might conclude that Charlton deliberately set Castron up to fail.

Renee Wrede was transferred to an assembly installation support group after Boeing substantiated her complaint of sexual harassment against her direct supervisor. While in her new position, Wrede was evaluated three times in two years as part of the RIFs . She received a positive evaluation from her supervisor, Bruce Wright, the first time; a lower one the next; and a significantly lower one the third time. Wright could not explain why he had given her such low scores. After the last evaluation, six men and Wrede were given RIF notices, but only Wrede was terminated. Five of the men transferred to other positions, two with the help of a supervisor. The other man's notice of termination was withdrawn after he expressed concerns about the assessment process.

The district court dismissed the lawsuit, finding that the EEOC had failed to establish a prima facie case of discrimination in Castron's case and failed to establish pretext in the case of Wrede. The EEOC appealed.

Court of Appeals Decision

The court concluded that the EEOC had established a prima facie case on Castron's behalf "because of direct evidence of discriminatory animus." Charlton's derogatory comments about women, along with the nature of his interactions with her, "are sufficient to create an inference of discriminatory motive," even if the comments were not directed to her. "These comments are more severe than 'ambivalent' 'stray remarks' that

we have previously held insufficient to establish such an inference," said the court.

It also found that the EEOC presented sufficient evidence from which a jury could infer that the reasons Boeing gave for transferring and then terminating Castron were pretextual. It cited her supervisor's discriminatory animus as direct evidence of pretext. In addition, it found "specific and substantial" circumstantial evidence that the transfer was discriminatory, pointing to Charlton's initial refusal to transfer her, the fact that he subsequently transferred her to a different department than the one she requested, and his assurances that she would not be subjected to the RIF to get her to agree to the transfer. "Taking note of all of the direct and circumstantial evidence, a jury might conclude that Charlton deliberately set Castron up to fail because of her sex or because of her invocation of Title VII rights," said the court.

Coworkers' assessments' of a plaintiff's work should be considered.

The court concluded that there was sufficient evidence for a jury to find that Castron's poor performance scores in her new position, which led to her termination, were also pretextual, citing Hobby's prior comments to her and the fact that he evaluated her without asking her trainer about her progress. It also determined that testimony by other employees regarding the unfairness of Hobby's evaluation was relevant. "Although subjective evaluations of an employee's skills of course may differ for a variety of reasons, specific positive evaluations of Castron's performance, both by her coworkers and by other managers, critically undermine the credibility of her official evaluation in a manner relevant to determining the existence of pretext," said the court. "We therefore adopt the Tenth Circuit's view that 'coworkers' assessments' of a plaintiff's work should be considered because they can be 'clearly probative of pretext,'" it ruled, citing *Abuan v. Level 3 Communications, Inc.*, (10th Cir. 2003) 353 F.3d 1158.

As for Wrede, both parties agreed that the EEOC had established a prima facie case of gender discrimination. The parties' only dispute was whether the EEOC presented sufficiently "specific and substantial" circumstantial evidence that could convince a jury Wrede's RIF scores were not credible.

The court acknowledged an inference that no discrimination took place arises from the fact that the individual who made the adverse employment decision against Wrede had twice given her scores which were high enough to avoid discharge. Here, however, it concluded that the inference was weak because her prior evaluations were lukewarm and none of the men who the supervisors ranked as low or lower than Wrede were terminated.

Further, the EEOC did produce "specific and substantial" evidence that suggested Wrede's final RIF assessment was pretextual. Wright gave her low scores for "no background or experience" in areas where she received higher scores on previous assessments. He could not offer any reasons for the changes between the second and third assessments. Several of Wrede's coworkers and managers gave detailed testimony that discredited the assessments. They also testified that she should have received higher scores, and that she performed better than several males who were not laid off. The court also cited as probative of pretext the fact that only Wrede, the sole woman, was terminated, leaving no female employees in the department.

The sole woman was terminated, leaving no female employees in the department.

The court reversed the district court's grant of summary judgment and sent it back to the lower court for further proceedings. (*EEOC v. The Boeing Co.* [9th Cir. 2009] 577 F.3d 1044.) ✻

FEHC Finding of Pregnancy Discrimination Upheld

On an appeal from a decision by the Fair Employment and Housing Commission, the Fourth District Court of Appeal determined that the employer discriminated against a pregnant employee in violation of the Fair Employment and Housing Act. In *SASCO Electric v. California Fair Employment and Housing Commission*, the court found that the commission had not abused its discretion, and that its decision was supported by substantial evidence.

Background

The employer, SASCO Electric, operates a 70-foot yacht to entertain guests. The captain, David McIntyre, hired Zibute Scherl as a deckhand. Scherl had years of boating experience and eventually became second captain. Jerry Jordan, SASCO's executive director and McIntyre's supervisor, told Scherl, "Whatever you do, don't get pregnant."

Scherl did get pregnant. When she told McIntyre in early February 2004, he was disappointed because he thought her pregnancy would impact her work. He believed her plan to work as long as possible was "cavalier," and he had concerns about the company's liability. McIntyre told Scherl to get a release from her doctor before a planned trip to Mexico in April.

The following day, McIntyre told Jordan and another deckhand named Best that he was concerned about exposing Scherl to chemicals and fumes and the possibility that she could fall and miscarry. He told Best he could not take Scherl to Mexico and would have to find someone else.

On February 20, SASCO asked Scherl to submit a release from her doctor by March 15. But, on February 27, McIntyre told Scherl that she was being laid off because, in an email from Jordan, he was told he could have only two employees, himself and one deckhand, which would be Best. When Scherl asked why he had selected her for layoff, he evaded the question. He never indicated her work was unsatisfactory. To the contrary, he always told her she was doing a good job, and told his wife that she was the best he had ever seen. McIntyre later told Scherl he would not have terminated her if she had not been pregnant. He made the same comment to several other people.

'Whatever you do, don't get pregnant.'

Before the Mexico trip, McIntyre hired two independent contractor deckhands, one of whom he later put on the payroll in place of Best, who had quit. Neither deckhand had any prior boat-handling experience.

Following a hearing, an administrative law judge issued a proposed decision finding that SASCO had discriminated against Scherl because of her pregnancy. The ALJ awarded Scherl back pay and $85,000 in emotional damages. The ALJ also found clear and convincing evidence of oppression and malice by SASCO, and imposed a fine of $25,000. The commission adopted the proposed decision. (See summary of the commission's decision at *CPER* No. 186, pp.116-120.) SASCO appealed.

Court of Appeal Decision

The court found substantial evidence to support the commission's finding of a causal connection between Scherl's pregnancy and SASCO's decision to terminate her, pointing to McIntyre's many comments.

It rejected the company's contention that McIntyre laid off Scherl because she could not dock the yacht and Best could; the court found substantial evidence that this reason was pretextual. Most telling, according to the court, was that McIntyre told Best that he could not take Scherl to Mexico the day after he learned she was pregnant, which was *before* he received Jordan's email ordering the staff reduction. The court saw McIntyre's failure to recall Scherl when he needed additional hands for the Mexico trip as further evidence undermining SASCO's proferred reason for terminating her.

SASCO objected to the back-pay award for the period from May 10 to the date of her child's birth, arguing

that Scherl was disabled by pregnancy during that time. The court disagreed. Had she still been employed by SASCO, the company would have had to reasonably accommodate her disability, which might have included a transfer to a less strenuous or less hazardous position. Therefore, SASCO

McIntyre failed to recall Scherl when he needed additional hands.

would have had to establish not only that Scherl was disabled but that her disability could not have been accommodated, which it did not do.

SASCO also challenged the award of emotional distress damages, asserting that the evidence relied on by the commission was subjective and speculative. The court concluded that the testimony of Scherl, her husband, and her father-in-law regarding the emotional distress she suffered as a result of the termination amply supported the award.

In support of the administrative fine imposed by the commission, the court said the evidence "establishes SASCO intentionally discriminated against Scherl by terminating her employment because she was pregnant," and that "SASCO contrived a reduction in force to hide its discrimination." (*SASCO Electric v. California Fair Employment and Housing Commission* [2009] 176 Cal.App.4th 532.) ✻

Employer Liable for One-Time Failure to Accommodate Employee's Disability

An employer can be held liable for a violation of the Fair Employment and Housing Act where it failed to reasonably accommodate an employee's known physical disability even where it can show a pattern of successful accommodation. The First District Court of Appeal, in *A.M. v. Albertsons LLC*, also concluded that the duty to engage in the interactive process to determine a reasonable accommodation is not ongoing. Once it has been determined what accommodation is required, and that accommodation has been granted, the employer has a duty to provide it.

Background

A.M. worked for Albertsons in a variety of positions. She took medical leave when she was diagnosed with cancer of the larynx and tonsils. The treatment she received affected her salivary glands, which left her mouth dry. Because of this, she had to drink water constantly and had to urinate often, sometimes as frequently as every 45 minutes. When she returned to work, she told the store managers the accommodations she needed. They told her it was not a problem, she could have water with her at all times, and to let them know when she needed to use the bathroom and they would cover for her.

One year after returning to her job as a checker, A.M. called Kellie Sampson, the person in charge of the store and the only individual who could cover for her. She told Sampson that she needed a break, but Sampson said she was busy and A.M. would have to wait. Albertsons' policy prohibited a checker from leaving the front of the store unattended. A while later, with a line of customers at the check stand, A.M. called Sampson again and told her she needed to go to the bathroom. Sampson said she couldn't cover for her and she would have to wait. A.M. called again 10 minutes later, but again Sampson was busy and hung up. A.M. then was unable to make it to the bathroom, and she urinated while standing at the check stand.

There was no showing that Sampson had ever been made aware of A.M.'s disability or need for accommodation. A.M. had a severe emotional reaction to the incident and eventually spent several days in a psychiatric hospital. She did not return to work for an extended period of time because Albertsons would not provide her with shifts that allowed her to go to therapy, a condition of her returning to work.

A.M. filed a lawsuit for damages for failure to provide her with reasonable accommodation. The case went to trial before a jury, which found for A.M. Albertsons appealed.

Court of Appeal Decision

Albertsons contended that the trial court should have dismissed the lawsuit because it had accommodated A.M. for many months before the incident and, on that occasion, she should have left her check stand to go to the bathroom or should have communicated to Sampson that she had been granted an accommodation.

The appellate court did not agree. "Acceptance of this argument would require us to blur the distinctions between these two different violations of the FEHA — the failure to engage in a good faith interactive process to determine a reasonable accommodation for an employee's disability and the failure to provide a reasonable agreed-upon accommodation," it said. It noted that none of the legal authorities relied on by Albertsons support its "novel claim" that "the legislature intended that after a reasonable accommodation is granted, the interactive process continued to apply in a failure to accommodate context." Such a conclusion would be "contrary to the apparent intent of the FEHA and would not support the public policy behind that provision."

Albertsons also argued that its failure to accommodate was "trivial" because it was "a single incident in the context of a much longer period of successful accommodation…." The court found this interpretation inconsistent with the language of the FEHA and with the statutory purpose to require employers to make reasonable accommodations for their employees' disabilities. "As is demonstrated by A.M.'s case, a single failure to make reasonable accommodation can have tragic consequences for an employee who is not accommodated," said the court. "When construing a statute, we seek to interpret it in a manner that promotes wise policy, not absurdity." It also noted that the jury awarded A.M. $200,000 in damages, indicating "that it found the failure to accommodate to be substantial, not trivial."

The court also affirmed the trial court's refusal to give the jury instructions in conformity with Albertsons' interpretation of the law. (*A.M. v. Albertsons LLC* [9-18-09] No. [1st Dist.], ___Cal.App.4th___, 2009 DJDAR 14865.) ✻

Legislative and Regulatory Updates

Undoing *Gross*

Congressional Democrats have introduced legislation to counteract the U.S. Supreme Court's decision in *Gross v. FBL Financial Services* (2009) 557 U.S. ___, 196 CPER 63. In that case, by a vote of five to four, the court made it much more difficult to establish age discrimination in employment by requiring plaintiffs to prove by direct evidence that the employer would not have taken the adverse action "but for" the employee's age. The court also held that the burden of proof does not shift to the employer.

The decision raised the standard of proof for age discrimination claims based on the Age Discrimination in Employment Act. It is higher than for plaintiffs complaining about other types of employment discrimination under Title VII, who must show only that the discrimination complained of was one factor motivating the employer.

Legislation introduced in the Senate by Judiciary Committee Chair Patrick J. Leahy (D-Vermont) and Senator Tom Harkin (D-Iowa), and in the House by Representative George Miller (D-Martinez), chair of the House Education and Labor Committee, would return the law to where it was before *Gross* and bring the standard of proof in ADEA cases in line with that in Title VII cases. "Why should there be a higher standard for someone who can't find a job or who doesn't get promoted because he or she was born before a certain arbitrary year than if he or she was discriminated against because of race or gender?" asked Harkin. "It is difficult that we have these laws on the books for some time that work very well to protect Americans, and then time and time again a very, very activist Supreme Court overturns them," said Leahy.

Bill to Ban LGBT Workplace Discrimination Moving Forward

Hearings on the Employment Non-Discrimination Act, authored by Representative Barney Frank (D-Mass.), were held by the House Education Committee on September 21, 2009. H.R. 3017 would prohibit employment discrimination, preferential treatment, and retaliation on the basis of sexual orientation or gender identity by employers with 15 or more employees.

New ADA Regulations Proposed

Last year, Congress passed the Americans with Disabilities Act Amendments Act of 2008 in reaction to the Supreme Court's decisions in *Sutton v. United Air Lines, Inc.* (1999) 527 U.S. 471, 137 CPER 21, and *Toyota Motor Manufacturing, Kentucky, Inc.* (2002) 534 U.S. 184. Those decisions had narrowed the definition of disability under the ADA and made it more difficult for people with disabilities to be covered by the law's protections. The legislation broadened the act. (See full discussion of the amendments at *CPER* No. 192, pp. 65-66.)

The Equal Employment Opportunity Commission now has issued proposed regulations implementing the Amendments Act. The commission is conducting four full-day "Town Hall Listening Sessions" to obtain "direct input from the business/employer community and the disability and disability advocacy community." It will be accepting public comments on the regulations until November 23. Additional information can be found at http://www.eeoc.gov/ada/amendments_notice.html.

Reconciling FMLA and CFRA Regulations

The United States Department of Labor's final regulations interpreting the federal Family and Medical Leave Act took effect on January 16, 2009. (See full discussion of the regulations at *CPER* No. 194, pp. 11-19.) These regulations now deviate from comparable regulations issued by California's Fair Employment and Housing Commission interpreting the California Family Rights Act. The commission plans to revise its CFRA regulations; in the interim, it has updated its table comparing its regulations with those revised by the FMLA. The table can be found at http://www.fehc.ca.gov/pdf/FMLA-CFRARegsTable-2.pdf.

Promoting Employment Opportunities for the Developmentally Disabled

On October 11, 2009, Governor Arnold Schwarzenegger signed into law A.B. 287. Introduced by Assembly Member Jim Beall (D-San Jose), the legislation requires the State Council on Developmental Disabilities to implement a policy designed to increase the number of individuals with developmental disabilities who are employed. ✻

General

Limits on Employer's Workers' Comp Liability for Injuries Suffered Seeking Treatment

An employer is liable when an employee receiving workers' compensation benefits injures herself while en route to or from a medical appointment for an existing industrial injury. But, announced the Fourth District Court of Appeal, there are some limitations on that liability. The employee must be traveling a reasonable distance and within a reasonable geographic area. Because there is no specific statutory or regulatory test for determining these boundaries, the court directed that they must be made on a case-by-case basis.

The case involved Tania Esquivel, a correctional officer living in San Diego. She sustained injuries in the course of her employment and received benefits under the Workers' Compensation Act. She was treated by a physician and a pain management specialist, both with offices in San Diego.

During a weekend in May 2007, Esquivel traveled to her mother's home in Hesperia, in San Bernardino County. On Monday morning, while en route to her medical appointments in San Diego, she drove through a stop sign, collided with two cars, and suffered serious injuries. Esquivel claimed that these were a compensable consequence of her industrial injuries.

A workers' compensation judge said that "one may begin a journey to medical treatment from anywhere, not just one's home or workplace." What matters is the patient's intent, he said, not her starting point. Since Esquivel was intending to drive directly from Hesperia to her first medical appointment in San Diego, the WCJ reasoned, she was traveling to treatment for her industrial injuries and the injuries she suffered in the car accident were compensable.

The Workers' Compensation Appeals Board reversed the WCJ's determination, finding that, while there is no test to determine the reasonable geographic area of an employer's risk, "the lack of an established test does not mean there is no limit." Whether Esquivel deviated from her intended journey is not the issue, the board said. Rather, because the accident occurred 136 miles from the offices of her medical providers, it was unreasonable to assign the risk of injury en route to the medical appointment to the employer.

Esquivel appealed the board's decision, asserting that the dispositive issue is whether she deviated from the direct route from her mother's house to her doctors' appointments in San Diego.

In *Laines v. Workmens' Compensation Appeals Board* (1975) 48 Cal. App.3d 872, the court held as a matter of first impression that an injury an employee suffers while traveling to a medical appointment for treatment of an industrial injury arises out of, and in the course of, employment even if the existing injury was not a factor contributing to the new injury and the journey to the medical appointment did not commence at the employee's place of employment.

A determination of boundaries must be made on a case-by-case basis.

But the *Laines* court did not address the issue presented in the *Esquivel* case — is there a geographic limitation on the employer's liability?

The court agreed with Esquivel that she enjoys the same constitutional right to travel as other citizens, and her status as an industrially injured worker does not curtail her right to visit her mother in Hesperia, about 140 miles away from her home, her workplace, and the offices of her medical treatment providers. Esquivel also relied on the "deviation standard," under which an injury is compensable when it occurs while the

employee is going to or coming from medical treatment for a compensable injury "unless the employee materially deviates from a reasonably direct route for a purpose not germane to the medical visit."

The Court of Appeal rejected her argument that her injuries were compensable because she did not deviate from a reasonably direct route. This logic, said the court, would render compensable "an injury suffered by a San Diego employee who, for reasons unrelated to her need for statutorily required medical care, elects to travel from her home in San Diego to the East Coast, and then substantially increases her risk of injury (and her employer's risk of incurring compensable liability) by riding a motorcycle back to San Diego without a material deviation from a reasonably direct route from her East Coast starting point to attend a medical appointment for treatment of her existing industrial injuries."

The court found support for constructing a rule of geographic reasonableness.

The court saw no reason why the employer should bear the increased risk of such extended travel when it is unrelated to the employee's need for medical treatment.

The court found support for constructing a rule of geographic reasonableness from the language of the statute, its implementing regulations, and the legislative intent. It held that an employer is liable for an injury an employee suffers while traveling a reasonable distance, within a reasonable geographic area, to or from a medical appointment related to an existing compensable injury. "Conversely," said the court, "where the employee chooses for reasons unrelated to his or her need for medical treatment to travel to a distant location beyond the reasonable geographic area of his or her employer's compensability risk, and is injured while traveling an unreasonable distance from that distant location to a medical appointment for examination or treatment of an existing compensable injury, the employer will incur no such liability under the Act."

The court did not adopt a specific test for determining either the boundaries of the reasonable geographic area limitation or what constitutes a reasonable distance. However, it instructed that these determinations be made on a case-by-case basis with consideration given to the location of the employee's residence and workplace, the location of the employee's attorney and medical provider, the place where the new travel-related injury occurred, the distance between the employee's departure point and the medical provider's office, the distance traveled deviating from a reasonably direct route, the availability of medical providers in the needed field of practice, and the reason for the travel beyond the employee's reasonable geographic area.

In this case, the court found that the injuries Esquivel suffered as a result of her motor vehicle accident were not compensable because they occurred for reasons unrelated to her need for medical treatment near her mother's home and outside the reasonable geographic area of her employer's risk for incurring liability for her injuries. (*Esquivel v. Workers' Compensation Appeals Board* [10-13-09] D054197 [4th Dist.] ___Cal. App.4th___, 2009 DJDAR 14782.) ✻

State Mediation and Conciliation Service Authorized to Charge Fees for Certain Services

For the first time in its 62-year history, the California State Mediation and Conciliation Service has been authorized by the legislature to charge fees for some of its services. The change, initiated by CSMCS and the governor's office, was passed as part of a budget bill in late July 2009. The agency is in the process of writing regulations to implement the changes, which are targeted to go into effect in July 2010.

CSMCS may now charge for arbitration services (annual arbitrator fees

to be on the panel and charges to the parties for lists of arbitrators), election services (administration and supervision of representation and agency shop elections), and training and facilitation. CSMCS' central work of mediation of contract disputes and mediation of grievance disputes will continue to be provided at no cost to the parties.

The agency sought the change as a way of allowing the program to become less dependent on California's highly volatile general fund. "Having alternative sources of revenue can help us weather the fiscal storms, maintaining an adequate level of staffing for our vital core mission of keeping the labor peace in California's public sector," said CSMCS Supervisor Paul Roose.

CSMCS also has begun charging other California state agencies for certain services, such as mediation of interpersonal workplace disputes. Also under consideration is a charge for mediation of state employee disciplinary appeals prior to a formal hearing before the State Personnel Board. ✻

Reminder: American Recovery and Reinvestment Act Protects Whistleblowers

As the flow of economic stimulus funds picks up, be aware that the American Recovery and Reinvestment Act (Sec. 1553 of Pub. Law 111-5) prohibits reprisal against an employee of any non-federal employer for disclosing evidence of waste or mismanagement of stimulus funds, abuse of authority or violation of law related to the implementation or use of covered funds, or a "substantial and specific danger to public health or safety related to the implementation or use of covered funds." The whistleblower can file a complaint with the appropriate inspector general, who investigates the complaint and issues a report within 180 days.

The agency distributing the funds makes the determination whether there was a reprisal and can order the recipient of stimulus funds to reinstate the employee with back pay and attorney's fees. If the employee exhausts administrative remedies without receiving full relief, the employee can file suit in court for compensatory damages and attorney's fees. The employee need prove only that the disclosure of the waste, fraud, or abuse was a contributing factor in the reprisal. ✻

Public Sector Arbitration

Court Compels District to Arbitrate Legal Defense to Grievance

A SCHOOL DISTRICT cannot refuse to arbitrate a grievance on the ground that the collective bargaining agreement provisions conflict with state law relating to charter schools. The court rejected the district's contention that an arbitrator should not be able to review contract language which prescribed notice and other prerequisites when converting a high school to a charter school. The district argued the procedural requirements were preempted or invalidated by the Education Code, relying on *Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269, 118 CPER 48. *Round Valley* does not govern the outcome of this case, the court held, because it does not address whether a case involving a legal defense should go to arbitration in the first instance.

Charter School Grievance

In May 2007, Green Dot Public Schools filed a charter petition with the Los Angeles Unified School District to convert a public high school to a charter school. In September, the district's board granted the petition.

Before the petition was granted, the United Teachers Los Angeles filed a grievance alleging that the district had violated provisions of the collective bargaining agreement by not presenting the complete charter to employees, not giving the union a copy of the proposed charter, not fully disclosing the conditions of employment of the charter school, and not giving employees and the community ample time to review and discuss the plan. After completing the lower steps of the grievance, the union demanded arbitration, but the district refused.

The union went to court to compel the district to submit the grievance to arbitration. The district contended that the holding of *Round Valley* barred arbitration because the contract provisions were either preempted or invalidated by the Education Code. The Education Code states that the approval of a charter school petition shall not be controlled by a collective bargaining agreement or subject to review or regulation by the Public Employment Relations Board. It describes the procedural steps a district must take before granting a charter school petition.

The district also argued the union did not have standing to challenge the alleged violations of the collective bargaining agreement.

The trial court agreed with the district. The union appealed.

Union Has Standing

The appellate court rejected the assertion that the union did not have standing to pursue the grievance. The court pointed out that the California Arbitration Act provides that a court should compel an arbitration when petitioned by a "party to an arbitration agreement" if the court determines the parties agreed to arbitrate the controversy. The general rule is that a party to an arbitration agreement may seek to enforce it, the court noted. Since the union was a party to the collective bargaining agreement, seeking to enforce its provisions, it had standing to file the grievance. In addition, the court explained that the Educational Employment Relations Act provides that a union has standing to sue in any action on behalf of a member.

The merits of a dispute first must be resolved by the arbitrator.

The district insisted that the union did not have standing to compel arbitration because neither the charter school operator nor the school's staff is party to the collective bargaining agreement. It relied on *Amalgamated Transit Union, Loc. 1756 v. Superior Court* (2009) 46 Cal.4th 993, which held that a union which did not suffer any damages could

not file under the unfair competition law or the Labor Code's Private Attorney General Act because those laws require that the plaintiff must have suffered injury. The court found that case was not relevant because the petition to compel arbitration did not involve either law.

Legal Defense Goes to Arbitration

In addressing the petition to compel arbitration, the court pointed out that EERA provides a party may compel arbitration under the California Arbitration Act when the opposing party refuses to submit to arbitration. The act states, "If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner's contentions lack substantive merit."

The district's primary contention was that the provisions of the collective bargaining agreement relating to charter schools could not be reviewed in arbitration because an arbitrator would not have the power to enforce the contract in light of conflicting provisions of the Education Code. The court pointed out, however, that the trial court should have confined itself to determining whether there was a valid agreement to arbitrate. It was not proper for the district to raise the merits of the claim as a defense to the motion to compel arbitration. The merits of a dispute first must be resolved by the arbitrator, said the court, and the arbitrator has authority to decide a statutory defense.

The court quoted at length from *California Correctional Peace Officers Assn. v. State of California* (2006) 142 Cal.App.4th 198, 180 CPER 28. In that case, the union grieved a provision of the contract that allowed rank-and-file members to attend meet and confer sessions of the supervisors' unit. The state refused to arbitrate the grievance because the Government Code excludes rank-and-file employees from negotiations concerning supervisors and vice versa. The appellate court disapproved the state's refusal to arbitrate. Even if the statute superseded the collective bargaining agreement, the *CCPOA* court held, the argument had to be submitted to an arbitrator.

The *UTLA* court distinguished *Round Valley* from the case before it. In *Round Valley*, the district moved to vacate an award that allowed a rehearing on the correctness of its refusal to rehire a probationary teacher. Since the Education Code prescribed the causes and procedures for deciding whether

to rehire a probationary teacher and vested the decision exclusively in the school district, the district argued that the arbitrator exceeded his powers. The Supreme Court held the Education Code preempted collective bargaining over the causes and procedures involved in rehiring probationary teachers. It vacated the arbitrator's award.

The *UTLA* court pointed out that *Round Valley* addressed whether an arbitrator had exceeded his powers, but not whether the statutory defense should have gone to arbitration in the first instance. Statutory claims must be presented to the arbitrator first, the court held. If the arbitrator decides in the employer's favor, there will be no need to go to court to decide the preemption issue, the court explained. If the arbitrator's award is in favor of the union, the district may challenge the award in the trial court. The petition to compel the arbitration should have been granted. (*United Teachers Los Angeles v. Los Angeles Unified School Dist.* [2009] 177 Cal.App.4th 863.) ✻

Arbitration Log

• **Discharge — Absenteeism**

Appellant and Los Angeles County Department of Children and Family Services (8-30-08; 10 pp.). *Representatives:* Lyle Fulks, civil service advocate, for the appellant; Jeanine A. Thomas, Esq., civil service advocate, and Andrew L. Talton, Jr., Esq., civil service advocate, for the department. Hearing officer: Philip Tamoush.

Issue: Was the appellant properly discharged?

Department's position: (1) The applicant consistently failed to report for duty or notify her managers about her absences.

(2) She was repeatedly counseled and given notice that she would face discipline, including discharge, if she continued to disregard the attendance policy. Nonetheless, during an eight-month period, she was absent or tardy over 1,000 hours.

(3) After receiving a notice of intent to discharge, the parties executed a last-chance agreement. She was suspended for 30 days in lieu of discharge.

(4) When the appellant's pattern of excessive absenteeism and tardiness persisted, she was appropriately discharged.

Appellant's position: (1) The absences are the result of physical and mental ailments that cause stress and chest pains and make it difficult for her to sleep.

(2) The appellant's doctor faxed two notes to the department regarding the absence that preceded her discharge. A medical assistant recalled faxing the doctor's notes that excused the appellant from work.

(3) The department failed to meet its burden, particularly in light of the notification her doctor provided just prior to discharge.

Hearing officer's recommendation: The discharge should be sustained.

Hearing officer's reasoning: (1) The appellant has a continuing record of extensive, unjustified, and non-documented absences.

(2) She has repeatedly been counseled and disciplined, including a 30-day suspension.

(3) Except for one fax sent by her doctor, there is no evidence of other documents sent or received by the department regarding her absences.

(4) Despite progressive discipline, the appellant violated department rules by failing to notify management of her absences.

(Civil Service Appeal)

• **Contract Interpretation**
• **Discrimination/Reprisal for Union Activity**

United Professors of Marin, AFT, Loc. 1610, and Marin CCD (11-20-08; 27 pp.) *Representatives:* Patricia Lim (Law Offices of Robert J. Bezemek) for the union; Larry Frierson for the district. *Arbitrator:* Ron Hoh.

Issue: Did the district violate the collective bargaining agreement when it cancelled the grievant's Sociology 114 class and refused to assign him a Sociology 110 class? If so, what shall the remedy be?

Union's position: (1) The grievant, a full-time instructor, served as department chair for the past 10 years as an overload assignment. He has been the union's chief negotiator for the last four bargaining agreements. In fall 2007, he was assigned five classes totaling 15 teaching units. He also scheduled three overload hours as department chair and six overload units as union negotiator.

(2) When the grievant's Sociology 114 was cancelled due to low enrollment, the vice president asked him to choose between being chair and teaching Sociology 110. When he protested, she assigned his department chair duties as part of his full-time faculty load, despite his request to teach Sociology 110, a class taught by a part-time, temporary instructor.

(3) The grievant was entitled to teach 14-16 "teaching units" each semester. When one class was cancelled, he was entitled to teach another. Under the contract, any additional work is overload. The grievant was entitled to be department chair if elected by the department and, under the contract, can choose how to be compensated for voluntary administrative service. The union can determine how to allocate units for union service.

(4) The part-time temporary instructor's contract may be discontinued if necessary to reassign the class to a probationary or tenured faculty member. The grievant was already teaching a sociology class and had regularly taught it in the past.

(5) No chair has been denied a full-time teaching load. The district's action is

retaliation for union service, particularly for his testimony in an arbitration.

District's position: (1) There is no right to an overload assignment, including that of department chair. The contract, requires the faculty member to request and get approval for overload compensation from the college president.

(2) The grievant had no overload after the class was cancelled. He had no option to take overload pay or a stipend. The contract does not guarantee that chair duties be an overload assignment if the instructor has fewer than 15 units.

(3) There is no right to teach 14-16 units. "Teaching units" means workload, including non-teaching duties. If interpreted to refer only to teaching, librarians and counselors could demand 14 units of classroom teaching in addition to their non-teaching duties.

(4) There is no right to bump another faculty member except during layoffs. The best interests of the students are not served by removing a teacher who has begun teaching the class.

(5) There was no causal link between the refusal to replace the cancelled class and the grievant's union activity. Her decisions were made before the union won the prior arbitration.

Arbitrator's decision: The grievance was sustained in part, but there was no bumping rights violation.

Arbitrator's reasoning: (1) "Teaching units" means actual teaching activities. The regular workload of instructional faculty includes "14-16 teaching units in lecture and/or laboratory." "Units" is used in reference to overload pay. "Teaching units" is used to describe the pay equivalency for coordinator positions compensated by overload, stipend, or reassigned time.

(2) The union's construction of the term would not allow non-teaching faculty to demand a teaching load. The contract measures their workload in work hours and provides how "teaching units" equate to work hours for counselors or librarians.

(3) The grievant is entitled to teach 14-16 teaching units. The district violated the contract when it did not assign him another class. Concerns about students were not voiced when the greivant was asked to choose between teaching and being department chair.

(4) The refusal to remove the part-time instructor did not violate bumping rights.

(5) The union proved a causal link between the district's decisions and the grievant's union activity and recent arbitration testimony. In the past, the district has allowed department chairs to teach 14-16 units and be compensated as chosen by the chair. Differential treatment leads to an inference of retaliation for union activities.

(Binding Grievance Arbitration)

• Denial of Tenure

Hartnell Community CCD and Hartnell College Faculty Assn. (11-28-08; 19 pp.). *Representatives:* Michelle A. Welsh (Stoner, Welsh & Schmidt) for the association; William E. Brown, Esq., for the district. *Arbitrator:* Paul Staudohar.

Issue: Was the community college instructor properly denied tenure?

Association's position: (1) The grievant did not receive notice of the trustees' decision to deny her tenure by registered or certified mail as required. It was delivered to the grievant's campus mailbox and provided no reasons.

(2) The tenure review committee did not consider the unanimous recommendations of administrative or peer evaluations. It credited false information that the grievant did not attend department meetings, and it was misinformed that her student evaluations were negative.

(3) The grievant worked according to her approved schedule. She received exemplary ratings, has a Ph.D. in English, and has 16 years of teaching experience.

(4) The district told a board member the grievant's services would be limited because of her pregnancy.

(5) The district did not prove its decision to deny tenure was reasonable.

District's position: (1) The grievant got personal notice of the tenure decision before the statutory deadline.

(2) The committee examined all material it was given and had subsequent discussion. Its decision to deny tenure was unanimous.

(3) The decision to deny tenure was made before it was known the grievant was pregnant.

(4) The committee determined the grievant's performance did not warrant tenure, and should not be overruled by the arbitrator.

Arbitrator's holding: The grievance is sustained.

Arbitrator's reasoning: (1) The grievant did not receive notice by registered or certified mail, but the district president gave notice by telephone 10 days before the deadline. She also received timely notice by letter in her campus mailbox. While technically flawed, the grievant received notification before the deadline.

(2) The allegation that the grievant frequently missed department meetings is untrue. All seven members of the department signed a statement that the grievant attended monthly meetings. This was corroborated by other testimony.

(3) The president of the academic senate who served on the tenure committee did not know the contract allowed the committee to recommend tenure coupled with a one-year remediation plan. She was told it was not an option.

(4) The grievant's schedule was approved by her administrators and she worked in accordance with it. Overall, student evaluations were positive. The grievant consistently won high praise from administrators, peers, and students.

(5) The board did not evaluate the grievant according to standards mandated by the Education Code. It did not receive the grievant's most recent evaluations as required.

(6) Although the law cautions against second guessing the committee's recommendation, its negative tenure decision was unreasonable. It did not accurately reflect the grievant's record of teaching or campus service.

(7) While the evidence is that the district president made a comment about the grievant's pregnancy, there is no proof it impacted the tenure decision.

(8) The grievant shall be reemployed in her former probationary position, with full back pay and benefits, and thereafter be reconsidered for tenure.

(Binding Grievance Arbitration)

• Contract Interpretation
• Timeliness
• Post and Bid

California Statewide Law Enforcement Assn. and State of California, Dept. of Mental Health (Atascadero State Hospital) (5-7-09; 16 pp.). *Representatives*: David De La Riva, for the association; Nikki Mozdyniewicz, for the state. *Arbitrator*: Franklin Silver.

Issue 1: Was the grievance timely?

Issue 2: Did the hospital violate the collective bargaining agreement regarding the post-and-bid process?

Union's position: (1) The grievance was timely filed after the post-and-bid process. The department did not object to timeliness during the grievance procedure.

(2) Administrative positions in the police department must be posted for bidding. The contract requires bidding and selection by seniority based on employee skills, abilities, and training needs.

(3) All line officers have the same skill sets since all attend the same introductory course and academy. Only certain positions require particular skills. Since the hospital has no standards for selection to the administrative positions, it cannot rely on the contract to prevent bidding by seniority.

(4) The hospital has not used skills or abilities to fill administrative positions in the past. There was no evidence the two officers who were selected had particular abilities or skills.

Employer's position: (1) The grievance was untimely. The union has known since 1998 that administrative assignments were not posted for bidding.

(2) The plain language of the contract permits the department to schedule shifts based on factors other than seniority — efficiency, training needs, and employee skills.

(3) A seniority-based system interferes with operational needs. Canine officers need to live and work with the dog. Photo lab officers need extensive technical skills. These needs cannot be met if selection is based on a rigid seniority system.

(4) The management rights clause gives the department the authority to assign, schedule, and train personnel to maintain efficiency. The hospital reasonably exercised that discretion.

(5) For two decades, the consistant practice has been to exclude administrative assignments from the post-and-bid procedure. The union acquiesced to this practice.

Arbitrator's holding: Although timely filed, the grievance is denied.

Arbitrator's reasoning: (1) The grievance was filed within 14 days of the post-and-bid process.

(2) The contract does not provide an absolute right to bid on shifts based on seniority. The department may consider employee skills and abilities along with other factors.

(3) There is a long-standing practice of excluding administrative assignments from the seniority bidding process. All officers have been notified of openings and asked to submit letters of interest. Personnel files and work records have been considered by management. The union acquiesced to this procedure until two junior officers were selected. Past practice has been incorporated as a binding contractual procedure.

(4) Even though all officers are similarly trained, they are not equally qualified for each administrative job. Few have

bachelor's degrees, computer expertise, or dog-handing skills. The department reasonably considers report-writing skills and extra training. Although the transportation assignment does not require extensive qualifications, the department's training needs are served by exposure to courts and outside agencies. These factors are consistent with management rights to schedule, assign, and train employees.

(5) The contract allows management to evaluate skills and abilities in making assignments. If the union wants seniority to be weighed in making administrative assignments, it may raise that issue in negotiations.

(Binding Grievance Arbitration)

• Discipline
• Automatic Resignation

City and County of San Francisco and SEIU Loc. 1021 (8-27-09; 20 pp.) *Representatives:* Jannah V. Manansala (Weinberg, Roger & Rosenfeld) for the union; Thornton C. Bunch, Jr., for the city and county. *Arbitrator*: Jerilou Cossack.

Issue 1: Did the city have just cause to terminate the grievant?

Issue 2: Did the city violate the MOU when it gave the grievant a notice of automatic resignation?

Employer's position: (1) The grievant was absent and failed to provide medical verification. The city notified him that it intended to file an automatic resignation because he had been AWOL for at least five continuous workdays and had not provided a disability certification. He did not attend a hearing on the AWOL notice, and his automatic resignation was effective.

(2) The grievant was terminated under the automatic resignation provision of the MOU and civil service rules because he was absent without submitting a proper leave request. Because the termination was non-disciplinary, the city is not required to prove just cause, only that the grievant failed to submit a request for leave when absent for more than five working days. The arbitrator's review is confined to examining the dates of absence and whether the city's actions were arbitrary, discriminatory, or in bad faith.

(3) The grievant's disregard of the rules resulted in the loss of his job. The city was justified in terminating him, under either the automatic resignation or just cause provisions of the MOU.

Union's position: (1) The grievant's absence was not an automatic resignation because he never manifested an intent to resign. The grievant called his supervisor daily, left voicemail messages, and exchanged seven emails. He explained he was unable to work and would provide medical verification as soon as possible. It was unreasonable for the city to view the grievant AWOL while he tried to sort out his medical coverage.

(2) The grievant complied with the unreasonable request to notify his supervisor of his absence daily.

(3) The city did not reject the grievant's leave requests until months after they were submitted and after he was terminated. The grievant attempted to obtain verification from his doctor. He submitted leave requests without the doctor's statement to show he was attempting to comply with the rules.

(4) The automatic resignation provision must be read in conjunction with the just cause section of the contract. Just cause includes consideration of an employee's work history and other factors. The grievant must have knowledge of the rule and disciplinary consequences for violating it.

Arbitrator's decision: The grievance is sustained.

Arbitrator's reasoning: (1) The city did not have just cause to terminate the grievant. It believed the grievant had an attendance problem, but did not issue progressive discipline. Poor attendance does not justify summary termination.

(2) The MOU permits leaves of absence due to injury. It allows 10 days to request leave for an unscheduled absence. Whether after-submitted medical evidence is accepted was handled on a case-by-case basis.

(3) The city's rejection of the request-for-leave forms after filing the automatic resignation was unreasonable. It was unreasonable to reject the signed doctor's form only because it authorized a longer leave than requested.

(4) The grievant failed to present disability certificates for all absences, but consistently demonstrated his desire to retain employment. The automatic resignation provisions allow, but do not require, the city to record an automatic resignation if an employee is absent without authorization on more than five workdays. Here, the automatic resignation was arbitrary and violated the applicable section of the MOU.

(5) The grievant shall be reinstated and made whole. Because it is unclear if he became physically able to work, he may not recoup wages for any period of incapacitation.

(Binding Grievance Arbitration)

Public Employment Relations Board

Orders & Decisions

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

Dills Act Cases

Unfair Practice Rulings

No unlawful interference or retaliation against employee whose union membership was revoked: SEIU.

(*Hernandez v. SEIU Loc. 1000*, No. 2049-S, 7-3-09; 2 pp. + 15 pp. B.A. dec. By Member Wesley, with Members Neuwald and McKeag.)

Holding: Suspension of membership did not have a substantial impact on the employee's relationship with the employer. The union acted reasonably and followed its own procedures when suspending him for advocating decertification.

Case summary: The charging party was an SEIU Local 1000 officer who helped organize California State Employees United, a group seeking to reform California State Employees Assn. and SEIU Loc. 1000. He assisted another group member with filing an unfair practice charge against SEIU. He also sought access to union financial documents. A bargaining unit member filed a complaint with the union that the officer was advocating decertification. After the union declined to disclose certain documents, the charging party's attorney threatened a lawsuit. The charging party also criticized the union in two newspaper articles.

SEIU notified the officer of the complaint and set a disciplinary hearing. The hearing was rescheduled three times, once at his request. His request for a third change of date was denied. The hearing panel recommended a one-year suspension, which was upheld by three-fourths of the union's council members present and voting. He remained a union board member and president of a union district labor council.

The officer charged that the union interfered with his right to union membership and retaliated against him for protected activities. The board upheld and adopted the board agent's decision to dismiss the charge.

The charging party argued that suspension of membership barred him from using union leave, which he needed to represent members and continue labor-management activities as DLC president. When leave was exhausted, he alleged he would face discipline from his employer. The board agent dismissed the charge because the disciplinary suspension was an internal union matter that did not have a substantial impact on the employee-employer relationship. The officer had no personal duty of fair representation to unit members, and any duty to SEIU had no impact on his relationship with his employer.

The charging party contended that the union did not follow its own procedures when suspending him. He argued that his suspension required a vote of three-quarters of the council members, but the board agent found that three-quarters of those present and voting was sufficient. The agent also rejected the charging party's contention that the denial of his request for a continuance was unlawful interference since he and five of his witnesses testified at the hearing. The board agent also rejected claims that the charges against him were vague and ambiguous and that it was unreasonable for the hearing panel to submit its recommended decision three weeks late due to the unavailability of the transcript and a panel member.

The charging party also complained that he was prevented from attending an international SEIU convention and he lost his seat as a delegate. The board agent noted that the union's international constitution requires delegates to be members in good standing of a local union.

EERA Cases

Unfair Practice Rulings

On remand, board finds charter school retaliated: Journey Charter School.

(*California Teachers Assn. v. Journey Charter School*, No. 1945a, 6-2-09; 3 pp. dec. By Member Wesley, and Members McKeag and Neuwald.)

Holding: The prior board decision finding no retaliation was vacated. The charter school was ordered to make teachers whole.

Case summary: In *Journey Charter School* (2008) No. 1945, 190 CPER 25, the board dismissed the unfair practice charge of three teachers who alleged that the school refused to renew their teaching contracts in retaliation for sending a letter to parents that criticized the district's financial management and because they had engaged in union organizing. The board found that the teachers were dismissed because they disseminated the letter but it was not protected activity because it did not directly address issues relating to the teachers' interests as employees. The board also concluded there was insufficient evidence that JCS was unlawfully motivated by the teachers' union activities when it decided to terminate them. CTA appealed, and the Fourth District Court of Appeal, in *California Teachers Assn. v. PERB* (2009) 169, Cal. App.4th 1076, 194 CPER 21, reversed. The court agreed with CTA that dissemination of the letter was protected activity and, since PERB had determined that the teachers were terminated because of the letter, that the district violated EERA. It sent the case back to PERB to issue an order consistent with its decision.

Governed by the Education Code, teacher classification is outside of scope: SFUSD.

(*United Educators of San Francisco v. San Francisco Unified School Dist.*, No. 2040, 6-23-09, 6 pp. dec. By Acting Chair Dowdin Calvillo, and Members McKeag and Wesley.)

Holding: PERB has no jurisdiction to enforce provisions of the Education Code. The charge failed to state a prima facie case of unlawful unilateral change because the subject of teacher classification falls outside the scope of representation.

Case summary: The parties' collective bargaining agreement establishes two categories of substitute teachers. In April 2008, during a reduction in force, the parties stipulated that both types would be "classified as probationary employees for the purposes of seniority."

On July 1, 2008, the district sent all substitutes employment contracts that classified them as temporary. The union alleged that, in doing so, the district violated provisions of the Ed. Code and EERA by failing to classify the substitutes as probationary.

The board found it had no jurisdiction to enforce provisions of the Ed. Code and dismissed that allegation for lack of jurisdiction.

The board also determined it had no authority to enforce the parties' April 2008 stipulation unless the breach of the agreement also was an independent unfair practice, here an unlawful unilateral change in violation of EERA Sec. 3543.5(c).

The board held that UESF's charge failed to allege an unlawful unilateral change because the stipulation did not concern a matter within the scope of representation, which EERA Sec. 3543.2(a) defines as "matters relating to wages, hours of employment, and other terms and conditions of employment." Moreover, EERA Sec. 3540 instructs that the collective bargaining statute "shall not supersede other provisions of the Education Code." "In other words," the board said, "a subject governed by a mandatory section of the Education Code does not fall within the scope of representation under EERA."

Classification of substitutes is governed by the Ed. Code, and Ed. Code Sec. 44924 voids any provision of an individual employment contract "purporting to waive the protections accorded certificated school employees by the Code, including provisions governing their classification and termination," said the board. Citing *Bakersfield Elementary Teachers Assn. v. Bakersfield City S.D.* (2006) 145 Cal.App.4th 1260, 182 CPER 41, the board concluded that because the Ed. Code provisions governing classification of certificated employees may not be waived by contract, teacher classifi-

cation is not a proper subject of bargaining between school districts and employee organizations.

Employees' reporting location not negotiable: SFUSD.

(*United Educators of San Francisco v. San Francisco Unified School Dist.*, No. 2048, 6-30-09; 10 pp. dec. By Acting Chair Dowdin Calvillo, with Members Neuwald and Wesley.)

Holding: Employees' reporting location is not within the scope of representation, and the charging party failed to show the change in location had an actual effect on terms or conditions of employment over which the district was obliged to negotiate.

Case summary: Special education aides were directed to begin their duty by getting on a bus at the bus yard in order to pick up individuals to whom they are assigned as aides. Unilaterally and without notice to the charging party, the district changed the reporting location from the bus yard to where the first student was picked up.

The charging party alleged that the change altered the length of employees' workday and workweek and, in some cases, caused inconvenience and financial hardship. The charging party cited an example of an employee whose first pickup was in an area where parking was difficult and expensive and not accessible by bus.

The board upheld the board agent's dismissal of the charge for failure to state a prima facie case. It found that a change in the reporting location did not constitute a violation of EERA Sec. 3543.5(c) because the action did not fall within the scope of representation, citing *Moreno Valley USD* (1982) No. 206, 54 CPER 42. In that case, the employer's unilateral change in reporting location did not constitute an unlawful change because "the evidence does not support a finding that the change affected a subject within the scope of representation." The board here recognized that this language in *Moreno* "could be read to mean that the district's decision itself, and not just the effects of the decision, would be negotiable if the decision had an impact on wages, hours, or other terms or conditions of employment." Instead, the board interpreted this language "as requiring bargaining only over negotiable effects of the employer's nonnegotiable decision," relying on *Newman-Crows Landing Unified School Dist.* (1982) No. 223, 55 CPER 62. There, the board held that an employer's decision on a subject outside of the scope of representation is not negotiable merely because it has an impact on terms and conditions of employment.

The board found the charge did not allege any negotiable effects on the terms and conditions of employment over which the district was obligated to bargain. The board did not agree that the change in the reporting location extended the employees' workday. The charging party provided no authority for the proposition that an employee's commute time is part of the workday. Further, the charging party did not establish that the district had ever paid for parking for special education aides and, therefore, failed to show that the change in location had an impact on employees' wages.

Prohibiting distribution of union newsletter in district mailboxes not unlawful interference: Conejo USD.

(*United Association of Conejo Teachers v. Conejo Valley Unified School Dist.*, No. 2054, 7-27-09; 6 pp. dec. By Member Neuwald, with Acting Chair Dowdin Calvillo and Member McKeag.)

Holding: Distribution of materials endorsing political candidates in district mailboxes is prohibited by Ed. Code Sec. 7054(a). The district did not interfere with employees' rights by barring distribution of a union newsletter endorsing political candidates.

Case summary: The association argued that Ed. Code Sec. 7054(a) was not controlling because mailboxes are not "services, supplies, or equipment" as the boxes are permanent fixtures and do not require specialized maintenance or service. It also alleged that the prohibition on the distribution of its newsletters violates the constitutional right of free speech. It asked the board to reconsider and reverse its decisions in *San Leandro USD* (2005) No. 1772, 174 CPER 86, and *San Diego CCD* (2001) No. 1467, 152 CPER 86, holding otherwise. The board refused, noting that its reasoning in those decisions was recently upheld by the California Supreme Court in *San Leandro Teachers Assn. v. Governing Board of San Leandro USD* (2009) 46 Cal.4th 822, 196 CPER 20.

The board also rejected the association's argument that the newsletter was not advocating for political candi-

dates but simply informing members that the association had decided to recommend certain candidates and the basis for its recommendations. The board found that the recommendation was the same as an endorsement and prohibited by Sec. 7054(a).

List of principal's expectations of teachers not negotiable, and retaliation not established: SFUSD.

(*United Educators of San Francisco v. San Francisco Unified School Dist.*, No. 2057, 8-28-09; 10 pp. dec. By Acting Chair Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: Work assigned to teachers by their principal is not a unilateral change but a nonnegotiable management prerogative. The charging party failed to show that the assignments had an impact on employment terms over which the district must negotiate. No prima facie case of retaliation was established.

Case summary: Union representative Jeremiah Jeffries reported to the union that school principal Phyllis Matsuno had made unilateral changes in working conditions by requiring teachers to provide weekly lesson plans and biweekly student progress reports. She directed that all absences be reported orally and in writing, and that teachers prepare specific lesson plans concerning American cultural morés. Jeffries told the faculty the union would protest the changes.

Matsuno sent an email to parents criticizing Jeffries and exchanged emails with a parent chair of the site committee; these were shared with other committee members who were critical of Jeffries.

The board found that the charging party failed to produce any facts establishing written agreement or past practices concerning the principal's conditions and, therefore, failed to state a prima facie case of unlawful unilateral change.

In *City & County of San Francisco* (2004) No. 1608-M, 166 CPER 78, the board held the assignment of new work is a nonnegotiable management prerogative if it is reasonably related to the employee's existing duties. Here, said the board, because the charging party did not allege what the teachers' duties were before the change, it failed to establish that the newly assigned duties were not reasonably comprehended within their existing duties.

The charge failed to allege facts demonstrating that the principal's conditions had an actual impact on the teachers' evaluation criteria or workday. Therefore, it did not establish that the district was obligated to bargain over the effects of the change in duties.

Retaliation was not established because the charge did not allege that the principal or any district representative knew Jeffries had engaged in protected activity when the emails were sent. There was no showing that Matsuno knew Jeffries had complained to the union or other teachers about her directives. Moreover, said the board, the charge did not allege that the emails had any adverse impact on Jeffries' employment.

Representation Rulings

Dismissal of decertification petition for insufficient proof of support: United Faculty of Grossmont-Cuyamaca CCD.

(*Grossmont-Cuyamaca Community College Dist.*, *Grossmont-Cuyamaca Community College Dist. Faculty Assn.*, *and United Faculty of Grossmont-Cuyamaca Community College Dist.*, No. Ad-380, 6-30-09; 4 pp. dec. + 3 pp. R.A. dec. By Member McKeag, with Acting Chair Dowdin Calvillo and Member Neuwald.)

Holding: Dismissal of the decertification petition for insufficient support was upheld. The petitioner's request for withdrawal of the appeal was denied.

Case summary: The faculty association filed a petition to decertify the incumbent representative of the faculty unit, United Faculty of Grossmont-Cuyamaca CCD. The faculty association appealed the board agent's dismissal of its decertification petition. It asserted the employee list provided by the district was not an accurate representation of the employees of the unit. The list included individuals who received hire letters for the fall semester, but not all those who receive letters become district employees. It argued if payroll records had been used, the number of unit employees would be lower and the association's proof of support sufficient to allow it to participate in the decertification election.

The board adopted the B.A.'s decision as its own, finding the association failed to allege facts sufficient to demonstrate the adequacy of the proof of support. The association's appeal consisted of bare assertions that the district's list contained too many names, but failed to provide any specific evidence regarding employees improperly included or excluded. The appeal also failed to identify how the association would have met its proof of support burden if the unit size had been "appropriately" determined.

In *Grossmont-Cuyamaca CCD* (2009) No. Ad-378, 196 CPER 83, the board previously determined that a decertification petition filed by the American Federation of Teachers Guild, Loc. 1931, was timely submitted and accompanied by a sufficient showing of support. After the election was scheduled, this appeal was filed in which the faculty association asked that the election be stayed, pending the board's decision on the merits. The board refused to stay the election but ordered the ballots impounded. As part of its order in this case, the board lifted the impound order.

The board also declined to grant the association's request for withdrawal of its appeal, concluding that, because the issues presented were significant and the representation rights of 1,400 employees were at issue, the best interests of justice would not be served by withdrawal.

Duty of Fair Representation Rulings

Dismissal of DFR charge upheld: Alvord Educators Assn.

(*Bussman v. Alvord Educators Assn.*, No. 2046, 6-30-09; 3 pp. + 13 pp. R.A. dec. By Member Wesley, with Acting Chair Dowdin Calvillo and Member McKeag.)

Holding: The allegation that AEA representatives made defamatory comments about the charging party is outside of PERB's jurisdiction. The charging party's allegations that AEA failed to properly represent him during contract negotiations and retaliated against him for raising concerns about the agreement occurred outside the statute of limitations.

Case summary: This case arises out of the same set of facts as in *Alvord USD* (2009) No. 2012, 196 CPER 81, and *Bussman v. California Teachers Assn.* (2009) No. 2047, summarized below.

The charging party was a high school history/government teacher employed by the district. The association represents certificated employees and is affiliated with CTA.

The charging party complained that proposed provisions in a new contract between the district and AEA were unfair and illegal. On or about January 30, 2007, he asked AEA to represent him in challenging these provisions. It 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 but was "shouted down" by union representatives. He was denied access to a meeting by a union representative.

CTA subsequently advised AEA that the contract included illegal provisions. On March 26, 2007, new district hires were told that they would have to pay back part of their salaries. The union laid the blame on the charging party. A union representative allegedly made disparaging remarks about him.

On April 13, 2007, CTA refered the charging party to a CTA attorney. He met with her and was advised that she would file a lawsuit on his behalf. On June 19, 2007, CTA told the charging party it was awaiting approval of legal assistance.

By email dated July 31, 2007, the charging party voiced to CTA displeasure with his lack of representation. The CTA lawyer called him that afternoon, allegedly promising to notify the district of pending legal action on his behalf.

In August 2007, the charging party's teaching schedule was changed after he had received notice that his schedule would remain the same.

The charging party met with an AEA official regarding the tardy assignment change, "but to no avail."

The board concurred with the board agent's assessment that the allegation concerning comments damaging to the charging party's reputation were outside of PERB's jurisdiction.

The board also adopted the B.A.'s dismissal of allegations that AEA failed to properly represent the charging party

regarding the contract as untimely. The six-month statute of limitations began to run on January 30, 2007, when AEA told the charging party it would not represent him. The charge was not filed until January 22, 2008.

The board rejected the charging party's argument that a September 17, 2007, email from CTA indicated a renewed promise of representation and brought the DFR claim against AEA within the six-month statute of limitations because he thought AEA and CTA were the same entity. Nothing demonstrated a valid legal argument that CTA's actions could be imputed to AEA, or that the charging party was being represented by either entity.

All of the alleged retaliatory conduct occurred on or before April 20, 2007, and was known to the charging party as of that date. The allegations, therefore, were outside the statutory period, and the board adopted the B.A.'s dismissal of these allegations.

The charging party failed to allege facts demonstrating that AEA abused its discretion in failing to represent him concerning his assignment change. Nor did he show that its actions were without a rational basis or devoid of honest judgment.

Dismissal of charge alleging breach of duty of fair representation upheld: CTA.

(*Bussman v. California Teachers Assn.*, No. 2047, 6-30-09; 4 pp. dec. By Member Wesley, with Acting Chair Dowdin Calvillo and Member McKeag.)

Holding: CTA did not violate the duty of fair representation because it was not the exclusive representative of the certificated employees, which included the charging party, and it has no independent obligation under EERA to represent bargaining unit employees.

Case summary: This case arose out of the same set of facts as that in *Alvord USD* (2009) No. 2012, 196 CPER 81, and *Bussman v. Alvord Educators Assn.* (2009) No. 2046, summarized above.

The charging party was a high school history/government teacher employed by the district. The Alvord Educators Association is the exclusive representative of the district's certificated employees and is affiliated with CTA.

The charging party complained that proposed provisions in a new contract between the district and AEA were unfair and illegal. The charging party asked AEA to represent him in challenging these provisions. It refused. Subsequently, CTA advised AEA that certain contract provisions were illegal. The charging party was advised by CTA legal counsel that a lawsuit regarding illegal pay issues would be filed on behalf of the charging party and other teachers. The charging party later demanded that CTA immediately file a lawsuit on his behalf. CTA informed him that it would not.

The charging party alleged that CTA's promise to represent him created a duty of fair representation. The board found that EERA imposes that duty only on the exclusive representative, and that CTA, while an affiliate of AEA, is not the exclusive representative.

Administrative Appeals Rulings

Board ordered limited remedy, not traditional back pay: Long Beach CCD.

(*Long Beach Community College District Police Officers Assn. v. Long Beach Community College Dist.* No. Ad-379, 6-22-09; 4 pp. + 8 pp. ALJ dec. By Member Neuwald, with Members McKeag and Wesley.

Holding: The board's original order called for a limited, not a traditional, back pay remedy. The request for attorney's fees was denied.

Case summary: In *Long Beach CCD* (2008) No. 1941, 189 CPER 116, the board held that, while the district was not obligated to bargain with the association regarding its decision to contract out police services to the City of Long Beach, which resulted in the layoffs of officers represented by the association, it violated the act by failing to bargain regarding the effects of that decision. As a remedy, the district was ordered to pay the laid-off police officers at the rate they were paid prior to their layoff, until one of five stated conditions were met. The board also held, "however, in no event shall the sum paid to these employees exceed the amount they would have earned in wages and benefits from the date of their layoff to the time they secured or refused equivalent employment elsewhere."

Following the board's ruling, a dispute ensued as to whether the district had complied with its remedial order. The association argued that the board intended issuance of back pay and benefits retroactive to August 1, 2003, the day of layoff, up through and until the district met and conferred and reached agreement. It also pointed to the parties' MOU, executed on July 8, 2008, which provides that laid-off employees are entitled to back pay and benefits from the day of layoff.

The district argued that, according to the order, its financial obligation started on March 10, 2008, or 10 days following the date of the decision, and was no longer subject to appeal. It also argued that the board's order, not the MOU, controls.

The ALJ agreed with the district. The board did not order a traditional back pay remedy but rather a limited one, which, he said, is standard in cases where the employer is privileged to make a decision that results in layoffs but fails to bargain the effects of that decision, citing *NLRB v. Transmarine Navigation Corp.* (9th Cir. 1967) 380 F.2d 933. The board in *Placentia USD* (1986) No. 595, 71 CPER 62, has adopted the so-called *Transmarine* remedy. The ALJ also found the question presented was whether the district had complied with the board's order, not the parties' agreement.

The board adopted the ALJ's decision as its own. It denied the district's request for attorney's fees because the district failed to show that the association's position "was without arguable merit" or "pursued in bad faith," citing *City of Alhambra* (2009) No. 2036-M, summarized in the MMBA Cases, below.

HEERA Cases

Unfair Practice Rulings

Untimeliness, lack of nexus, defeat charge of retaliation for protected activity: Trustees of CSU (Sonoma).

(*Kyrias v. Trustees of California State University*, No. SF-CE-870-H, 6-11-09, 19 pp. By Member Dowdin Calvillo, with Members Neuwald and Wesley.)

Holding: Retaliation claims based on actions taken against a union steward were not timely under the continuing violation theory. The steward failed to allege facts showing she was entitled to pay increases or to a position she was denied. The allegations did not show a nexus between her 2004 protected activity and a 2008 threat to reorganize her work and reassign her.

Case summary: In 2004, the charging party, a union steward, filed an unfair practice charge alleging she received a written reprimand because of her involvement in processing a grievance. That charge was resolved after the board ordered the general counsel to issue a complaint. (See *Trustees of California State University [Sonoma]*([2005] PERB Dec. No. 1755, 173 CPER 92.

In 2007, the charging party requested and received a permanent reduction to 80 percent time. In January 2008, management granted her request to work 60 percent beginning September 1, 2008. In February 2008, the administrative manager informed the steward that she had reorganized administrative support work, reclassified her position, and made it full time. She offered the steward a different position. The steward filed a grievance and requested assignment to the newly reclassified position on a 100 percent basis, beginning September 2008. The manager abandoned the plan to reorganize the work.

On August 1, 2008, the charging party asked to work full time beginning September 1. The manager denied her request based on workload. Three days later, two temporary full-time positions in the steward's classification were posted.

The steward filed a charge on August 21, 2008, alleging that CSU retaliated against her for protected activity by reorganizing her position, denying her request to work a full-time schedule, and failing to give her pay raises. The board agent dismissed her charge because the reorganization did not occur and the charge contained no facts showing retaliation for protected activity.

On appeal, the charging party asked the board to consider claims stemming from a failure to give her pay raises and other personnel actions that occurred prior to February 21, 2008, six months before the charge was filed. The board

rejected her contention that the actions were a continuing "deprivation of economic opportunity." Continuing violations must be of the same type as an action that occurred within the statute of limitations, and the charging party had not alleged any similar actions after February 21, 2008. Even though the charging party had not learned until March 2008 that others had received in-range pay raises from 2004 to 2007, the board found the pay allegations untimely because she knew with each paycheck that she had not received an increase. Her failure to discover the legal significance of the lack of pay raises did not restart the limitations period.

The board found the threat to reorganize the charging party's work, even though not implemented, was an adverse action because the position she was offered consisted of lower-level duties than she had been performing. However, the board found insufficient evidence to link the 2004 protected activity to the threatened reorganization. The charging party failed to show the university departed from established procedures, treated her differently from others, or offered an inadequate explanation or inconsistent justifications for the reorganization.

The denial of the charging party's request to be assigned to the newly reclassified position was not an adverse action, the board found, because the job required a full-time employee and she could work only part-time when the position was available. The refusal to let her return to full-time work in September 2008 was not an adverse action because she did not show she was entitled to an increase in her time base. Although two temporary positions were posted, the board found the allegations did not show it was feasible to transfer that work to her.

MMBA Cases

Unfair Practice Rulings

Layoffs were retaliation for filing unit modification petition: Coachella Valley Mosquito & Vector Control Dist.

(*California School Employees Assn. and its Chap. 2001 v. Coachella Valley Mosquito & Vector Control Dist.* No. 2031-M, 5-29-09; 26 pp. dec. By Member Neuwald, with Members McKeag and Wesley.)

Holding: The district laid off employees based on their protected activity.

Case summary: The complaint alleged that the district retaliated against employees and interfered with their rights by threatening them with layoffs for filing a unit modification petition. The charging party also alleged that the district failed to meet and confer over employees' access to its email system.

The administrative law judge found that the district retaliated against these employees because of their protected activity when it laid them off and threatened them with layoff if they were to unionize. The ALJ found that the district did not fail to meet and confer regarding employee access to the email system, but that the district interfered with the right to communicate with the union by denying email access.

On appeal, the board found that the employees were laid off in retaliation for protected activity. The district informed the employees that budget revisions necessitated the layoffs shortly after the filing of the unit modification petition and showing of majority support. The board also found that the district exaggerated the reasons for the layoffs. Therefore, the board found the layoffs were motivated by retaliation for filing the unit modification petition and to interfere with the election, not for legitimate business reasons.

The board upheld the ALJ's factual conclusion that the district general manager had stated that, if employees chose to be represented, there would be layoffs. The remarks contained a threat of reprisal and did not refer to demonstrably predictable results within the district's control.

The allegation of discrimination and interference with employees' right to communicate with the union by denying them email access was not an alleged violation. The board found no compelling reason to entertain it.

Other than the fact that the ALJ resolved factual questions contrary to its position, the district failed to allege any evidence of bias on the part of the ALJ. And, the board found the district failed to properly request that the ALJ disqualify herself in accordance with PERB Reg. 32155(c), which requires that the request be made in writing and prior

to the taking of any evidence or the commencement of any other proceedings.

Hospital district, as a public entity, unlawfully refused to permit agency fee election: El Camino Hospital Dist.

(*SEIU Loc. 715 v. El Camino Hospital Dist.*, No. 2033-M, 5-29-09; 28 pp. dec. By Member McKeag, with Members Neuwald and Wesley.)

Holding: The hospital is a public employer covered by the MMBA and was required to conduct an agency fee election based on the union's showing of support.

Case summary: Following an election in 2000, SEIU became the exclusive representative of professional, licensed, technical and maintenance employees at the hospital. It negotiated a memorandum of understanding and two successor agreements.

In 2003, the union filed an unfair labor practice charge against the hospital with the National Labor Relations Board. The NLRB's regional director concluded that the hospital was exempt from its jurisdiction as a political subdivision.

In 2005, SEIU and the hospital began negotiations on a successor MOU. The union attempted to amend the maintenance of membership provision in the organizational security article, but the hospital refused to agree to the proposed changes. SEIU withdrew its proposal and, together with the presentation of a comprehensive settlement offer, negotiations concluded.

The union then sought an agency shop election pursuant to the procedures in the MMBA. SEIU obtained the necessary proof of support, which was conveyed to the State Mediation and Conciliation Service. When the hospital refused to proceed with the election, SEIU filed an unfair practice charge.

The first question addressed by the board was whether the hospital is a public agency within the meaning of Sec. 3501(c). The board concluded that the hospital became a public entity in 1996, when, following litigation, the hospital's private board of directors resigned, leaving the district as the sole member of the hospital corporation. This allowed the El Camino Hospital and its assets to be returned to public control. In addition, the board noted that the district exerts control of the hospital and is ultimately responsible for its operation. PERB also agreed with the NLRB's assessment that the hospital is a public entity outside of the NLRB's jurisdiction.

PERB also concluded that the hospital and the district are a single employer by virtue of their functional integration, centralized control of labor relations, and shared management and ownership.

The board rejected the district's argument that it was excused from participating in the agency fee election because of the existing maintenance of membership provision in the parties' MOU. Citing Sec. 3502.5(d), the board determined that an existing provision may be rescinded by an election. The union is not required to initiate an election for rescission of the maintenance of membership provision. And, the board noted, the existing maintenance of membership provision and the proposed agency fee provision are materially different.

The two provisions are not incompatible, the board added. The proposed agency fee provision would apply only to non-members since current members have dues deducted under the maintenance of membership provision. Therefore, the board reasoned, the agency fee provisions would only serve to supplement the fees currently directed to SEIU.

To remedy the unfair practice, the board ordered the employer to participate in the election process as demanded by SEIU. It declined to order the hospital to make the union whole (in the event the agency fee provision is approved) by giving SEIU an amount equivalent to the fees it would have collected had the election not been unlawfully delayed. The board found that remedy "speculative and unwarranted."

Employer unlawfully denied union access to drivers' assembly rooms during non-work time: Omnitrans.

(*Amalgamated Transit Union, Loc. 1704, v. Omnitrans*, No. 2030-M, 5-29-09; 33 pp. dec. By Chair Rystrom, with Members McKeag and Dowdin Calvillo.)

Holding: The employer denied a union representative access to employees in the drivers' assembly rooms during non-working time and unilaterally adopted a new union access policy without providing the union with notice and an opportunity to meet and confer.

Case summary: A union representative meeting with employees in the drivers' assembly room was ordered to leave the facility because he had not first obtained permission from management. The union representative was handcuffed and forcibly removed by two police officers. The company's director of security placed him under citizen's arrest; he was taken to a detention center and charged with a criminal trespass.

An administrative law judge concluded that the employer interfered with the union's and employees' rights by prohibiting union officers from speaking with employees in the drivers' assembly rooms without prior management permission. He also found that application of this policy was an unlawful unilateral change.

On appeal, the board first announced that the MMBA grants a recognized employee organization a right of access to a public agency's facilities in order to communicate with employees. The employer may regulate union activity in non-work areas during non-work time only if the regulation is necessary to maintain order, production, or discipline.

The board found that the drivers' assembly rooms are not work areas because most of the employees there are free to engage in non-work-related activities. Drivers who have not yet signed in for a shift and who have signed out after a shift are not on working time. The board also determined that the majority of time that standby drivers spend in the assembly room is non-working time. Therefore, the board said, the provision in the parties' MOU that denies union access to any "on duty" employee is invalid to the extent that it applies to standby drivers who are not performing duties.

The board also found that language in the parties' MOU did not clearly waive employees' statutory right to participate in union activity during paid, non-working time. Therefore, the contract was an invalid regulation of union activity as applied to standby drivers not performing duties but on paid, non-working time.

Because both the union representative and the drivers with whom he spoke had a protected right to discuss union matters in the assembly room, the employer interfered with their rights when it denied the union representative further access. The employer lacked a legitimate business reason for limiting the access rights. No evidence demonstrated that the union representative's conversations with the drivers had been disruptive to operations in the past. Although the union representative discussed rest and meal periods, an ongoing dispute between union and management, no disruption occurred in this case.

The employer asserted it did not unilaterally change the union access policy because the action it took was consistent with the parties' MOU and past practice. The board found the contract silent on union access to employees in non-work areas during non-working hours and noted there had been no discussion about union access to drivers' assembly rooms during negotiations.

The board also found that union officers regularly spoke to drivers in the assembly room without obtaining prior permission from management. As this was a regular and consistent practice that was accepted by management, the board found the employer deviated from past practice when it asked the union representative to leave because he had not obtained prior permission to speak with drivers about union matters.

The union did not have notice of the employer's intent to apply the prior permission policy or an opportunity to meet and confer before the change was implemented.

The board affirmed the ALJ's order that the employer reimburse the union for legal expenses it incurred defending the union representative against the criminal trespass charge because he would not have been arrested but for the employer's enforcement of its unlawful union access policy.

The board also directed the employer to join in a petition to expunge from the union representative's record any charges filed because of his arrest and to pay reasonable attorney's fees and costs he incured petitioning the court to expunge his record.

Equitable tolling applies in MMBA cases, but no evidence here of resort to grievance procedure: Solano County Fair Assn.

(*Hinek v. Solano County Fair Assn.*, No. 2035-M, 6-9-09; 9 pp. dec. By Chair Rystrom, with Members Neuwald and Wesley.)

Holding: The doctrine of equitable tolling is applicable to cases brought under the MMBA; however, here, the charging party failed to sufficiently allege that he had resorted to a bilaterally agreed-on grievance procedure.

Case summary: On July 12, 2007, the charging party filed an unfair practice charge alleging that he had been wrongly terminated by the association on July 17, 2006.

A board agent determined that the charge was untimely and did not state a prima facie case.

On appeal, the board addressed the claim that the statute of limitations was tolled while he pursued a grievance. First, the board announced that equitable tolling applies to cases filed under the MMBA. It then applied the principles announced in *Long Beach CCD* (2009) No. 2002, 195 CPER 84, that explain under what conditions the doctrine will be applied. Under that ruling, the six-month statute of limitations under EERA is tolled during the time the parties are using a non-binding dispute resolution procedure if (1) the procedure is contained in a written agreement negotiated by the parties; (2) the procedure is being used to resolve the same dispute that is the subject of the unfair practice charge; (3) the charging party reasonably and in good faith pursues the procedures; and (4) tolling does not frustrate the purpose of the statute of limitations period by causing surprise or prejudice to the respondent.

In the present case, the board found insufficient facts to support a finding that the charging party pursued a grievance established by a bilaterally agreed-on dispute resolution procedure. The letter relied on by the charging party notified him that no grievance had been filed by the union because there was no grievance procedure available under the union's contract with the association.

Pursuant to PERB Reg. 32645(b), the board declined to consider any new factual allegations or evidence presented for the first time in its appeal to the board.

No change of policies during limitations period; award of attorney's fees unwarranted: City of Alhambra.

(*Alhambra Firefighters Assn., Loc. 1578, v. City of Alhambra*, No. 2036-M, 6-9-09; 19 pp. dec. By Member Neuwald, with Members McKeag and Dowdin Calvillo.)

Holding: The association knew of the driver's license and relief driver policies long before the charge was filed, and equitable tolling did not apply to extend the limitations period while a Skelly hearing was pursued. An award of attorney's fees is warranted only where the case is without merit and pursued in bad faith.

Case summary: The charging party alleged that the city unilaterally changed its policy regarding firefighters' driver's license requirements and duty assignments as relief drivers without giving the association prior notice or an opportunity to bargain.

An ALJ found that the charge was untimely. She concluded that the association was aware of the city's long-standing practice requiring firefighters to obtain and maintain Class B licenses. The city's practice need not be labeled as a "policy." Although the ALJ did not discredit the testimony of the association officers that they had never seen the department's administrative policy which contains the Class B license requirement, she noted that job flyers since 1996 have cited the requirement as does the handbook that has been distributed to new firefighters since 1988. The ALJ found the association was aware of the Class B requirement because it was cited in the January 2005 termination notice of a firefighter whose license was suspended.

The ALJ also found that the association was aware that firefighters have been asked to serve as relief drivers. However, she found no evidence that firefighters are required to do so, as the association contended.

The ALJ rejected the association's argument that the statute of limitations was suspended while it pursued review of the firefighter's termination at a Skelly hearing. Equitable tolling does not extend to non-contractual disciplinary appeals, which are not created as part of a bilateral agreement.

On appeal, the board affirmed the ALJ's conclusions that the charge was untimely and that equitable tolling was not applicable in this case.

The board also examined the ALJ's proposed award of attorney's fees to the city because she found the association's charge without arguable merit. After a thorough review of PERB precedent, Code of Civil Procedure Secs. 128.5(b)(1)

and (2), and Government Code Sec. 11455.30(a), the board announced that it will utilize a two-pronged test and award attorney's fees only if the charge is without arguable merit and pursued in bad faith. Bad faith includes conduct that is dilatory, vexatious, or otherwise an abuse of process. To allow a less restrictive standard would differentiate PERB from what is commonly accepted in civil courts.

In this case, the ALJ did not designate them as being pursued in bad faith. Finding that the association did not pursue its unfair practice charge in bad faith, the board reversed the ALJ's award of attorney's fees.

Award of attorney's fees justified where charge was without arguable merit and filed in bad faith: City of Alhambra.

(*Alhambra Firefighters Assn., Loc. 1578, v. City of Alhambra*, No. 2037-M, 6-9-09; 4 pp. + 19 pp. ALJ dec. By Member Neuwald, with Members McKeag and Dowdin Calvillo.)

Holding: The charge that the city unilaterally changed its policy regarding the location of personnel records was untimely. The award of attorney's fees is warranted where the case was without arguable merit and pursued in bad faith.

Case summary: The charging party alleged that the city unilaterally changed its policy regarding the location of personnel records without giving the association prior notice or an opportunity to bargain.

An administrative law judge found that the charge, filed in April 2006, was untimely because the association knew in March 2005 that the department maintained its own set of records.

The ALJ found "strong evidence" that the charge was brought in bad faith because the charge complained of conduct that occurred long before the charge was filed, the association president lied under oath, and the testimony of the president and vice president was discredited. Describing the case asmeritless, frivolous, vexatious, dilatory, pursued in bad faith, and an abuse of process, she ordered that the association pay to the city reasonable attorney's fees and costs incurred in defending the unfair practice charge and complaint.

On appeal, the board concurred with the ALJ's assessment that the charge was untimely.

The board also examined the ALJ's proposed award of attorney's fees and costs to the city. As announced in *City of Alhambra* (2009) No. 2036-M, summarized above, the board uses a two-pronged test and awards attorney's fees only if the charge is without arguable merit and pursued in bad faith. Bad faith includes conduct that is dilatory, vexatious, or otherwise an abuse of process. In this case, the board found the association filed a charge without arguable merit and in bad faith, and upheld the ALJ's award of attorney's fees.

Nexus between protected activity and termination lacking: Calaveras County Water Dist.

(*SEIU Loc. 1021 v. Calaveras County Water Dist.* No. 2039-M, 6-19-09; 11 pp. dec. By Member Wesley, with Acting Chair Dowdin Calvillo and Member Neuwald.)

Holding: The allegations failed to demonstrate that the employee received a negative evaluation and was terminated because she engaged in protected activity.

Case summary: A complaint was issued regarding claims that the district retaliated and interfered with the rights of an employee because of his protected activity. However, the board agent dismissed a portion of the charge since the allegations did not establish that a second employee was terminated because of her exercise of protected activity. The board affirmed the B.A.'s finding that the employee engaged in protected activity by participating in picketing, signing pro-union petitions, and wearing union insignia at work. The board found that the district was not aware of these activities. It found, however, that the employer was aware that she met with her supervisor while accompanied by a union representative and participated in a "human chain" in support of a new contract.

The district issued a negative evaluation and terminated the employee in close temporal proximity to her protected activities. However, the charge failed to allege other factors showing a nexus between her protected activity and the adverse action. Because the charge did not establish that the employee was entitled to union representation at the meeting with her supervisor, the board concluded that the denial of union representation before the meeting was scheduled did not demonstrate nexus.

While the charge asserts that a board member told the employee that employees would be fired if they went on strike, there were no allegations that the board member was aware of her participation in protected activity or had any role in her evaluation or the decision to terminate her.

The union also asserted that nexus was demonstrated by the shifting justifications advanced by the district. The board found no factual support for the contention that the employee had received positive evaluations and had only minor performance problems prior to receiving the negative evaluation. An allegation that the employee's supervisor told her she was doing a good job did not demonstrate that the employee had a consistent, documented history of excellent work.

The board found no support for the claim that the district engaged in disparate treatment, another indication of nexus. Nor did the charge allege that the district deviated from existing policies.

The fact that other allegations in the charge stated a prima facie case does not relieve the charging party of the obligation to allege all elements of a discrimination charge, including nexus.

Following impasse, participation in charter-imposed impasse procedure is mandatory: City and County of San Francisco.

(*City and County of San Francisco v. Stationary Engineers, Loc. 39*, No. 2041-M, 6-29-09; 6 pp. + 45 pp. ALJ dec. By Member McKeag, with Acting Chair Dowdin Calvillo and Member Neuwald.)

Holding: The union violated the act by refusing to name a representative to an interest arbitration panel and participate in the impasse resolution procedures set forth in the city charter.

Case summary: When mid-term contract negotiations reached an impasse in 2004, the parties participated in interest arbitration. After the parties made their presentations to the panel, the neutral told the union that, while it had made the case for its proposed wage increase, he could not vote in favor of it because he was unwilling to break with the "pattern" set by the other unions.

In 2005, the union informed the city that it would not participate in the impasse resolution procedure because of its negative experience in 2004. The union pledged to engage in good faith negotiations, but it took the position that the impasse resolution procedures of the charter were not mandatory and refused to choose a representative. Following several bargaining sessions, the city declared impasse.

The administrative law judge noted that Sec. 3507(a)(5) authorizes a public agency to adopt reasonable rules and regulations, including those addressing impasse resolution procedures. The ALJ concluded that the impasse procedures in the charter are reasonable where they only apply to situations where disputes remain unresolved after good faith bargaining. He also noted that the role of impasse resolution procedures is well established in California public sector labor law; they are intended to produce resolution *after* good faith negotiations fail to achieve the intended purpose.

The ALJ rejected the argument that the charter provision was an unreasonable local rule because it effectively eliminates the right to strike. He relied on the strong public policy favoring arbitration as a means of resolving employment disputes and promoting labor peace.

The ALJ found that the language of the charter provision connotes a mandatory obligation to participate in the interest arbitration process. Based on the legislative history, he reasoned that the right to proceed to interest arbitration and benefit from an award is forfeited by the union that engages in a strike. The union does not have the option of engaging in interest arbitration or striking.

Finally, the ALJ was not persuaded by the union's contention that the charter permits the city to declare impasse prematurely. The term "impasse" traditionally means that point in negotiations when, despite good faith bargaining, continued negotiation would be futile. Therefore, the ALJ reasoned, since good faith bargaining is a precondition for reaching a bona fide impasse, a party must be permitted to dispute the claim that impasse was declared after good faith bargaining.

In this case, the ALJ noted, while the parties had participated in 11 bargaining sessions and exchanged more

that 45 proposals, they were still far apart on wages at the time impasse was declared by the city; there was substantial disagreement on the core economic issues. The parties considered each other's proposals and attempted to narrow their disagreements. The ALJ concluded that the union was not excused from participating in the impasse resolution procedures.

On appeal, the board adopted the ALJ's proposed decision. It affirmed the ALJ's conclusion that the dispute was not moot, despite the fact that the parties subsequently finalized an agreement. The board found nothing in the record to suggest that the union would not continue to refuse to participate in the charter impasse procedure unless compelled to do so by a third party.

The board also agreed with the ALJ's finding that the charge was timely. The statute of limitations began to run for the first violation when the union refused to designate a member to serve on the arbitration panel, and again when it refused to participate in the impasse procedure. Both of these events occurred within the six-month limitations period. The board rejected the union's contention that the statute began to run when its representative informed the city it would not participate in the impasse procedure unless the parties could reach an agreement in principle on wages. This was a threat of noncompliance, the board said, and was insufficient to trigger the statutory period.

Charge alleging retaliation for union organizing dismissed as untimely: County of San Diego.

(*Saenz v. County of San Diego [Health and Human Services]*, No. 2042-M, 6-29-09; 3 pp. + 7 pp. ALJ dec. By Member McKeag, with Acting Chair Dowdin Calvillo and Member Neuwald.)

Holding: The charging party filed his unfair practice charge more than six months after the conduct alleged to be an unfair practice occurred.

Case summary: In October 2004, the charging party testified, he began discussing with his coworkers the possibility of gaining union representation. He alleged that after this, he was harassed and intimidated.

In January 2005, the charging party was given a performance improvement plan. A few weeks later, he was placed on administrative leave and ordered to take a fitness-for-duty exam.

During the course of 2005, the charging party was informed that he did not meet expected performance standards; he contends he was not given the resources or training to do so. He also discussed unionization at a staff meeting and allegedly was directed by his manager to stop all such communication.

The charging party was demoted on January 17, 2006. On August 15, 2006, he filed an unfair practice charge alleging that the county placed him on administrative leave, ordered that he undergo a fitness-for-duty exam, and demoted him because he exercised protected activity.

The ALJ concluded that the charge was untimely because the charging party was aware of the alleged retaliation more than six months prior to the filing of the charge.

On appeal, the board addressed the charging party's contention that he had no knowledge of retaliation until an April 2006 hearing before the civil service commission in which the county allegedly admitted that he was sent for a fitness-for-duty exam because he wanted to start a union. The board has long held that the six-month limitations period commences on the date the conduct that constitutes an unfair practice is discovered, not the date of the discovery of the legal significance of that conduct.

In this case, the board noted, the charging party was aware of the administrative leave and fitness-for-duty exam in January 2005, and the demotion in January 2006. Therefore, these adverse actions occurred outside the statute of limitations period and the charge was untimely filed.

County unilaterally changed retiree medical insurance program: County of Sacramento.

(*Sacramento County Attorneys Assn. v. County of Sacramento; Sacramento County Professional Accountants Assn. v. County of Sacramento; American Federation of State, County and Municipal Employees, AFL-CIO, Loc. 146, v. County of Sacramento; Chauffeurs, Teamster & Helpers, Loc. 150 v. County of*

Sacramento, No. 2043-M, 6-30-09; 6 pp. + 15 pp. ALJ dec. By Member Neuwald, with Members McKeag and Wesley.)

Holding: The county unilaterally changed the eligibility criteria for current employees/future retirees to participation in the retiree health insurance program and the retiree medical and dental insurance program.

Case summary: Since 1980, based on annual determinations of the board of supervisors, eligible county retirees have had access to group medical and dental plans and to a health insurance offset to help pay for insurance.

On January 26, 2006, the county notified the employee organizations that the board would hold a public hearing to propose changes to the health insurance program for 2007. The proposed changes would keep the existing level of medical offset payments but would change the eligibility requirements for current employees retiring after 2006.

The county maintained that the policy was not a mandatory subject of bargaining because it concerned retirees. On March 28, 2006, the board changed eligibility requirements for the retiree health insurance program.

The county subsequently engaged in bargaining with SCAA and SCPAA as well as with AFSCME and the Teamsters. New contracts were approved and ratified.

On September 12, 2006, the board of supervisors approved a revised retiree health insurance program for 2007, which returned to the 2006 eligibility requirements, deleting the provisions that affected current employees who retired on or after January 2, 2007.

In December 2006, the county informed employee organizations that the county executive would recommend to the board of supervisors that it discontinue the retiree health subsidy for all employees retired on or after January 1, 2008. It offered to meet and confer.

At the January 30, 2007, meeting of the board of supervisors, the county executive recommended that the board continue to subsidize medical coverage for retirees who retired prior to June 29, 2003, "subject to the meet and confer process," and directed the staff to return with an actuarial analysis for four retiree medical and dental insurance program options for 2008.

On April 17, 2007, the county withdrew its offer to negotiate, and on June 5, 2007, the board adopted its retiree medical and dental insurance program for 2008. The subsidy was eliminated for all participants who retired after May 31, 2007.

The employee organizations filed an unfair practice charge alleging that the county unilaterally changed the eligibility criteria for current employees/future retirees' participation in the retiree medical and dental insurance program by discontinuing subsidies for employees retiring after June 1, 2007.

An administrative law judge found that the retiree medical and dental insurance program is an established past practice that provides a future benefit for current employees. He found it a subject within the scope of representation. The county, therefore, violated its obligation under the MMBA when it made a unilateral change in its retiree medical insurance program on June 5, 2007. The ALJ ordered the county to rescind changes to employee eligibility for the medical and dental program and to make all employees whole for lost benefits because of the changes in eligibility.

The board affirmed the ALJ's proposed decision. It found that the county had a 27-year past practice of awarding retiree health subsidies, which it unilaterally discontinued. The board also upheld the ALJ's order that the county rescind the unilaterally implemented changes in eligibility, return to the status quo prior to the unilateral change, and make whole all those impacted by the change, plus interest.

A judicial appeal is pending in this case.

Retiree medical insurance program unilaterally changed: County of Sacramento.

(*United Public Employees, Loc. 1 v. County of Sacramento*, No. 2044-M, 6-30-09; 5 pp. + 16 pp. ALJ dec. By Member Neuwald, with Members McKeag and Wesley.)

Holding: The county unilaterally changed the eligibility criteria for current employees/future retirees to participate in the retiree health insurance program and the retiree medical and dental insurance program.

Case summary: The facts in this case closely parallel those in *County of Sacramento*, No. 2043-M, summarized

above. However, UPE and the county are signatory to two collective bargaining agreements, effective 2006 to 2011, that contain a zipper clause. A negotiator from UPE participated in a meeting with the county on April 10, 2007, to discuss retiree health benefits but took the position that, because of its contracts with the county, it was not obligated to negotiate planned changes.

On May 11, 2007, UPE filed an unfair practice charge alleging that the county unilaterally eliminated a medical and dental insurance subsidy for current employees retiring after June 1, 2007.

An administrative law judge found that the retiree medical and dental insurance program is an established past practice which provides a future benefit for current employees. He found it a subject within the scope of representation. The ALJ also found that UPE was entitled to rely on the zipper clause in its contract and to refuse to negotiate a mid-contract change to a matter within the scope of representation. Indeed, said the ALJ, the new retirement savings plan was intended to displace the existing one.

The ALJ concluded that the county violated the MMBA when it made a unilateral change in its retiree medical insurance program on June 5, 2007. The ALJ ordered the county to rescind changes to employee eligibility for the medical and dental program and to make all employees whole for lost benefits because of the changes in eligibility.

On appeal, the board affirmed the ALJ's proposed decision and upheld his order that the county rescind the unilaterally implemented changes in eligibility to participate in the program, return to the status quo prior to the unilateral change, and make whole all those impacted by the change, plus interest.

A judicial appeal is pending in this case.

Unilateral change to retiree medical insurance program unlawful: County of Sacramento.

(*Service Employees International Union, Loc. 1021, v. County of Sacramento*, No. 2045-M, 6-30-09; 5 pp. + 14 pp. ALJ dec. By Member Neuwald, with Members McKeag and Wesley.)

Holding: The county unilaterally changed the eligibility criteria for current employees/future retirees to participate in the retiree health insurance program and the retiree medical and dental insurance program.

Case summary: The facts in this case closely parallel those in *County of Sacramento*, Nos. 2043-M and 2044-M, summarized above.

As in those cases, an administrative law judge found that the retiree medical and dental insurance program is an established past practice which provides a future benefit for current employees. Accordingly, he concluded that the county violated the MMBA when it made a unilateral change in its retiree medical insurance program on June 5, 2007. To remedy this unlawful action, the ALJ ordered the county to rescind changes to employee eligibility for the medical and dental program and make all employees whole for lost benefits because of the changes in eligibility.

On appeal, the board affirmed the ALJ's proposed decision, including the remedy.

A judicial appeal is pending in this case.

Withdrawal of appeal of partial dismissal of unfair practice charge permitted: Riverside Transit Agency.

(*Amalgamated Transit Union, Loc. 1277, and Moore v. Riverside Transit Agency*, No. 2053-M, 7-23-09; 2 pp. dec. By Acting Chair Dowdin Calvillo, with Members McKeag and Neuwald.)

Holding: Consistent with the purposes of the MMBA, the charging parties' request to withdraw their entire action, including their appeal of the partial dismissal of their unfair practice charge, was granted.

Case summary: The charging parties alleged that the agency violated the MMBA by refusing to hire Moore as a bus operator because of his union activity. PERB general counsel issued a complaint based on this allegation. However, the board agent dismissed Moore as a charging party because he was an applicant for employment and, therefore, lacked standing to file an unfair practice charge. The charging parties appealed the partial dismissal.

Thereafter, the charging parties notified the board that they were withdrawing the entire action, including the appeal

of the partial dismissal of their charge, with prejudice. The board granted the charging parties' request as being in the best interests of the parties and consistent with the purposes of the act.

Charge alleging abrogation of the parties' MOU barred by statute of limitations: Nevada Irrigation Dist.

(*AFSCME Loc. 146, AFL-CIO, v. Nevada Irrigation Dist.*, No. 2052-M, 7-23-09; 4 pp. + 9 pp. B.A. dec. By Member Neuwald, with Acting Chair Dowdin Calvillo and Member Wesley.)

Holding: The unfair practice charge that the district violated the act by refusing to process a grievance was untimely and the doctrine of equitable tolling did not apply because the matter at issue in the grievance was not the same matter in dispute in the unfair practice.

Case summary: The charge alleged that the district violated the act by refusing to process or arbitrate a grievance concerning the termination of an employee. A board agent concluded that the charge was untimely. The district advised the union that it would not process the grievance on August 30, 2006; the charge was filed 11 months later.

The B.A. also dismissed the union's contention that the district was reconsidering its decision. He found no evidence of ongoing discussions between the union and the district concerning the grievability of the matter. The discussions concerned the employee's employment status.

On appeal, the union argued that equitable tolling should apply to extend the statute of limitations period. The board turned aside the district's assertion that it could not consider this argument since it was raised for the first time on appeal. AFSCME alleged that the charge was timely filed and presented evidence in support of that claim. The equitable tolling argument on appeal is merely a new legal argument on the issue of timeliness based on the same evidence presented to the board agent, said the board. It does not constitute a new allegation or new evidence barred from consideration by PERB Reg. 32635(b).

In *Long Beach CCD* (2009) No. 2002, 195 CPER 84, the board said that the statute of limitations will be tolled during the period of time the parties are utilizing a non-binding dispute resolution procedure if it is contained in a written agreement negotiated by the parties, the procedure is being used to resolve the same dispute that is the subject of the unfair practice, the charging party reasonably and in good faith pursues the procedures, and tolling does not frustrate the purpose of the statute of limitations period by causing surprise or prejudice to the respondent.

The "same dispute" component ensures that the respondent will be put on notice of the dispute that is the subject of the unfair practice charge. In this case, the parties' MOU contains a negotiated grievance procedure that AFSCME alleges was unilaterally abrogated by the district's refusal to process or arbitrate a grievance. The grievance, on the other hand, concerned the termination of an employee. Filing a grievance concerning an employee's termination does not put the district on notice of a charge alleging a unilateral change of the MOU.

The board declined to award attorney's fees to the district. It found no evidence that AFSCME pursued the appeal in bad faith, and the district did not demonstrate that the appeal was without arguable merit.

Association waived right to bargain decision and effects of new policy affecting employer-provided vehicles: Metropolitan Water District of Southern California.

(*Metropolitan Water District Supervisors Assn. v. Metropolitan Water District of Southern California*, No. 2055-M, 8-26-09; 7 pp. dec. By Acting Chair Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: By failing to demand bargaining, the association waived its right to meet and confer over the district's decision to implement a new long-term vehicle assignment policy and the foreseeable effects of that decision which were evident from the policy itself.

Case summary: On May 25, 2006, the district sent a memorandum to the association president, notifying him of proposed revisions to the district's operating policies, including a policy concerning the long-term assignment to employees of district vehicles. The district invited him to meet to discuss any of the revisions. The district and the

association did not meet and confer before implementation of the revised policy on October 12, 2008.

On June 16, 2008, the district notified the association that it was terminating the long-term vehicle assignments of some supervisors pursuant to the revised policy. On the same day, the association requested in writing that the parties meet and confer over the decision to take away the vehicles and the effects of that decision. The district refused to negotiate, citing the association's failure to request to meet and confer before the revised policy was implemented.

The association filed an unfair practice charge asserting that the district refused to bargain over both the decision and its effects. A board agent concluded that the association had waived its right to meet and confer.

On appeal, PERB first noted that a policy allowing employees to use employer-owned vehicles to commute to and from work is a matter within the scope of representation because the savings employees realize by not using their own vehicles is part of their compensation. Therefore, the board said, the refusal to bargain over a vehicle use policy is a per se violation of the duty to meet and confer in good faith.

However, the board found the district had no obligation to bargain over the termination of the long-term vehicle assignments because the association had waived its right to bargain over the policy. The board explained that when, as in this case, the respondent can establish an affirmative defense as a matter of law based on undisputed facts, the issue of waiver is purely a legal determination that the board may consider even when the charging party has otherwise established a prima facie case.

When an employer gives an employee organization written notice of a proposed change to a matter within the scope of representation and provides a reasonable opportunity to meet and confer before implementation, the union's failure to request bargaining constitutes a waiver of its right to meet and confer. Here, the association did not request to meet and confer over the policy before June 16, 2008, when the district announced that some supervisors would no longer be provided with district vehicles.

The board was unreceptive to the association's argument that the district's memo merely asked for "questions or comments" and did not express a willingness to meet and confer. The board noted the memo said the district was willing to meet and discuss any of the proposed changes. "Once an employer gives appropriate notice of a proposed change, it is not required to invite bargaining," the board said.

The board also was not persuaded by the association's contention that, even if it waived its right to meet and confer over the district's decision, it did not waive its right to meet and confer over the effects of that decision. Unlike the case in *Santee Elementary School Dist.* (2006) PERB No. 1822, 177 CPER 81, where the employee organization was unable to determine the foreseeable effects of the policy change from the policy itself, in this case, the policy clearly said that long-term vehicle assignments would be reviewed annually and could be terminated by the district at any time. Having been provided sufficient information to determine the foreseeable effects of the policy change, the association was obligated to demand to bargain over the effects prior to implementation of the policy. The board found its failure to do so was a waiver of its right to meet and confer over the effects of the district's decision to adopt the policy.

Because the association waived its right to meet and confer, the district did not commit an unfair practice.

Interaction with supervisors was not investigatory meeting triggering right to union representation: San Bernardino County Public Defender.

(*Shelton v. San Bernardino County Public Defender*, No. 2058-M, 9-3-09; 7 pp. + 11 pp. ALJ dec. By Member McKeag, with Member Wesley; Member Neuwald dissenting.)

Holding: The charging party was not entitled to union representation because the meeting with her supervisors was not investigatory in nature.

Case summary: The charging party alleged that she was denied union representation on April 18, 2007, when she was called to a meeting with the supervising deputy public defender and the chief deputy public defender. The charging party reasonably anticipated that discipline would result from this meeting because she had been told six days earlier that she would be subject to discipline for refusing to move her work station as directed.

In assessing whether the charging party was entitled to union representation at the meeting, an administrative law judge found that she had sought representation because "she at least expressed her reluctance to attend the meeting without a union representative." The ALJ determined, however, that the meeting was not an investigatory interview warranting union representation because the charging party was asked only one question, whether she would comply with the order to move her work station. The ALJ concluded that the charging party was not questioned by her supervisors, but merely given one more opportunity to comply with their previous order.

The ALJ also found insufficient evidence to support the charging party's allegation that the county retaliated against her when it placed her on administrative leave following the meeting. The ALJ found the chief deputy public defender's comment that he did not want to get the union involved was "hardly the same thing as expressing animosity towards union activists." The ALJ concluded that the supervisor was expressing concern that the union contract might be violated if another employee was asked to do some of the charging party's duties.

On appeal, the board affirmed the ALJ's dismissal of the retaliation allegation.

The board credited the employee's testimony that she had requested union representation. But it disavowed the ALJ's basis for finding a request — that the charging party had "at least expressed her reluctance" to attend the meeting without a union representative. The board found that statement inconsistent with long-standing PERB precedent that requires employees to affirmatively request union representation to invoke their rights to representation at an investigatory interview. "Expressing reluctance to attend an investigatory interview without union representation is insufficient, standing alone, to invoke the right to union representation," the board said.

In agreement with the ALJ, Members McKeag and Wesley concluded that the charging party's meeting with her supervisors was not an investigatory interview and dismissal of the charge was warranted.

Member Neuwald dissented. In her view, the meeting was investigatory because the charging party was required to provide information about whether she was going to move her work location. The purpose of the meeting was not simply to deliver a predetermined disciplinary action, such as a letter of reprimand. Member Neuwald also noted that the meeting did result in discipline. Finding that the charging party had a reasonable belief of impending disciplinary action, Neuwald concluded she had been denied the right to union representation in violation of the MMBA.

Duty of Fair Representation Rulings

Allegations in DFR charge refer to events that occurred more than six month prior to the filing of the charge: SEUI Loc. 721.

(*Hagans and Toole v. SEIU Loc. 721*, No. 2050-M, 7-20-09; 4 pp. dec. By Acting Chair Dowdin Calvillo, and Members McKeag and Neuwald.)

Holding: The charge alleging that the union breached its duty of fair representation was dismissed as untimely.

Case summary: Charging party Hagans alleged that the union failed to take his grievance to arbitration or provide any reasons for not doing so. He also alleged that SEIU did not protect him from retaliation.

Advised by a board agent that the charge was deficient, an amended charge was filed. It alleged that SEIU denied charging party Toole fair representation in a grievance and in proceedings before PERB, retaliated against him for exercising rights protected by the act, and negotiated with the city in bad faith. A board agent dismissed the charge as untimely.

The original charge was filed on March 14, 2008. The allegations reference conduct that occurred in May 2006, and April and May 2007. Therefore, the board concluded, the charge was untimely.

On appeal, the board declined to consider new allegations or supporting evidence that predate the dismissal letter and were known to the charging parties at the time the amended charge was filed.

All allegations in DFR charge refer to events outside six-month statute of limitations period: SEIU Loc. 721.

(*Hagans and Toole v. SEIU Loc. 721*, No. 2051-M, 7-20-09; 4 pp. dec. By Acting Chair Dowdin Calvillo, and Members McKeag and Neuwald.)

Holding: Allegations in support of the duty of fair representation charge refer to events that occurred outside the six-month statute of limitations period.

Case summary: The charge alleged that the union breached its duty of fair representation by failing to amend a previously filed unfair practice charge and allowing the charging parties to attend a PERB hearing in a prior case without representation. They also alleged that the union negotiated in bad faith with the City of Riverside.

The board found the charge failed to contain any allegations of unlawful activity by the union during the six-month period preceding the filing of the charge. All of the allegations referred to conduct that occurred outside the statute of limitations period.

Pursuant to PERB Reg. 32635(b), the board declined to consider new allegations and supporting evidence that was known to the charging parties before the dismissal letter issued but presented for the first time on appeal.

Charging party knew union would not pursue his grievances more than six months before DFR charge was filed: Teamsters.

(*Hinek v. Teamsters Locals 78 and 853*, No. 2056-M, 8-26-09; 5 pp. dec. By Acting Chair Dowdin Calvillo, with Members Neuwald and Wesley.)

Holding: The charging party was aware that the union had made a firm decision not to process his grievances, and his renewed efforts to get them to do so did not extend or restart the six-month limitations period.

Case summary: The charging party alleged that the union breached its duty of fair representation by failing to process a grievance seeking vacation pay after he was terminated by the Solano County Fair Association. He also alleged that the union failed to pursue a grievance challenging his termination.

A board agent dismissed both allegations as untimely and for failure to state a prima facie case.

In his amended charge and before the board, the charging party asserted that he received assurances from the union that the matter was still open for discussion.

The board found that the union clearly declined to process grievances on the charging party's behalf not later than August 2007, eight months before the charge was filed. His continued attempts to obtain assistance by contacting the union's international office and the union's attorney did not extend the limitations period. The failure of the international to set up a conference call as promised did not restart the six-month statute of limitations period because, at the time, the charging party had clear notice that the union had made a firm decision not to process his grievance.

Activity Reports

ALJ Proposed Decisions

Sacramento Regional Office — Final Decisions

Modesto City Employees Assn. v. City of Modesto, Case SA-CE-470-M. ALJ Shawn P. Cloughesy. (Issued 8-19-09; final 9-17-09; HO-U-966-M.) The city retaliated against the union president. The recommended disciplinary action was protected conduct, and it could not be determined if the same discipline would be issued for unprotected conduct alone. No investigatory meeting occurred. Information was requested for use in an extra-contractual forum, a *Skelly* hearing. The blanket prohibition of note-taking regarding union business during work hours interferes with MCEA's right to represent its members.

Plumas Lake Teachers Assn. v. Plumas Lake Elementary School, *Case* SA-CE-2482-E. ALJ Shawn P. Cloughesy. (Issued 8-28-09; final 9-23-09; HO-U-968-E.) The teacher did not receive a notice of non-reelection because she joined the union. There was no showing that district administrators were aware of her union membership.

Los Angeles Regional Office — Final Decision

California School Employees Assn. & its Chap. 477 v. Rio Hondo Community College Dist., Case LA-CE-5154-E. ALJ Thomas J. Allen. (Issued 08-27-09; final 9-23-09, HO-U-967-E.) Contracting out of high-pressure, hot-water power washing work was not contrary to an established past practice.

Sacramento Regional Office — Decisions Not Final

County of Siskiyou, *Siskiyou County Employees Assn.*, *and Siskiyou County Employees Assn./AFSCME*, Case SA-AC-63-M; *Siskiyou County Superior Court*, *Siskiyou County Employees Assn.*, *and Siskiyou County Employees Assn./AFSCME*, Case SA-AC-64-C. ALJ Christine A. Bologna. (Issued 7-21-09; exceptions filed 8-10-09.) SCEA disaffiliated from AFSCME and petitioned to amend its certification and change the identity of the exclusive representative. PERB had jurisdiction because there were no applicable local rules. To amend certification under PERB precedent, there must be substantial continuity between the two representatives and union members must be permitted to vote. Necessary continuity was lacking because AFSCME International became the administrator of SCEA/AFSCME Local 3899 after the disaffiliation. It controlled physical and financial assets, terminated the business agents, and restricted the authority of local officers to act on behalf of bargaining unit members. PERB had no jurisdiction to address internal union matters such as whether the administratorship had been properly imposed or the interpretation of the affiliation agreement.

California Correctional Peace Officers Assn. v. State of California (DPA), Case SA-CE-1665-S. ALJ Bernard McMonigle. (Issued 08-19-09; exceptions filed 9-21-09.) After it implemented its final offer, the state withdrew salary and benefits increases not approved by the legislature and the governor declared a fiscal emergency and made budget cuts. The union argued these events broke the impasse. The ALJ found the state was not compelled to resume bargaining since sufficiently changed circumstances had not occurred. Under *Rowland Unified School Dist.* (1994) PERB Dec. No. 1053, this requires a concession from an earlier bargaining position that shows agreement may be possible.

Woods v. State of California (CDCR), Case SA-CE-1640-S. ALJ Christine A. Bologna. (Issued 8-24-09; exceptions due 10-12-09.) The charging party demonstrated that she engaged in protected activity about which the employer was aware, and that she suffered adverse action. However, she did not show that CDCR took adverse action because of her protected activity. No disparate treatment, departure from established procedures, or anti-union animus was shown. Even assuming Woods demonstrated a prima facie case, CDCR established it would have rejected Woods in the absence of protected activity.

SEIU Loc. 1000, *CSEA v. State of California (Franchise Tax Board)*, Case SA-CE-1516-S. ALJ Shawn P. Cloughesy. (Issued 9-22-09; exceptions due 10-19-09.) The job steward sent a mass email to 400 employees notifying them of a union meeting and asking them to rsvp by email. A verbal directive given to the job steward by her supervisor telling her not to send email notices of union meetings in the future was not retaliation or a unilateral change. The directive was not an adverse action. FTB's attempt to bring the job steward's conduct within compliance of the MOU's language of "incident and minimal use" was not a unilateral change of policy. (*Marysville Joint Unified School Dist.* [1983] PERB Dec. No. 314.)

California Correctional Peace Officers Assn. v. State of California (DPA), Case SA-CE-1653-S. ALJ Christine A. Bologna. (Issued 9-29-09; exceptions due 10-26-09.) The unfair practice alleged that DPA failed to respond to CCPOA's request for information. The stipulated facts established that the union requested the information twice and DPA responded twice with letters and over 150 pages. There was no unreasonable delay in producing the large amount of information sought by the union. CCPOA claims that an expedited response to its information request was required because the unprecedented implementation of the final offer was unfounded; it waited three months to request information, sent letters by regular mail, and did seek out DPA contacts before filing the charge. CCPOA's resort to PERB was premature; it filed the charge on the second business day after the revised production deadline.

Oakland Regional Office — Decision Not Final

Jacala v. SEIU Loc. 1021, Case SF-CO-186-M. ALJ Donn Ginoza. (Issued 09-9-09; exceptions filed 9-28-09.) A union does not necessarily breach its duty of fair representation by failing to attend a meeting that the employee believes requires a *Weingarten* representative. It is not required either to meet personally with the employee for purposes of investigating a potential grievance or to provide any particular level of advocacy in defense of the employee. An employee, in a conflict with her supervisor over an out-of-class assignment and attendance issues, and required to attend meetings with management, did not demonstrate a DFR claim or violation of her *Weingarten* right. The union's failure to attend a meeting the employee believes triggers *Weingarten* protection or investigate issues to the employee's satisfaction does not breach its duty.

Los Angeles Regional Office — Decisions Not Final

SEIU Loc. 721 v. County of Riverside, Case LA-CE-470-M and *County of Riverside v. SEIU Loc. 721*, Case LA-CO-85-M. ALJ Ann L. Weinman. (Issued 08-3-09; exceptions filed 9-3-09.) Both the county and SEIU violated local rules addressing union access to bulletin boards and to employees. The county also unilaterally changed its access policies.

Pelonero v. Trustees of the California State University (San Marcos), *Case LA-CE-1038-H.* ALJ Thomas J. Allen. (Issued 09-09-09; exceptions filed 9-23-09.) The charging party did not prove by a preponderance of the evidence that he suffered interference where one witness testified his superiors told employees to pressure the charging party to stop filing grievances. Four other witnesses testified to the contrary.

Report of the Office of the General Counsel

Injunctive Relief Cases

Six requests were filed during the reporting period of July 1, 2009, through September 30, 2009. One was granted, four were denied, and one was withdrawn by the filing party.

Requests granted

City of Palo Alto v. SEIU Loc. 521, IR No. 576, Case SF-CO-210-M. On September 15, 2009, the city filed a request for injunctive relief to prohibit a threatened strike by employees in the city's general unit. On September 22, the board granted the request with regard to the essential employees in the unit.

Requests denied

Travis Unified Teachers Assn. v. Travis Unified School Dist., IR No. 573, Case SF-CE-2797-E. On August 24, 2009, the union filed a request for injunctive relief to prohibit the district from implementing changes in class size and class-preparation time. On August 31, the board denied the request.

Teamsters Loc. 856 v. County of Alameda, IR No. 574, Case SF-CE-687-M. On August 26, 2009, the union filed a request for injunctive relief to prohibit the county from implementing planned layoffs. On September 2, the board denied the request.

Oceanside Firefighters Assn., IAFF Loc. 3736 v. City of Oceanside, IR No. 575, LA-CE-560-M. On September 8, 2009, the union filed a request for injunctive relief to prohibit the city from eliminating several bargaining unit positions. On September 15, the board denied the request.

Tulare County Government Lawyers Assn. of Workers v. County of Tulare, IR No. 577, Case SA-CE-617-M. On September 23, 2009, the union filed a request for injunctive relief to prohibit the county from implementing various economic

items including furloughs and salary reductions. On September 30, the board denied the request.

Requests withdrawn

California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment (CASE) v. State of California (Unemployment Insurance Appeals Board), IR No. 572, SA-CE-1812-S. On July 31, 2009, the union filed a request for injunctive relief to prohibit elimination of alternate work schedules. The union withdrew its request.

Litigation Activity

Four litigation cases were opened during the reporting period of July 1, 2009 through September 30, 2009.

County of Sacramento v. PERB; Sacramento County Attorneys Assn. et al., California Court of Appeal, Third Appellate District, Case No. C062483. (PERB Case SA-CE-484-M.) In July 2009, the county filed a writ petition alleging the board erred in PERB Dec. No. 2043-M.

County of Sacramento v. PERB; United Public Employees Local One, California Court of Appeal, Third Appellate District, Case No. C062484. (PERB Case SA-CE-477-M.) In July 2009, the county filed a writ petition alleging the board erred in PERB Dec. No. 2044-M.

County of Sacramento v. PERB; SEIU Loc. 1021, California Court of Appeal, Third Appellate District, Case No. C062482. (PERB Case SA-CE-505-M.) In July 2009, the county filed a writ petition alleging the board erred in PERB Dec. No. 2045-M.

PERB v. SEIU Loc. 521, Santa Clara County Superior Court Case No. 109CV153088. (IR No. 576, Case SF-CO-210-M.) In September 2009, PERB obtained a temporary restraining order to enjoi n essential employees in the City of Palo Alto's general unit from striking.