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LETTER FROM THE EDITOR

Dear *CPER* Readers;

These are challenging times. *CPER* is facing financial difficulties as a result of drastic cuts to our U. C. funding and the inability of some of our subscribers to renew, as budget reductions are felt by local governments, public schools, and state employees. We have worked diligently to overcome these hardships by drastically cutting our expenses, and by taking a 40 percent reduction in hours (and compensation). We are meeting with our advisory board to come up with fundraising ideas, but we must do more.

One of our new efforts focuses on our Pocket Guide Series. These little books have been hugely popular with people in all public employment sectors. They pack a wallop of information in an easy-to-use format and are extremely affordable. In 2009, new editions of the FLSA and Family Leave pocket guides rolled off the press. The “Basics” guide also was updated. And, we recently added three new titles to the series — one covers the recent Firefighters’ Bill of Rights Act; two are devoted to layoffs that impact certificated and classified employees in the schools.

We will soon introduce another new title, a pocket guide targeting the fundamental concept of just cause. And, there is a new MMBA pocket guide in the works as well as revised Due Process and Workplace Rights Pocket Guides.

If you haven’t seen the list of our available pocket guides recently, check it out now — it’s on the back cover. You can order them at the *CPER* website, <http://cper.berkeley.edu>.

As this issue of *CPER* reveals, we’re not alone in adjusting to severe financial difficulties. The state, local governments, and all levels of public education are facing hard choices and resorting to draconian measures to survive. We hope our efforts will allow us keep bringing you valuable public employment news from throughout the state. We urge you to help us by renewing your subscriptions and purchasing our pocket guides. Tax deductible gifts to “Friends of *CPER*” are also welcome. Those “friends” who have already contributed are honored on the following page.

Thank you for your support over the years. We would like to be around for many more to come.



Carol Vendrillo,
CPER Editor

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CPER would like to acknowledge the generous donations of the following contributors, the first of many we hope will support our program:

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We invite both labor and management — law firms, associations, and individuals — to donate \$1,000, \$5,000, or more. Your contribution will be publically acknowledged in this new “FRIENDS OF CPER” section in the Journal and on our website. Plus, we will announce your programs and conferences in a new “Calendar of Upcoming Events” section. Of course, your gift will help continue the delivery of valuable information and analysis that the public sector labor relations community has come to rely on.

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H1N1 in the Workplace: 'Go Home'

Steven M. Berliner and Camille Y. Townsend



Steven M. Berliner is a partner, and Camille Y. Townsend an associate, of Liebert Cassidy Whitmore's Los Angeles office. The firm, which maintains offices in Los Angeles, Fresno, and San Francisco, represents public sector management in all aspects of labor and employment law, including labor relations, civil litigation, and education law.

IN MARCH 2009, the H1N1 influenza, or “swine flu,” gained worldwide attention as it spread in Mexico. By April, the first cases were noted in the United States. And by June, widespread outbreaks were observed across the world and H1N1 was classified as an international pandemic.¹ According to recent estimates by the Centers for Disease Control and Prevention, nearly 1 in 6 Americans (roughly 15 percent) have been infected by the virus.² Since last spring, the CDC estimates the virus has caused approximately 10,000 deaths in the United States.³ This number, however, remains inaccurate; many who may be infected do not seek medical attention⁴ and those who do may not be tested specifically for H1N1.⁵

Although H1N1 does not garner the media attention it once did — and though the typical “flu season” is behind us — employers and employees still have questions about how to handle the virus. While reports indicate that the outbreak may have peaked, they also warn of the possibility of a reemergence, both in the United States and abroad.⁶ There are concerns that H1N1 may resurface in a mutated form.⁷

In other words, we’re not “out of the woods” just yet. The paramount issue that employers faced in 2009 will still need to be addressed should the virus return, namely how to juggle two potentially competing legal requirements: (1) providing a safe workplace when an employee is exhibiting flu-like symptoms; and (2) doing so without violating employee rights.

Employers tend to have a uniform initial response when dealing with an employee infected with, or exhibiting signs of, H1N1 in the workplace: “Go home.” A crucial legal issue is whether employers may “direct” or “advise” an employee to leave work in those circumstances. Another issue is whether an employer may require an employee to submit to a fitness-for-duty examination when flu-like symptoms are evident. In light of the ever-changing legal and medical

landscape, employees and employers alike are wondering whether employees stricken with H1N1 qualify for leave under the Family and Medical Leave Act or the California Family Rights Act, or whether other leave options are available.

Is H1N1 Different Than the Seasonal Flu?

Like the seasonal flu, the H1N1 influenza is a virus. It is transmitted person-to-person in the same manner — e.g., coughing, sneezing, and contact with contaminated surfaces. Symptoms of H1N1 may include fever, cough, sore throat, body aches, headache, chills, fatigue, diarrhea, and vomiting. What is it then that makes H1N1 different?

According to some, the H1N1 influenza is no more dangerous than the seasonal flu.⁸ Presumably then there is no need to change employee leave policies and practices that have been in place. However, according to CDC Director Thomas Freidan, the H1N1 virus affects different people differently and is not an equal threat like the regular seasonal flu.⁹ For example, children younger than five, adults ages 18-65, and pregnant women are highly susceptible.¹⁰ Of the 10,000 estimated deaths in the United States, 7,500 were adults between the ages of 18-64, many of whom were under age 50.¹¹

What About Treatment Options?

In response to the H1N1 outbreak, the CDC and some health care officials have suggested that a vaccination is the best means of preventing serious illness, hospitalization, and death.¹² Antiviral drugs, such as Tamiflu, are also available. Tamiflu, alleged to be one of the most effective treatments for combating H1N1, is supposed to shorten the duration of the flu and avoid possible complications associated with the H1N1 influenza.¹³ On the other hand, these antivirals are not free from criticism. Tamiflu, for example, a fairly new drug,¹⁴ has not been tested for long periods of time,¹⁵

and, by some reports, certain H1N1 strains have proven resistant.¹⁶ Moreover, deaths are alleged to have been caused by the drug itself.¹⁷

These issues have raised serious concerns among employers, employees,¹⁸ and even health experts because there is no definitively effective remedy available.¹⁹ In response, Congress has begun to explore what legislation it could enact to maintain the nation's health.

Proposed Legislation

In addition to the employers' exhortion to "go home," legislators are working to encourage infected employees to stay home. On November 3, 2009, United States Representative George Miller (D-CA), chairperson of the House Education and Labor Committee, and Representative Lynn Woolsey (D-CA), chairperson of the Workforce Protections Subcommittee, proposed emergency temporary legislation to guarantee up to five days of paid sick leave for workers sent home or directed to stay home by their employer for a contagious illness such as the H1N1 influenza virus.

The legislation, named the Emergency Influenza Containment Act, went before the full Committee on Education and Labor on November 17, 2009.²⁰ Employers that already provide at least five days of paid sick leave would be exempt from the act. An employer would be able to end paid sick leave at any time by informing the employee that it believes the employee is well enough to return to work. The proposed act covers both full-time and part-time workers (on a pro-rated basis) in businesses with 15 or more workers. If necessary, and if qualified, an employee may continue paid leave under other existing sick policies, or unpaid leave under the FMLA. The act also proposes a non-retaliation policy — employees who follow their employer's direction to stay home because of a contagious illness cannot be fired, disciplined, or made subject to retaliation for following those directions. Finally, the law would take effect 15 days after being signed into law and sunset after two years.

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stay home.*

In its current form, the proposed legislation leaves several questions unanswered. For example, it does not specifically address the appropriate pay status of employees who have the H1N1 virus and who accrue five or more days of paid sick leave a year, but who have already exhausted their accrued sick leave for other illnesses. If the employer provides five days of sick leave a year, it would be exempt from the act. Presumably, therefore, the employee would not be entitled to receive an additional five days of paid sick leave. The act also does not provide guidance as to whether employers may subject an employee to a fitness-for-duty examination or whether infected employees can qualify for FMLA or CFRA leave. Nor does it address how or whether the act's leave provisions run simultaneously with other state and federal leave provisions. To date, the act has not advanced very far in the legislative process.

The Americans with Disability Act and California Fair Employment and Housing Act

The Americans with Disability Act is significant to the H1N1 dialogue in at least three ways: (1) the ADA regulates disability-related inquiries and medical examinations for all applicants and employees; (2) the ADA prohibits employers from excluding employees from work for health and/or safety reasons unless certain criteria are met; and (3) the ADA requires reasonable accommodation for individuals with disabilities (absent undue hardship to the employer).²¹

The ADA applies at all times including during a pandemic.

Under the ADA and the California Fair Employment and Housing Act, which mimics the ADA regarding disability-related matters in many respects, an employer may require an employee to undergo a medical examination (and/or inquiry) if it is job-related and consistent with business necessity. Under Equal Employment Opportunity Commission regulations, a medical examination of a current employee meets this standard if the employer has

a reasonable belief, based on objective evidence, that (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a "direct threat" due to a medical condition. A "direct threat" is defined as a significant risk of substantial harm to the health or safety of the employee or others that cannot be eliminated or reduced by reasonable accommodation.²² Whether an employee poses a direct threat must be assessed and based on objective, factual information, "not on subjective perceptions or irrational fears."²³

According to recent guidance published by the EEOC, whether pandemic influenza rises to the level of a direct threat depends on its severity.²⁴ In other words, the fact that

H1N1 has been described as pandemic (i.e. widespread) is not sufficient in and of itself.

Under California's Labor Code,²⁵ employers have a duty to provide a "safe workplace" for their employees. Given the contagious nature and potentially serious health effects of H1N1 influenza, the CDC, EEOC, and Department of Homeland Security all recommend sending employees home when they are sick and/or exhibiting flu-like symptoms.²⁶ According to

the EEOC, advising an employee to go home under these circumstances is not a disability-related action.²⁷ Rather, in light of these recommendations, an employer should consult with a healthcare professional to determine whether the employee's illness poses a direct threat.

What About the FMLA and CFRA?

Under the Family and Medical Leave Act and California Family Rights Act, covered employers must provide employees up to 12 weeks of job-protected, unpaid leave during a 12-month period for specified family and medical reasons. Employees are eligible to take leave under the FMLA and CFRA if they have worked for their employer for at least 12 months for at least 1,250 hours and if the employee works at a location where the employer employs at least 50 employees within 75 miles of that site.²⁸ The

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purpose of these acts is to allow eligible employees to take a job-protected leave when they are unable to work because of a serious health condition, to care for an immediate family member (spouse, child, or parent) with a serious health condition, or to handle the birth or adoption of a child or foster care placement of a child.

It is possible that H1N1 infection may qualify as a “serious health condition” triggering either leave. The analysis will be based on factors such as the seriousness of the flu, whether complications arise, and other individual health concerns. At this time, the flu, absent complications, does not qualify as a “serious health condition.”²⁹ Employers should review and follow their family medical leave policies — after ensuring that their policies have been updated to reflect the revised FMLA regulations published in 2008.

Conclusion

The threat of H1N1 appears to have abated for now. Certainly the widespread media coverage of the illness has diminished. Nonetheless, a great number of questions still are unanswered, and they will remain pertinent in flu seasons to come. Employers should use this lull in H1N1 cases to prepare for a possible increase in the future. *

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3 *Id.*

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5 *Id.*

6 See CBC News, *H1N1 ‘not done yet’: Canada’s top doctor* (December 15, 2009); Craig, Jolene, *More H1N1 clinics on tap* (January 5, 2010) <http://www.newsandsentinel.com/page/content.detail/id/525291.html?nav=5061> (last visited January 9, 2010).

7 See Trafton, Anne, MIT, *CDC find H1N1 flu virus ill-suited for rapid transmission. But researchers say new strain bears watching, could mutate* (July 2, 2009) <http://web.mit.edu/newsoffice/2009/h1n1-0702.html> (last visited January 9, 2010).

8 Kaplan, Karen and Zarembo, Alan, *Scientists See this Flu Strain As Relatively Mild*, Los Angeles Times (April 30, 2009) <http://www.latimes.com/news/nation-and-world/la-sci-swine-reality30-2009apr30,0,731404.story> (last visited January 9, 2010).

9 See *H1N1 by the Numbers*, dated December 14, 2009. <http://www.flu.gov/news/blogs/bythenumbers.html> (last visited on December 15, 2009).

10 Centers for Disease Control and Prevention, *What To Do If You Get Sick: 2009 H1N1 and Seasonal Flu* (November 10, 2009) <http://www.cdc.gov/h1n1/sick.hym> (last visited November 11, 2009).

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13 Centers for Disease Control and Prevention, *Questions & Answers: Antiviral Drugs, 2009-2010 Flu Season* (November 17, 2009) <http://www.cdc.gov/H1N1flu/antiviral.htm> (last visited January 9, 2010).

14 CBS News, *Experts Question Effectiveness of Tamiflu* (December 8, 2009) <http://www.cbsnews.com/stories/2009/12/08/health/main5939496.shtml> (last visited January 9, 2010).

15 *Id.*

- 16 Randall, Tom, *Tamiflu-Resistant Strain Found in Three World Regions* (Update 3) (July 9, 2009) <http://www.bloomberg.com/apps/news?pid=20601124&sid=axkEygwqBVsl> (last visited January 9, 2010).
- 17 *Times* online, *Japan issues Tamiflu warning after child deaths*, *Times Online* (March 21, 2009) <http://www.timesonline.co.uk/tol/news/world/asia/article1549260.ece> (last visited January 3, 2010).
- 18 See Hennessy-Fiske, Molly, *Nannies who get flu shots may have an edge in the job market*, *Los Angeles Times* (January 3, 2010) <http://www.latimes.com/news/local/la-me-nanny-flu3-2010jan03,0,3027295.story> (last visited January 3, 2010).
- 19 CBS News, *Experts Question Effectiveness of Tamiflu* (December 8, 2009) <http://www.cbsnews.com/stories/2009/12/08/health/main5939496.shtml> (last visited January 9, 2010).
- 20 On November 17, 2009 a hearing was held regarding the ramification of the Emergency Sick Leave Bill, if passed. Full Committee Hearing (November 17, 2009) *Protecting Employees, Employers and the Public: H1N1 and Sick Leave Policies*, available at <http://edlabor.house.gov/hearings/2009/11/protecting-employees-employers.shtml> (last visited January 3, 2010).
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- 26 U.S. Equal Employment Opportunity Commission, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* (not dated) http://eeoc.gov/fact/pandemic_flu.html (last visited November 5, 2009); Centers for Disease Control and Prevention, *What to Do If You Get Sick: 2009 H1N1 and Seasonal Flu* (November 10, 2009) <http://www.cdc.gov/h1n1/sick.hym> (last visited November 11, 2009); Department of Homeland Security, *Federal Guidelines Encourage Employers to Plan Now for Upcoming Influenza Season* (August 19, 2009) http://www.dhs.gov/ynews/releases/pr_1250698238233.shtm (last visited January 9, 2010).
- 27 U.S. Equal Employment Opportunity Commission, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* (not dated) http://eeoc.gov/fact/pandemic_flu.html (last visited November 5, 2009).
- 28 29 CFR Sec. 825.110(a).
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Mission Impossible: Requesting Injunctive Relief From PERB

Sarah Sandford-Smith



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WHAT DOES it take to get the Public Employment Relations Board to seek injunctive relief on behalf of a charging party? That is the million-dollar question. The issue first came to my attention three years ago, when, on behalf of a union, I filed a request seeking injunctive relief to prevent a school district from opening and closing school sites without first bargaining the issue. My request was denied. However, as it turns out, I am in good company.

In the past two years, for example, with the implementation of furloughs and layoffs, public employee unions have requested that PERB step in to enjoin employers from cutting back on the workforce. And conversely, employers have appealed to PERB, asking it to prevent unions from engaging in strikes or work-stoppages. However, during the 2008-09 fiscal year, PERB sought injunctive relief on behalf of a charging party just once — out of a total of 19 requests.¹ While not explicitly stated by PERB, what constitutes sufficient harm for the board to seek injunctive relief on behalf of a charging party can be gleaned from the requests it has granted.

Filing an Injunctive Relief Request

PERB will seek injunctive relief in superior court on behalf of a charging party if it determines (1) there is “reasonable cause” to believe that an unfair practice has, or may be, committed; and (2) injunctive relief is “just and proper.”² There are any number of potential unfair practices that may be alleged, and PERB generally does not deny a request for injunctive relief on that basis only. More often, PERB focuses its attention on whether injunctive relief would be “just and proper” given the factual allegations in each case.

Demonstrating Irreparable Harm Sufficient for PERB to Seek Injunctive Relief

When deciding whether injunctive relief is “just and proper,” PERB looks at whether the purposes of the pertinent labor relations statute would be frustrated or whether either a final order issued by PERB or PERB’s administrative procedures would be rendered meaningless absent injunctive relief.³ Integral to PERB’s analysis of the “just and proper” prong is whether the requesting party would suffer irreparable harm of the type intended to be protected without injunctive relief by the relevant labor relations statute.⁴

At the end of each fiscal year, PERB issues annual reports summarizing, among other things, the requests for injunctive relief that were sought and the action taken on each.⁵ Between 2000 and the end of the 2008-09 fiscal year, parties filed approximately 147 injunctive relief requests.⁶ Of these, PERB granted nine and indicated it would grant one other.⁷ The remaining requests were either withdrawn (46) or denied (91). Following is a summary of the nine decisions issued since 2000 in which PERB granted injunctive relief requests.

Charges filed by employer. In *Regents of the University of California v. AFSCME Loc. 3299*,⁸ PERB granted the university’s request for injunctive relief to require the union to give the exact dates for its service unit strike, and to define and enjoin the “essential employees” of the patient care technical unit from honoring the service unit strike.

In addition to this case, on two other occasions since 2000, PERB has granted employers’ requests for injunctive relief to enjoin health care workers from striking.⁹ In both cases, the health care workers had direct patient contact.¹⁰

Charges filed by union. Of the nine requests for injunctive relief granted by PERB, four were to stop employers from interfering with union organizing campaigns.¹¹ Types

of interference that caused PERB to seek relief on behalf of the charging parties included the employer’s suspension of the lead union supporter during an election, the restriction of his access to the worksite, and an order that the union supporter not speak with colleagues.¹² In two other cases in which unions sought injunctions, charges were filed based on two community college districts’ persistent recognition of two separate unions (California Teachers’ Association and College of the Canyons Faculty Association) during an organizing drive, thereby nullifying a separate union’s (American Federation of Teachers) efforts to organize the part-time faculty.¹³ In a fourth case, PERB enjoined an employer to “stop alleged interference with an organizing campaign.”¹⁴

In addition to the allegations of interference with organizing campaigns, PERB granted a request for injunctive relief in a matter that would otherwise have threatened its jurisdiction under the Educational Employment Relations Act. In *East Oakland Community Charter Teachers Assn. v. Education for Change*,¹⁵ PERB sought injunctive relief on behalf of the union where the charter school intended to hold a secret ballot election based on an erroneous theory that it was a private employer.¹⁶

Charge filed by employees of the union. The ninth request granted was to enjoin a union from suspending its employees from their elected offices.¹⁷

In addition to the injunctive relief requests set forth above, PERB reserved the authority to make a decision granting a union’s request for relief where the allegation was that the County of Sacramento violated the Meyers-Milias-Brown Act by interfering with and dominating the union’s ability to conduct business.¹⁸ In reserving its authority, the board directed its staff to expedite the processing of the underlying unfair labor practice charge.¹⁹

Of the 147 requests for injunctive relief, union requests constitute approximately 71 percent, while requests by employers make up approximately 14 percent. Requests by

PERB is less likely to grant a request by an individual, as opposed to a union or employer, and slightly more likely to grant a request by an employer as compared to a union.

HOW TO FILE A REQUEST FOR INJUNCTIVE RELIEF WITH PERB

While filing an unfair labor practice charge can now be done with a few clicks of the mouse, filing a request for injunctive relief is more involved. PERB maintains a guide for parties on its website, <http://www.perb.ca.gov>. Below is a brief summary of the steps a charging party must follow to seek an injunction:

- Provide at least 24 hours notice that injunctive relief is being sought to PERB's general counsel and the party against whom injunctive relief is sought.
- File an unfair labor practice charge with the regional office either

before, or in conjunction with, its request for injunctive relief.

- Include in the request for injunctive relief: (1) the reason(s) why the charging party believes an unfair labor practice has been committed and why injunctive relief is "just and proper"; and (2) declarations supporting (1).
- Provide an original and six copies of: (1) the unfair labor practice charge; (2) the request for injunctive relief; (3) the supporting declarations; (4) proof of service of the injunctive relief request on the respondent; and (5) an affidavit setting forth the time and manner in which the 24-hour notice was provided to the general counsel

and the respondent, to the general counsel at PERB's headquarters in Sacramento.

A board agent will investigate the charges set forth in the request for injunctive relief and accompanying documents, and make a recommendation to the general counsel. The general counsel will submit a recommendation to the PERB board within 120 hours after the request is filed (except in the situation of a lockout or work stoppage, in which case the general counsel would submit a recommendation within 24 hours). The board makes the final determination regarding the request for injunctive relief.

individuals account for the remaining 15 percent. However, of the nine times PERB granted the request for injunctive relief, five (approximately 55 percent) were requested by the union, three (approximately 33 percent) by the employer, and one (approximately 11 percent) by an individual. Based on these numbers, PERB is less likely to grant a request for injunctive relief filed by an individual, as opposed to a union or employer, and slightly more likely to grant a request filed by an employer as compared to a union.

PERB provides limited information on its website regarding the type and number of requests for injunctive relief that were made prior to 2000. However, earlier PERB decisions on such requests demonstrate that the agency sought injunctive relief for the following: to stop a teachers strike that was causing a "complete breakdown" of the education system;²⁰ to halt a union's work stoppage before the parties had completed the statutory impasse procedures;²¹ to require the teachers union to give notice prior to striking;²² and, to enjoin teachers from engaging in a work stoppage while enjoining the school district from disciplining those teachers who had previously engaged in a work stoppage.²³

PERB's definition of irreparable harm is not always transparent. On many occasions, PERB has denied requests to seek injunctive relief where, on the face of the allegations, irreparable harm seems evident. For example, PERB has denied requests in the following instances: to prevent public employers from implementing layoffs without bargaining either the decision or the effects;²⁴ from unilaterally reducing employees' wages;²⁵ and from unilaterally increasing health care premiums.²⁶ In some of these situations, the employees' lost wages had a permanent effect on their retirement allotment or impeded their ability to maintain health coverage. However, PERB has not deemed such harm sufficient to meet its "just and proper" prong.

From these examples, it should be readily apparent that PERB rarely seeks injunctive relief on behalf of a requesting party. Further, PERB has provided very little guidance as to what constitutes sufficient irreparable harm to inspire it to seek injunctive relief. However, based on decisions in which PERB has granted such relief, it can be gleaned that a union will satisfy the irreparable harm aspect of PERB's "just and proper" prong by alleging that conduct on the employer's part which impedes the union's ability to

organize destabilizes the negotiation process.²⁷ Conversely, an employer likely will satisfy PERB's "just and proper" prong by alleging that the union has engaged in, or plans to engage in, a work stoppage with a potentially disastrous effect on the larger community it serves, especially patients or students. □

1 In its annual report, PERB provides information pertaining to the requests for injunctive relief that are filed each fiscal year. The reports, dating back from the 2000-01 fiscal year, can be found on PERB's website: http://www.perb.ca.gov/about/annual_reports.asp.

2 *County of San Joaquin (Health Care Services)* (2001) PERB Dec. No. IR-55-M.

3 *Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881; *County of San Joaquin (Health Care Services)* (2001) PERB Dec. No. IR-55-M.

4 *Modesto City Schools, supra*, 136 Cal.App.3d at 902-904.

5 See PERB's website at: http://www.perb.ca.gov/about/annual_reports.asp.

6 The requests for injunctive relief that were consolidated have not been separated for the purpose of this analysis.

7 See PERB's website at: http://www.perb.ca.gov/about/annual_reports.asp.

8 (2008) Dec. No. IR-553.

9 *Regents of the University of California v. California Nurses Assn.* (2005) PERB Dec. No. IR-487; *Regents of the University of California v. AFSCME Loc. 3299* (2008) PERB Dec. No. IR-548.

10 *Id.*

11 *Society of Professional Engineers v. U.C. Regents* (2007) PERB Dec. No. IR-518; *Part-Time Faculty United, AFT v. Santa Clarita Community College Dist.* (2002) PERB Dec. No. IR-430; *Part-Time Faculty United, AFT v. Victor Valley Community College Dist.* (2002)

PERB Dec. No. IR-437; *Union of American Physicians & Dentists v. County of San Joaquin* (2001) PERB Dec. No. IR-55-M.

12 *Union of American Physicians & Dentists v. County of San Joaquin* (2001) PERB Dec. No. IR-55-M.

13 These were the bases for two injunctive relief requests. *Part-Time Faculty United, AFT v. Santa Clarita Community College Dist.* (2002) PERB Dec. No. IR-430; *Part-Time Faculty United, AFT v. Victor Valley Community College Dist.* (2002) PERB Dec. No. IR-437.

14 *Society of Professional Engineers v. U.C. Regents* (2007) PERB Dec. No. IR-518.

15 (2006) Dec. No. IR-506.

16 *East Oakland Community Charter Teachers Assn. v. Education for Change* (2006) PERB Dec. No. IR-506.

17 *Hard, Hackett, Perkins and Carranza v. California State Employees Assn.* (2002) PERB Dec. No. IR-440.

18 *Sacramento County Deputy Sheriffs Assn. v. County of Sacramento* (2007) PERB Dec. No. IR-526.

19 *Id.*

20 *Compton Unified School Dist.* (1987) PERB Dec. No. IR-50.

21 *San Mateo City School Dist.* (1985) PERB Dec. No. IR-48.

22 *San Ramon Valley Unified School Dist.* (1984) PERB Dec. No. IR-46.

23 *Val Verde School Dist.* (1979) PERB Dec. No. IR-9.

24 *California School Employees Assn.* (2000) PERB Dec. No. IR-415; *Health Services Agency Physician Assn.* (2003) PERB Dec. No. IR-457; *International Union of Operating Engineers* (2004) PERB Dec. No. IR-466.

25 *United Food Commercial Workers 588* (2002) PERB Dec. No. IR-448.

26 *Marysville Unified Teachers Assn.* (1978) PERB Dec. No. IR-6; *Coalition of University Employees* (2006) PERB Dec. No. IR-495. PERB Dec. Nos. IR-496 and IR-497 are based on the same set of facts, but separate charges were filed by two different Unions.

27 *Eureka Teachers Assn.* (1980) PERB Dec. No. IR-14; *San Ysidro School Dist.* (1978) PERB Dec. No. IR-4.

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Recent Developments

Public Schools

California a Contender in ‘Race to the Top’

OVER THE OBJECTION of teachers unions and other critics, California has submitted an application to the federal government in a bid to get a share of the \$4.3 billion in “Race to the Top” funds. Governor Arnold Schwarzenegger has said that the state could be eligible for up to \$1 billion for its schools.

Under the program, states compete for federal funding aimed at encouraging public schools to institute a number of reforms designed to improve teacher effectiveness, enhance academic standards and student testing, and more effectively use data to drive change and accountability. The participating states submit education action plans to the federal Department of Education. Only seven to ten states are expected to be selected for the funds, which will be paid out over four years.

In order to increase the state’s chances of being one of the contest winners, the legislature passed several bills signed into law by the governor. SBX5 4, introduced by Sen. Gloria Romero (D-Los Angeles), authorizes parents of students enrolled in one of the state’s 1,000 low-achieving schools to apply for a transfer to another district. It also requires local districts to

implement alternative governance arrangements for up to 75 failing schools where at least one-half of the parents or legal guardians have signed a petition requesting such action.

SBX5 1, authored by Senate Pro Tem Darrell Steinberg (D-Sacramento), authorizes the state superintendent and the state board of education, along with local districts, to develop standards and take other actions to bring California into conformance with the Race to the Top requirements and regulations, and to ensure that it is positioned to be successful in the competition. Among other things, the bill authorizes changes to the state’s data collection system to allow pupil achievement scores to be used to evaluate teachers and administrators and to make employment decisions, but only if the practice complies with local collective bargaining agreements. SBX5 1 also permits the state superintendent and the president of the state board of education to enter into memorandums of understanding with local school districts for the purpose of implementing the Race to the Top regulations. It establishes an alternative credentialing program for working experts and others seeking to teach science, technology, engineer-

ing, mathematics, or career technical education. The bill also requires the governor, the superintendent and the state board, in collaboration with participating local districts, to develop plans to submit as part of the state’s application for the funds. It mandates the superintendent and the state board to establish a list of low-achieving and persistently low-achieving schools. They must implement one of four

To increase the state’s chances of winning the legislature passed several bills.

intervention options for turning the persistently low-achieving schools around: close the school, convert it to a charter school, replace the principal and up to 50 percent of staff, or replace the principal and implement a number of other changes, including enhanced staff training and financial incentives for top teachers.

State educator unions fought a losing battle to defeat the legislation. Both the California Teachers Association and the California Federation of Teachers have long opposed performance-based pay and strongly supported previous legislation, now extinct, that created a firewall between student performance data and teachers’ assessments. CTA argues that linking teacher pay to student test scores punishes those educators who work with

students who have learning disabilities or are English-learners. According to CFT President Marty Hittelman, research has shown that attempting to improve student performance by linking it to teacher evaluation procedures has proven to be ineffective.

The unions also were critical of the legislation because they believe it encourages the growth of charter schools as a means of “fixing” low-

Awarded funds will represent less than 2 percent of the state’s budget for education.

performing schools. Charter schools generally do not employ union teachers. The unions’ mistrust in this regard is understandable. Substantial support for the measures came from a well-funded organization called EdVoice, co-founded by Eli Broad, a billionaire Los Angeles developer, and Don Fisher, the late founder of the Gap. EdVoice is a school reform lobbying group with strong ties to the charter school movement. EdVoice board members have contributed over \$1 million to Governor Schwarzenegger’s various campaign committees. The governor has long championed charter schools, and the number has more than doubled since he took office. Schwarzenegger threatened to veto the Assembly’s Race to the Top plan, passed as an alternative to Gloria

Romero’s bill, because it would have tightened oversight measures for charter schools. EdVoice has announced its support for Romero in her bid to be state superintendent of education.

The California School Boards Association and Association of California Administrators also opposed the legislation. Critics called the bills too sweeping, too risky, too divisive, and too hastily written. They point out that even if California is awarded \$1 billion in Race to the Top funds, it will represent less than 2 percent of the state’s budget for education, and argue that implementing fundamental changes in policy for so little gain does not make sense.

After enactment of the legislation, the next step in the application process was to get local districts and unions to sign MOUs indicating that they would be participating in Race to the Top. While local unions are not required to sign the MOUs in order for the state to apply for the funds, their agreement is encouraged. The application specifically asks how many teachers unions support the changes.

State officials urged local districts and unions to sign, fearing that lack of participation would doom the state’s chances of receiving funds. Deputy State Superintendent Rick Miller and Undersecretary of Education Kathryn Radtkey-Gaither, in a conference call with superintendents throughout the state, argued that districts had little to lose and much to gain by signing on. They promised there would be

no unanticipated state mandates and no lingering expenses after four years when the payments are scheduled to stop. They said that districts would not be obligated to participate if the amount of money they would receive was overshadowed by the difficulty in using it, noting that they could withdraw without penalty within 90 days after the state is notified of its award. And, they could pull out even after that

State officials promised there would be no unanticipated state mandates.

time so long as they made a good-faith effort to comply, by, for instance, attempting to renegotiate teacher contracts to permit the use of test scores to evaluate performance.

CTA strongly encouraged local unions to resist signing the MOUs. President David Sanchez sent an email to all the locals one day before the deadline for commitments, urging them not to sign because the full details of the state’s plan were unknown. “It’s crazy for them to think that we were going to go out on a limb and sign something without knowing what the final product is going to look like,” he said.

In the end, 813 of the state’s 1,800 districts, offices of education, and charter schools signed on, comprising

over 56 percent of the state's 10,500 schools. Those participating represent 61 percent of students in poverty. Nine of the ten largest districts elected to participate, with only San Diego declining. However, only 122 local unions signed on.

California will learn whether it is one of the first round of winners in April. It can then resubmit for a second round of money in June, with

decisions announced in September. And, if California is not among the chosen, there is still hope. President Obama has asked Congress to authorize another \$1.3 billion just for school districts. The purpose is to allow individual districts to make a plea for funding in states that decided not to apply for the funds or whose applications failed to make the grade. *

fect in those schools controlled by the mayor, but most charter schools are non-union.

After passage of the resolution, UTLA filed a lawsuit against the district, alleging, in part, that the plan violates Education Code Sec. 47605(a)(2). That section states that a public school charter conversion can be accomplished only if a peti-

Unions see the plan as a threat to organized labor.

The Gloves Are Off: L.A. Teachers vs. Charter Schools vs. the Mayor

THE LOS ANGELES Unified School District has really done it this time. A highly controversial measure passed by the school board in the name of school reform last summer set the stage for pitched battles that have broken out between unions, charter school companies, Los Angeles Mayor Antonio Villaraigosa, and community groups this winter.

Last August, the school board, by a vote of six to one, passed a resolution introduced by Member Yolie Flores Aguilar that allows charter schools, nonprofit groups, and collaborative teams of teachers to compete to take over 250 schools, including 50 new multimillion-dollar campuses. Superintendent Ramon C. Cortines will present recommendations to the board, which will make the final decision.

Unions representing school employees strongly opposed the measure, known as the Public School Choice

reform plan, seeing it as a threat to organized labor. A representative for Teamsters Local 572, which negotiates for about 3,500 district employees, including plant and cafeteria managers, spoke against the measure at a board hearing, accusing the board of making "a 'yes' vote on choice into a 'no' vote on labor."

In a letter to the board, seven unions, including the Associated Administrators of Los Angeles, called the proposal "an insult to these children and their families to outsource education to charters and other private entities." United Teachers Los Angeles President A.J. Duffy accused the mayor of being behind the proposal, as a way of getting more schools under his control. Mayor Villaraigosa's nonprofit, Partnership for Los Angeles Schools, already controls 11 schools under an agreement with the district. Union contracts have remained in ef-

tion is signed by 50 percent of the permanent-status teachers at the school targeted for conversion. "We support positive school change, driven by teachers, parents, and other stakeholders at the school sites, but we will stand up against violations of the law and our members' rights," said Duffy. "Effective school reform can't begin by breaking the law." The lawsuit is still pending.

The board began to implement its resolution last fall, when it put 12 struggling schools and 18 campuses that are scheduled to open next fall on the auction block. On the day that "letters of intent" for reform plans by outside groups were due, there were two dueling news conferences, one called by UTLA and the other by the mayor.

Bids on the 30 schools were made by 85 applicants. Charter schools mostly went after the new campuses, while groups of teachers applied to run

their own schools. The teachers, with backing from the union, and, in some cases, school administrators, argue that they are in the best position to know what reforms are needed. Partnership for Los Angeles Schools put in bids on one high school, one middle school, and two elementary schools.

As part of its reform plan, the board called for an advisory vote earlier this month, to allow parents, teachers, and community members to help pick operators for the selected schools. The bidders made their case to parents and the community at public meetings prior to the vote. Teachers canvassed neighborhoods around their school for weeks.

The district paid the League of Women Voters \$50,000 to run the elections. Voting guidelines were extremely broad. Teachers were allowed to vote twice, once as an employee, and once as a community member. There were no age restrictions. Parents and members of the community were allowed to vote.

Anecdotal reports of the voting indicated that many teachers did vote twice and that many students, including elementary students, voted. Teachers were accused by charter groups and the mayor's organization of entering polling places and guiding parents' votes, and of using "scare tactics." One group alleged that teachers took advantage of Latino parents unused to the voting process.

Charter school operators urged LAUSD to give up on the idea of having an advisory vote altogether. "Given the

irregularities occurring at every voting station it would appear that the vote process has been tainted, calling into question the veracity of the votes in general," Jed Wallace, president of the California Charter Association, wrote in a letter to Superintendent Cortines.

UTLA President Duffy defended the teachers, noting that school em-

ployees are eligible to vote twice under the posted procedures. "We are following all the rules and guidelines," he said.

The results of the vote will be included in Cortines' report when he makes his recommendation to the school board at the end of this month. *

High Court to Decide if Grant of Charter School Petition Can Be Arbitrated

THE CALIFORNIA Supreme Court has agreed to decide whether a school district can be required to arbitrate disputes over the district's approval of a charter school petition under the terms of a collective bargaining agreement. In *United Teachers Los Angeles v. Los Angeles Unified School Dist.*, the district argued that Education Code Sec. 47611.5(e) precludes it from referring such a dispute to arbitration.

The Second District Court of Appeal disagreed, holding that the parties had a valid agreement to arbitrate, and that the district's statutory defense must be resolved by the arbitrator, not the court. The district filed a petition for review, which the Supreme Court granted last month.

Background

Green Dot Public Schools filed a charter petition with the district, seeking to convert a public high school to a charter school. The education board granted the petition.

UTLA sought to compel arbitration under the terms of its collective bargaining agreement with the district. The union alleged that the district violated the contract by not presenting the complete charter to employees; denying the union, affected employees, and the community enough time to review the proposed charter; and failing to clearly disclose the conditions of employment within the charter school.

The district refused to arbitrate the controversy, and the union filed a petition to compel arbitration. The district opposed the petition, arguing that the union had no standing to challenge the alleged violations of the agreement. And, it charged, the contract provisions alleged to have been violated were either preempted or invalidated by Sec. 47611.5(e). That section provides that the approval of a charter school petition shall not be controlled by a collective bargaining agreement nor be subject to review or

regulation by the Public Employment Relations Board. The district also argued that the collective bargaining agreement is invalid because it imposes procedural steps on the district beyond those required by Sec. 47605.

The trial court denied the union's petition, and the union appealed.

Court of Appeal Decision

The court rejected the district's argument that the union lacked standing to pursue the grievance because neither the school operator nor the charter school employees were parties to the collective bargaining agreement. But, the court said, the union and the district are parties to the agreement and they are in a dispute about its provisions. Here, "one party to an

agreement to arbitrate is seeking to enforce the arbitration clause against another signatory." The court also referenced Gov. Code Sec. 3543.8, a part of the Educational Employment Relations Act, which gives an employee organization standing to sue on behalf of its members. Citing a long line of cases, the court concluded that UTLA has standing to compel arbitration.

As for the merits, the court concluded that the trial court should have granted the petition to compel arbitration.

The district argued that the provisions of the contract alleged to have been violated are preempted or invalidated by Sec. 47611.5(e), and, therefore, the dispute cannot be reviewed by an arbitrator. To the

contrary the court said, the merits of a dispute, including the effect of Sec. 47611.5(e), "must be resolved in the first instance by the arbitrator." "At this stage, our determination...is limited to whether there was a valid agreement to arbitrate." Arbitrators are authorized to resolve statutory claims, including statutory defenses, instructed the court, including the district's Sec. 47611.5(e) defense.

The Court of Appeal pointed to *California Correctional Peace Officers Assn. v. State of California* (2006) 142 Cal.App.4th 198, 180 CPER 28, in support of its position. There, management refused to participate in negotiations involving supervisors with rank-and-file members present. It resisted the union's petition to compel

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

-- Robert Frost.poet

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arbitration based on Gov. Code Sec. 3529(e), a provision of the Dills Act, which expressly precludes supervisors from participating in meet-and-confer sessions with rank-and-file employees and vice-versa. The appellate court in *California Correctional Peace Officers Assn.* granted the union's petition to arbitrate and commented, "Reduced to its essence, the Department's claim is that it should be permitted to avoid arbitration because the Union's position is barred by section 3529 — in other words, that the Union's claim, as a matter of law, has no merit." *California Correctional Peace Officers Assn.* confirmed that "courts [are forbidden] from denying arbitration on the ground that the petitioner's claim is meritless."

The court rejected the district's assertion that *Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269, 118 CPER 48, is controlling. There, the Supreme Court found an arbitrator had exceeded his powers by ordering that a probationary teacher be given a hearing on the district's refusal to rehire him. The high court found that the procedural protections and just cause standard contained in the parties' collective bargaining agreement were preempted by statute because the reelection of a probationary teacher may not be the subject of collective bargaining under EERA.

This case is different from *Round Valley*, the appellate court explained. There, the court held that, based on preemption grounds, the arbitrator had exceeded his powers. *Round Valley*

did not hold that the statutory defense was not subject to arbitration in the first instance.

If the arbitrator finds that the district violated the contract, the court explained, it can challenge the award in the trial court based on its defense that Sec. 47611.5(e) preempts the union's grievance rights. By contrast, said the

court, the arbitrator may decide that the district did not violate the contract, in which case there would be no reason to bring the preemption issue to the court. (*United Teachers Los Angeles v. Los Angeles Unified School Dist.* [2009] 177 Cal.App.4th 863, modified 10-16-09 [S177403/B214119, review granted 12-24-09.]) *

Change Is Coming to 'No Child Left Behind'; Some Say Long Overdue

THE OBAMA administration is planning to ask Congress to make major changes to the unpopular No Child Left Behind Act, President Bush's education law enacted in 2001. Administration officials said that the proposed changes would address those provisions that teachers unions, associations of principals, school boards, and other groups have found most objectionable.

Although the details have yet to be made clear, it has been reported that the administration will propose changes to federal financing formulas, making a portion of the funds awarded based on academic progress, rather than number of students. Amendments likely will seek to drop the current requirement that all students be "proficient" in reading and math by the year 2014. It will be replaced by a new goal — that all students leave high school "college or career ready." Currently, representatives from more than 40 states are working together to arrive at common standards defining

the term. Benchmarks will delineate what students need to learn in earlier grades to meet that goal.

Likely to be eliminated is the current school rating system based on students' "adequate yearly progress"

*Students will have
to leave high school
'college or career ready.'*

determined by test scores. Under the current system, every school either passes or fails each year, depending on whether students' scores have risen or fallen as compared to the prior year. This system has been criticized by educators throughout the country because it does not differentiate between schools that help low-scoring students improve and high-performing suburban schools that appear to neglect some low-scorers. Failing schools at

first must permit students to transfer to other schools in the district and provide tutoring. If the school continues to fail, harsher sanctions are imposed, including staff dismissals and closing.

A clue about the forthcoming proposals can be garnered from the administration's "Race to the Top" competition that lets states compete for one-time federal funds provided they comply with certain requirements. (See story on pp. 18-21.)

The vast majority of teachers welcome changes to NCLB.

The vast majority of teachers likely will welcome changes to NCLB, as evidenced by a study published by U.C. Riverside earlier this year. The report, "Does the No Child Left Behind Act Help or Hinder K-12 Education?" was researched and written by Patrick Guggino, a Ph.D. teaching high school English, and Steven Brint, a leading researcher of U.S. education policy and practice. Brint and Guggino interviewed 740 board-certified California teachers and discovered that 84 percent had unfavorable attitudes about NCLB. They found that 61 percent of the teachers said the act created an overly narrow conception of education, 46 percent said it diminished creativity, and 59 percent said it had unintended consequences, such as less creativity in the

classroom, and increased influence by textbook companies on the content of instruction. One in four teachers said the act lowered their commitment and loyalty to the profession, and two in five said it had a negative influence on their enthusiasm for teaching.

Almost 60 percent of those interviewed said NCLB significantly affects the teaching profession: teachers focus on test performance to the detriment of other important aspects of education, and teach "scripts" designed by publishers. Between one-third and two-fifths said the act provided incentives to organize subject matter effectively, plan better, focus on core

subjects, increase expectations for student learning, and see all students as capable of learning. But only one in four reported that the act helped them improve as instructors.

The UCR researchers recommend that those seeking to improve NCLB pay close attention to the ideas of those on the ground. "The teachers we surveyed are among the most qualified teachers in the public system, and they are experienced hands in the classroom. Their views of the legislation should be taken seriously," said Brint.

The full report can be found at www.policymatters.ucr.edu. *

Bargaining Updates

West Contra Costa County

IN THE LAST ISSUE, *CPER* reported that the West Contra Costa County Unified School District and United Teachers of Richmond had reached a tentative agreement after more than a year of contentious negotiations, including imposition of a contract by the district and a strike authorization vote by the union. (See full story at *CPER* No. 197, pp. 30-31.) But, it turns out, the drama did not stop there. In November, the teachers rejected the contract by a vote of 701-671, but only after union leadership had announced that the contract had been approved and union members had forced a recount. Subsequently, some union

members circulated a petition calling for the recall of UTR President Pixie Hayward Schickele.

In early December, district and union bargaining team members met again with a state mediator and hammered out a second tentative agreement, similar to the first. It was approved by the union by a slim margin of 423 to 415. Critics of the tentative agreement complained that the vote had been called on extremely short notice, less than three days after the tentative agreement was reached, and was held in remote locations. Fewer than 25 percent of the total union membership voted to accept the pact. The school board unanimously rati-

fied the contract the day following the union vote.

The three-year contract, retroactive to July 1, 2009, includes a wage freeze through July 2011 and requires five furlough days a year, amounting to a 2.5 percent pay cut. It eliminates fully paid health benefits for workers and retirees. Health care benefits are capped at \$532 a month for single employees, \$625 for an employee and one dependent, and \$895 for an employee with multiple dependents. Between July 1, 2010, and June 30, 2012, the district's maximum contribution to employees' health care will not exceed \$13 million. Teachers who retire before July 2010 will still get full health care benefits, but, between now and June, they will have to make the same contributions as other workers.

The contract provides for a per-teacher maximum class size *average* of 38 students for math, social science, science, English, and English-language development classes in grades 6 through 12. This means that a teacher could have 32 students in one class and 44 in another. For other subjects, there must be a 1:32 average teacher-to-student ratio. Class sizes are capped at 31 for kindergarten through third grade, and at 33 in all higher grades.

If the district's "base revenue limit" is fully funded by the state, the issue of compensation can be reopened if both sides agree. The issue of class size can be reopened during the 2011-12 school year.

Oakland, Capistrano, Pajaro Valley

In the face of unprecedented budget cuts and massive layoffs, several teachers unions up and down the state have engaged in tough bargaining.

In January, members of the Oakland Education Association, by a vote of 726 to 45, authorized the union leadership to call a one-day strike, assuming the currently scheduled factfinding procedure does not result in an agreement. At the same meeting, members unanimously voted to reject the Oakland Unified School District's final offer, which included no enhancements to the pay scale. The union and the district have been negotiating since their last contract expired in July 2008. The district declared impasse last summer. Despite the union's strike vote, the district is predicting that the two sides will reach a settlement, as they did in 2006.

The Capistrano Unified School District and the Capistrano Unified Education Association spent 19 hours unsuccessfully attempting to come to an agreement during factfinding on January 25 and 26, 2010. The district declared impasse last June and mediation took place from July through October. Although the parties are bargaining only for the 2009-10 school year, ramifications of budget cuts in 2010-11, totaling \$34 million according to the district, factor in. The district is seeking a salary cut of more than 10 percent over two years, retroactive to July 1, 2009, as well as

class size increases, and permanent compensation cuts in salary and health benefits.

The union's last proposal, presented during factfinding, was for a two-year agreement including two furlough days the first year and five the second, and a 1 percent reduction in health benefits continuing for both years. It was prepared to accept the district's proposal to increase class size by one student in grades 1 through 12. The union sought language to "trigger off" compensation cuts if funds increased, and restoration of the current salary schedule and work year at the end of the agreement. The factfinding report is expected at the end of this month.

And, contentious year-long negotiations between the Pajaro Valley School District and the Pajaro Valley Federation of Teachers came to an abrupt halt in November when, the day after negotiations broke down, the district announced it had found additional money.

At the time negotiations faltered, the union had agreed to 12 furlough days over two years, but in return wanted binding arbitration of disputes and a plan to make up for financial losses when the budget recovers. The district refused to agree to these union demands in return for the furlough days. The district and the union did agree on an early retirement plan to "help provide budgetary relief." *

State Employment

Unions Win Some, Lose Some Furlough Lawsuits

AFTER LOSING the first legal challenges to the governor's furlough order, unions have found some successful arguments. Even in similar cases, though, decisions of the trial judges conflict. While several judges have ruled against furloughs, most state employees still are suffering the pay cut whether or not they can take time off. Because the decisions have been appealed, the litigation may last longer than the furloughs, which end in June. Unions have had no success in arbitration or at the Public Employment Relations Board.

SCIF Employees Exempt

A year ago, the initial lawsuits against the furlough order were unsuccessful. In consolidated cases filed by the California Association of Attorneys, Administrative Law Judges and Hearing Officers in State Employment, SEIU Local 1000, and unions representing engineers and scientists, Judge Patrick Marlette in Sacramento County ruled that the furlough had not violated Gov. Code Sec. 19826(b) by reducing salary ranges for represented employees. The furloughs were a reduction in work hours, and Sections 19851 and 19849 allow the governor

to reduce hours to meet the needs of state agencies during the fiscal crisis, he decided. He also found that an emergency exception in the Dills Act and provisions in union contracts permitted the governor to act unilaterally because of the crisis and the legislature's failure to pass a budget. Claims under the Fair Labor Standards Act were also unsuccessful.

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(See story in *CPER* No. 195, pp. 54-58.)

The judge later ruled that civil service employees of constitutional officers, such as the superintendent of public instruction, also are subject to the governor's order. And Judge Marlette was not convinced that the emergency had subsided when the legislature enacted a budget. Furloughs for state employees were factored into that budget, he observed. (See story in *CPER* No. 195, pp. 58-59.)

CASE then filed another petition asking the court in San Francisco to rule that employees of the State Compensation Insurance Fund could not be furloughed because state law exempts them from hiring freezes and "staff cutbacks," and because they are paid with SCIF funds rather than state general funds. CASE won. Judge Peter Busch reasoned that furloughs amount to staff cutbacks in violation of the Insurance Code since they affect the availability of staff. In September, SEIU Local 1000 won a similar case for SCIF employees it represents in front of another San Francisco judge, Charlotte Woolard.

CCPOA Loses, Then Wins

The California Correctional Peace Officers Association also lost before Judge Marlette. Because employees represented by CCPOA were subject to "self-directed" furloughs, however, the judge's decision offered a glimmer of hope. There was no proof yet that correctional officers would be unable to use their furlough days before they expire, but the judge hinted that it would be possible to argue that an inability to take furlough days amounted to a change in salary ranges in violation of Sec. 19826(b). (See story in *CPER* No. 195, pp. 54-58.)

In March, CCPOA filed another lawsuit in Alameda County. This time the union alleged that hundreds of employees had been denied the right to take furlough days because there is insufficient staff to cover furloughs

without paying overtime, which is forbidden by the governor's executive order. The union argued it would be impossible for all the employees to take all furlough days before they expire in July 2012.

Judge Frank Roesch found that all officers have had their salaries reduced each month, but few have experienced a reduction in hours. He rejected the governor's arguments that there was no change in the rate of hourly compensation and that employees were able to take furlough time instead of using vacation leave. The evidence from both experts showed that not all employees could use their furlough days each month and the backlog of furlough credit was growing. Absent evidence that all employees will be able to take 46 furlough days and vacation before

July 2012, the court concluded it could not be done. For the pay periods in which an employee was compensated for fewer hours than she worked, the judge concluded that the furlough order constituted a reduction in salary in violation of Gov. Code Sec. 19826(b) and a change in wage scale in violation of Labor Code Sec. 223. They also were not paid minimum wage for the uncompensated days, he ruled.

The judge's order directed the governor to pay employees for hours worked for which they had not been paid or taken furlough and to rescind portions of the executive orders.

Special Fund Wins and Losses

Two weeks later, Judge Roesch ruled in favor of three unions that asked the court to find that furloughs

of employees paid with special funds are illegal. CASE, SEIU Local 1000, and the Union of American Physicians and Dentists represent employees paid with federal funds or special funds earmarked for particular programs.

The unions argued that the governor justified the furloughs by citing a general fund deficit, low cash reserves in the state treasury, and the failure of the legislature to pass a balanced budget. Furloughing employees to save money in special funds, they contended, had no rational basis and interfered with the purposes for which the special funds were created by impeding their operations.

The governor argued that special funds which were saved through furloughs could be borrowed to meet fiscal obligations. The unions replied

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The cure for boredom is curiosity. There is no cure for curiosity.
-- Dorothy Parker, writer

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

This Guide provides a thorough description of the Dills Act—how it works, its history, and how it fits in with other labor relations laws. Also included are Public Employment Relations Board enforcement procedures, the text of the act, and a summary of all key cases that interpret the act, with complete citations and references to CPER analyses. In addition, there is a summary of PERB rules and regulations, a case index, and a glossary of terms designed for Dills Act users.

Pocket Guide to the Ralph C. Dills Act

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

that federal funds and some special funds cannot be borrowed by the state's general fund to meet its cash needs, but the governor contended that he has the discretion to decide that furloughs were the best method to deal with the financial crisis. He explained that he furloughed employees, regardless of funding source, based on principles of labor parity and sharing the burden among all employees.

Judge Roesch interpreted Gov. Code Sec. 19851 differently than Judge Marlette. While the law gives the governor the power to establish different workweeks based on the needs of varying agencies, the governor abused his discretion when he ordered a workweek reduction for all state workers without regard to the individual needs of various state agencies, the court decided. In addition, the governor abused his discretion by ordering furloughs of employees paid with special funds that cannot be borrowed by the general fund. Not only could these special funds not assist the state with its fiscal crisis, in some cases the furloughs actually increase state costs.

The judge also decided that the governor violated the law even when furloughing employees paid with borrowable special funds. The Government Code permits borrowing only when it does not "interfere with the object for which a special fund was created." The evidence in each case showed the governor had abused his discretion when furloughs interfered with the purpose of special funds. The

judge found furloughs have delayed the work of employees who review Social Security disability applications, delaying payments to disabled Californians. They have increased wait times and backlogs at the Department of Motor Vehicles. And, they have caused backlogs for administrative law judges and caused agencies to hire expensive outside attorneys because of unman-

The governor abused his discretion by ordering furloughs of employees paid with special funds.

ageable caseloads of furloughed state attorneys.

Unlike Judge Marlette, Judge Roesch was not persuaded that the emergency which the governor cited to justify furloughs continued to authorize them. The Emergency Services Act does not contemplate the governor declaring an emergency and suspending legislative authority for more than a temporary period, he declared. In addition, the legislature's failure to pass a budget no longer could justify the furlough order. The judge commanded the governor to rescind portions of the executive order.

After the Alameda court's special fund ruling, California Association of

Professional Scientists had high hopes it would win its special fund case. Like UAPD, Local 1000, and CASE, CAPS argued that furloughing employees paid with special funds was an abuse of discretion and that state law permits borrowing from a special fund only when it does not "interfere with the object for which a special fund was created." The union also reiterated the argument that the furloughs were essentially reductions in salary that the governor could not implement without bargaining or legislative approval. But San Francisco Judge A. James Robertson ruled against CAPS without explaining his reasons. One difference in the CAPS petition is that it did not identify special funds that were not borrowable.

CalPERS Rebuffed

The California Public Employees' Retirement System also lost litigation that made similar arguments as the successful special funds cases. CalPERS pointed out that its employees who manage the retirement fund and invest its assets are paid out of CalPERS trust funds which cannot be borrowed. CalPERS also contended that the furloughs impair the vested rights of state employees by impeding work of CalPERS employees when they most need to respond to extraordinary investment losses, including the ability to trade daily in the securities markets. In addition, the agency argued that the Emergency Services Act did not give the governor the power to declare a

year-long emergency, and that Proposition 58, which is the appropriate way to act on a fiscal emergency, was violated when the governor imposed three days of furlough without legislative approval.

Judge Woolard, who struck down furloughs of SCIF employees, upheld furloughs of CalPERS employees. Like Judge Marlette, she decided that the governor has broad authority to control the workweek. She rejected the contention that the governor did not have power to furlough employees. Unlike Judge Roesch, she did not find the governor abused his discretion. She wrote, "The Governor acted reasonably in furloughing all employees to preserve funds and maintain parity."

Still Furloughed

Despite some victories, most state employees remain furloughed while cases are on appeal. The Department of Personnel Administration has exempted only highway patrol officers, highway patrol dispatchers, and firefighters during the fire season.

Employees of constitutional officers initially were exempted from the furlough order and were not being furloughed at the time the controller and other constitutional officers appealed the ruling. The 15,000 employees have never been furloughed. SCIF employees also are not being furloughed. Ordinarily, a trial court ruling is automatically stayed on ap-

peal. But the court lifted the stay after CASE argued that continued furloughs would cause irreparable harm to the employees.

As *CPER* went to press, CCPOA was embroiled in a fight to end furloughs for correctional officers. The governor appealed the case, but CCPOA and Controller John Chiang argued that the appeal was premature and was not effective to stay Judge Roesch's ruling. The Court of Appeal asked for briefing on the point in late January, after temporarily ordering a stay of the ruling. The stay prevents the controller from issuing full paychecks until February at the earliest. *

STATE EMPLOYEE PAIN TO CONTINUE

Most state employees are suffering from furloughs that cut pay over 14 percent. The governor's budget proposal would not renew furloughs after they expire in June, but employee pay likely would not rise under his plan.

The governor is asking the legislature to enact a 5 percent pay cut for state employees. That would increase to 10 percent if the state is unable to garner enough money from the federal government. Under the Dills Act, the Department of Personnel Administration ordinarily would attempt to bargain such a concession. But, as Legislative Analyst Mac Taylor noted in a recent report, state labor relations are now largely "dysfunctional," and it is unlikely the unions will agree to pay cuts in time to pass a budget this summer. As confirmed by a recent decision by the Public Employment Relations Board, the legislature retains the power to set salaries and other terms and conditions of employment. (See story on the following page.) But, politically, it may be unwilling to enact a pay cut.

Even more problematic is the governor's proposal to force state employees to pay 5 percent more into the retirement system. Pensions are considered a vested right from the first day of employment, and courts generally overturn changes to pensions unless employees obtain benefits that offset detrimental alterations of pension rights. In the current budget crisis, the state has little to offer employees in exchange for their higher pension contribution.

Few state employees have been laid off, but a third prong of the governor's plan may result in more job losses. Each agency has been asked to cut payroll by 5 percent through attrition, eliminating vacant positions, and/or layoffs. While the governor has sent out notices of potential layoff to thousands of employees, most have been avoided through two avenues: employees have found unthreatened vacant state jobs or departments abolished vacancies. Both of these tactics likely will be harder this next time around.

Law Altering Overtime Calculation Not a Unilateral Change by Legislature, Governor

THE LEGISLATURE had authority to enact a law that changed overtime compensation, even while a union's expired contract was still in effect under the Dills Act, the Public Employment Relations Board ruled in December. The legislature's delegation to the governor to bargain with unions about terms and conditions of employment does not restrict its power to enact laws that affect overtime compensation, said the board, and the governor had no obligation to give the union notice and an opportunity to bargain before proposing the legislation. The board reiterated its position that it has no jurisdiction to rule on constitutional claims of impairment of contract.

Leave Not Counted

Stationary Engineers Local 39 and the state were parties to an MOU that provided, "For the purposes of computing overtime, all compensable time (i.e., sick leave, vacation, annual leave, holiday credit, CTO and personal leave) shall be considered as time worked."

The MOU expired on June 30, 2008. In November 2008, the governor called a special legislative session to address the financial crisis and proposed that leave no longer be counted as time worked when calculating overtime. In December 2008, the Department of Personnel Administration made the

same proposal at the bargaining table, but no agreement was reached.

In February 2009, the legislature passed a budget and legislation that excluded paid and unpaid leave from "time worked" for overtime purposes. DPA later negotiated with the state firefighters union an exemption from the new overtime provisions.

Local 39 contended that the state unilaterally changed employee compensation without providing the union an opportunity to bargain. The board agent dismissed the charge, and the union appealed to the board.

Legislative Authority

The board rejected Local 39's argument, relying on *State of California (DPA)* (2008) PERB Dec. No. 1978-S, 193 CPER 73. In that case, there was a collective bargaining agreement in effect between the state and AFSCME Local 2620 when the state enacted the alternative retirement program for new state employees. AFSCME argued that the ARP was a unilateral change in violation of the Dills Act. The board turned aside AFSCME's contention that the state was required to bargain the decision to implement the new program. Although the Dills Act delegated authority to the governor to bargain collectively with employee representatives, the act does not preclude the legislature itself from

exercising its authority to determine terms and conditions of employment, the board held, citing *Department of Personnel Administration v. Superior Court* (1992) 5 Cal.App.4th 155, 94 CPER 8.

Local 39 contended that the act required the state to give effect to the terms of its expired agreement because no impasse had been reached, but the board was not persuaded that the stage

Nothing indicates the legislature intended to tie its hands while DPA bargained after expiration of an MOU.

of the parties' bargaining made any difference in this case. The board found nothing to indicate the legislature intended to tie its hands while DPA is bargaining with a union after expiration of an MOU.

The board also found the governor had not violated the Dills Act by proposing the overtime change to the legislature. The board previously has held that when the governor acts as a participant in the legislative process, he is not obliged to give notice and an opportunity to bargain before proposing a budget or before signing legislation that affects terms and conditions of

employment. The fact that the governor proposed the overtime change makes no difference, the board held. The governor “acted pursuant to his constitutional obligation to keep the State ‘solvent and operating,’” the board noted.

Local 39 could not persuade the board that DPA’s refusal to extend to Local 39 the same exemption from the new overtime provisions that it negotiated with the firefighters’ representative was bad faith bargaining. The act does not require the state to offer every union the same benefits in bargaining, the board held. PERB noted that the legislation allows MOUs reached after

the effective date of the legislation to supersede the prohibition on recognizing leave as time worked.

The board agent’s failure to address the union’s contention that the state had impaired its contract did not require reversal of the decision to dismiss the charge. PERB has no jurisdiction to adjudicate constitutional claims, it reminded the union. The decision leaves it to the courts to resolve whether an expired contract can preserve past overtime conditions. (*Stationary Engineers Loc. 39, IUOE, and State of California [Dept. of Personnel Administration]* [12-22-09] PERB Dec. No. 2085-S.) *

annual compensation multiplied by years of service. The 3 percent factor was also enacted for peace officers and firefighters who retire at or after age 55, but firefighter and correctional officer unions soon negotiated a “3 percent at 50” formula. State safety members became eligible for a 2.5

The governor wants to change the benefit formula for firefighters and highway patrol officers to 3 percent at 55.

Pension Reform Revisited

THE GOVERNOR is both complaining about rising pension costs and volunteering to pay more. On one hand, as state payments to the pension fund continue a long climb, the governor is demanding reform. On the other, in December, he offered to pay a larger amount into the fund than the California Public Employees Retirement System required. Since CalPERS refused to set a higher minimum contribution, he will have to convince the legislature that it is better to pay down unfunded liabilities during a crisis than postpone the debt payment to better times. Meanwhile three new pension reform initiative petitions are circulating.

Back to 1999

The governor proposes returning to pension formulas that existed before the legislature and former Governor Davis enacted S.B. 400, which boosted benefits for any employee who retired on or after January 1, 2000. He estimates that the changes, which would apply only to state employees hired after July 1, 2009, would save \$74 billion over the next three decades.

The proposal includes rolling back several retirement enhancements enacted or bargained since 1999. S.B. 400 changed the benefit formula for highway patrol officers who retire at or after age 50 to 3 percent of the highest

percent factor at age 55, and in 2002, legislation expanded the definition of safety employee to include more classifications. Miscellaneous and industrial employees are eligible for a 2 percent formula at age 55, but can earn a 2.5 percent formula if they wait to retire until age 63.

The governor wants to return to the prior definition of safety classifications, change the benefit formula for firefighters and highway patrol officers to 3 percent at 55, and return other peace officer, safety employee, miscellaneous, and industrial categories to the formulas that existed prior to S.B. 400. Peace officers would be eligible for a 2.5 percent benefit factor at age 55, and safety employees would earn

a 2 percent factor at age 55. Miscellaneous tier I employees and industrial employees could retire at age 60 with a 2 percent formula or work longer to achieve a 2.418 percent factor at age 63. Only state miscellaneous tier 2 members who elect not to make monthly contributions and earn a lower benefit would not be affected. They would continue to be eligible for a 1.25 percent benefit factor at age 65.

In addition, the compensation used to calculate benefits would be based on the average of the three highest years of salary, not the single highest year that S.B. 400 enacted. Basing the benefit on an average of three years is designed to diminish

the effects of “spiking,” where an employee takes a higher-paying job or promotion for only a year prior to retirement and gains a benefit much higher than predicted.

The governor’s proposal would save another \$2 billion by making employees contribute to retirement based on their entire earnings. Currently, miscellaneous and industrial employees contribute 5 percent of the amount of their monthly salary over \$513. Other categories of employees pay 6 or 8 percent of the amount of their salaries above specified floors.

The governor also proposes lengthening the vesting period for full retiree health benefits to 25 years of service. Employees now earn a 50

percent state contribution to retirement health benefits after 10 years and a full contribution after 20 years.

Paying More

The impetus for the governor’s plan is the rising cost of contributions to the state’s pension fund. In his State of the State address in January, the governor complained that the state’s pension contributions were up 2,000 percent in the past 10 years. He acknowledged that an increase in pension costs would affect government services, universities, and parks.

When staring at a \$20 billion budget deficit, most people would be reluctant to voluntarily increase the deficit by \$1 billion. But the governor

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Facts do not cease to exist because they are ignored.

-- Aldous Huxley, writer

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

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

Pocket Guide to the Unfair Practices: California Public Sector

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

<http://cper.berkeley.edu>

tried to persuade CalPERS to require a bigger state contribution than its actuarial methods called for.

The state's CalPERS contribution has increased dramatically since 2000-01, when the state paid almost nothing into the fund for miscellaneous and industrial members because there was a surplus. For 2009-10, the state will

The governor tried to persuade CalPERS to require a bigger state contribution.

pay \$3.3 billion for all categories of employees and is contributing over 16 percent of payroll for miscellaneous employees.

Under pre-2009 actuarial practices, the state's pension costs likely would have risen to \$4.2 billion for 2010-11. The CalPERS actuaries decided, however, that the spike in costs was due to the highly unusual financial crisis and market crash of 2008, rather than a normal fluctuation in market value. They suggested spreading the 24 percent loss over three years, and paying it off separately over 30 years, without using stock market gains to pay for the loss. This method would both moderate the increase in required benefit costs during the next two years of the economic crisis and call for higher rates beginning in 2013-14,

when the economy and tax revenue are predicted to improve. Rather than \$4.2 billion, the board estimates that the state's contributions will total only \$3.5 billion in 2010, a \$200,000 increase.

The governor, however, recognized that actuaries will likely find the state pension fund fell from approximately 85 percent funded in 2008 to about 61 percent funded in 2009. Making contributions earlier allows them to be invested longer for a higher return over the long run. The governor's senior advisor for jobs and economic growth, David Crane, wrote in a letter to the *Sacramento Bee*, "Every dollar not contributed today is a borrowing at a 7.75 percent interest rate," which is CalPERS' assumed annual rate of return. Therefore, the governor tried to persuade CalPERS to set the state contribution for 2010-11 at \$4.5 billion, higher than the amount that would have been required without the three-year phase-in of the 2008-09 loss. The governor's proposed method would have returned the state pension fund to 85 percent funded within 30 years, assuming a 3.25 percent annual payroll increase and a 7.75 percent annual return on investments.

The board declined to adopt the governor's payback method as policy. It adopted for the state a method for paying for the 2008-09 loss that is similar to its phase-in plan for local and school funds. The state would be allowed to contribute more, but the governor would have to convince the legislature to make the necessary appropriation.

That appears unlikely when the state will have to find \$20 billion in cuts to services or increases in revenue.

New Initiatives

Rising pension costs first set off alarms as early as 2002, when losses in the market in 2001 began to affect employer pension contributions. Several pension reform initiatives began

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to circulate in 2004. As old initiative proposals have failed to obtain enough signatures to qualify for the ballot, new ones have appeared. One new measure would cap initial retirement benefits at \$100,000. Two others would reduce retirement benefit formulas and raise the minimum ages for a maximum retirement benefit.

The "Public Employee Pension Limitation Law" would apply to state or local employees hired on or after the initiative's effective date. It will limit a state or local retiree's first year of pension benefits to \$100,000. A retirement board could boost the pension amount by the increase in the Consumer Price Index for California. The maximum pension could never exceed \$162,500 annually. The measure could not be amended except by a three-quarters

vote of the legislature or a majority vote of the electorate. The measure must obtain nearly 434,000 signatures by June 14, 2010.

The other two initiative proposals are nearly identical measures filed by Marcia Fritz, president of California Foundation for Fiscal Responsibility, a pension reform organization founded by former State Senator Keith Richman. These measures would make larger reductions to benefit formulas than the cuts proposed by the governor and would apply to public employees

The two measures also would limit eligibility for retiree health benefits.

hired after July 1, 2011. Peace officer and firefighter members would not become eligible to retire until age 53 and would not be eligible for full benefits until age 58. The maximum multiplier would be 2.3 percent, rather than the 2.5 percent proposed by the governor. Other public safety employees could not collect retirement pay until age 55 and would become eligible for the maximum 1.8 percent formula at age 60. The remaining public employees would not become eligible for the full retirement formula until the age at which they could collect full Social Security benefits. Those who paid into Social Security would be entitled to a

1.25 percent formula. If not, the maximum factor would be 1.65 percent.

Like the governor's proposal, the Fritz initiatives would calculate benefits based on the highest three years of pay. No initial pension could be higher than 75 percent of pay, and cost-of-living increases would be capped at 3 percent. Other provisions would prohibit retroactive pension increases for current employees, require employees to contribute at least 4 percent of pay, and limit early retirement options.

The two measures also would limit eligibility for retiree health benefits. Employees generally would not be eligible for these benefits until they reached full retirement benefit age, and then only if they had worked full-time for a public agency for five consecutive years immediately preceding

retirement, and for 10 years altogether. The measure would also require pre-funding for retiree health benefits and would not permit pension funds to be used for health benefits.

The two Fritz measures differ only in how higher benefits could be enacted. One would require a majority vote of the electorate in a local jurisdiction and a two-thirds vote of the legislature for state and University of California pensions. The other would require two-thirds of the voters in a local jurisdiction to approve an increase in benefits or three-quarters of the legislature for state and U.C. retirement benefits. The measures must collect 695,000 signatures by June 14, 2010. *

Receiver Is Not Automatically Immune From Suit

THE RECEIVER in charge of the prison medical system is subject to suit in federal court for actions taken while operating the system, the Ninth Circuit Court of Appeals has held. The receiver used the services of Medical Development International, but terminated and refused to pay for the services because it suspected the company did not have a valid license to contract with physicians and hospitals or track patient care. MDI went to court to obtain payment from the receiver and the California Department of Correc-

tions and Rehabilitation for services it already had rendered. The receiver was sued in his official capacity, not personally. As a practical matter, any damages paid to MDI would come from CDCR funds controlled by the receiver.

MDI filed suit in state court, but the receiver removed the case to the eastern district federal court. That court held that the receiver was immune from suit unless the northern district federal court that appointed him would allow suit. Because CDCR was acting on the receiver's orders, the

court dismissed MDI's claim against both CDCR and the receiver. MDI sought permission from the northern district court to sue the receiver, but the court refused on the grounds the receiver was immune for actions connected with his receivership duties. MDI appealed the immunity rulings.

The appellate court disagreed that the receiver had absolute immunity from suit over his transactions as receiver. There is a long-standing rule

'A receivership does not create a liability-free zone.'

that a party cannot sue a receiver unless the appointing court agrees. The rule primarily is applied to proceedings where the receiver or trustee is reorganizing a company or liquidating property. There is a statute, however, that makes the rule inapplicable to receivers who are carrying on business transactions. The court observed that MDI was not challenging the receiver's authority or his appointment. Since the prison medical receiver was carrying on the operations of the inmate medical system and was sued for its transactions in connection with those prison operations, the appellate court held that the rule requiring permission to sue a receiver did not apply to MDI's suit. The eastern district court therefore had jurisdiction over MDI's case.

The court also overturned the northern district court's ruling that the receiver is absolutely immune from suit. The receiver argued that he had the same immunity as the federal court, and CDCR argued that it should also be immune because it was only following the receiver's orders. But the court found these arguments untenable. "A receivership does not create a liability-free zone," the court scoffed. The receiver's attempt to blame CDCR for entering into a relationship with MDI, and CDCR's claim that it only severed the relationship on orders of the receiver is a "Catch-22 gambit [that] cannot succeed," the court said. "Assuming that MDI has a valid claim, some courthouse door should be open to it."

The court observed that the statute discussed previously, 28 USC Sec.

929(a), indicated that receivers could be sued, and court decisions have also acknowledged that receivers may be sued. The northern district court could not give the receiver power to refuse to permit CDCR to pay its legal obligations, the appellate court reasoned, so judicial immunity cannot extend to everything a receiver may do.

The court distinguished the cases the northern district court had cited in support of its decision that the receiver had immunity. In those cases, the appellate court observed, the plaintiffs were challenging the appointment of a receiver or the receiver's ability to act. Here, MDI was only trying to get paid. The receiver is not immune from such a claim, the court held. (*Medical Development Intl. v. California Dept. of Corrections and Rehabilitation* [9th Cir. 2009] 585 F.3d 1211.) *

A.G.'s Opinion Paved Way for December Pay Reductions for Elected Officials

IN AN INFORMAL opinion that conflicted with prior advice his office issued only months before, Attorney General Jerry Brown told the California Citizens Compensation Commission that the salaries of elected officials could be reduced during their current terms in office. Salaries of legislators and elected constitutional officers fell at least \$21,000 on December 7.

At the end of May 2009, the commission cut salaries of legislators,

Board of Equalization members, the governor, and other elected officials by 18 percent effective December 7. But a deputy attorney general advised the commission in a June 16, 2009, letter that the lower salaries could not be implemented for any sitting official due to Article IV, Sec. 4(a), of the California Constitution, which prohibits reduction of elected state officers' pay during their term of office. It looked like the salary savings of \$2.9 million

would not be realized until after the November 2010 elections. (See story in *CPER* No. 196, pp. 48-49.)

On November 19, 2009, however, the A.G. issued another informal opinion paving the way for his own salary cut. Like his deputy, Brown recognized the conflict between the language that states, “Salaries of elected state officers may not be reduced during their term in office,” and language added in 1990 to Article III of the Constitution

*On December 7,
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\$95,291.*

that sets up a commission to “adjust the annual salaries of state officers... [which] shall be effective on or after the first Monday of the next December.” Whereas his deputy thought the two provisions could be harmonized by delaying a downward adjustment in salaries until a legislator’s next term, Brown found an irreconcilable conflict.

Brown’s examination of the ballot arguments for and against Proposition 112, which set up the commission, led to his conclusion that the voters intended to allow downward adjustments to become effective the next Decem-

ber. Proposition 112 did not expressly repeal Article IV, Sec. 4(a), and the ballot materials made no reference to the conflict. But the pamphlet represented to voters that the proposition “repeals current provisions setting salaries” and “establishes...[a] commission... to annually establish salaries.” It told the electorate that the commission’s original salary resolution would be effective for one year and be adjusted annually. Most important, the rebuttal to the opponents’ ballot argument stated, “The opponents didn’t tell you that the Commission has the power to lower salaries.”

Based on this ballot pamphlet text, which his deputy considered but did not discuss, Brown advised that the two sections of the constitution could not be harmonized, and that the newer language of Proposition 112 impliedly repealed Sec. 4(a).

On December 7, Brown’s salary went from \$184,301 to \$151,127, as did the salary of the superintendent of public instruction. Other officials also suffered 18 percent pay cuts. For example, the controller’s, treasurer’s, and insurance commissioner’s pay fell from \$169,743 to \$139,189. Top legislative leaders’ salaries were cut from \$133,639 to \$109,584, and rank and file legislators’ salaries were reduced from \$116,208 to \$95,291. While there have been grumblings from the legislature, no official has sued to recapture the prior earnings. *

Higher Education

To ‘Satisfactorily Address’ a Whistleblower Complaint, CSU Must Discuss Discipline and Punishment

THE LITIGATION saga of a California State University coach continues after an appellate court found the university misapplied the “good faith” standard when determining whether the coach made a protected disclosure. The court also held that the university’s determination letter did not satisfactorily address the coach’s complaint because it did not state whether the retaliators had been disciplined or referred for criminal prosecution, as authorized by the whistleblower statute.

This is the second time that this case has been at the Court of Appeal. The whistleblower act permits a complainant to sue for damages only if CSU does not timely respond to the internal complaint or does not “satisfactorily address” the complaint within 18 months. In *Ohton v. Board of Trustees of California State University* (2007) 148 Cal.App.4th 749, 184 CPER 66, the coach argued that he could file a complaint for damages without petitioning the court to overturn CSU’s determination because the university had not “satisfactorily addressed” his internal complaint. The court held that he first had to petition for a writ. It did not decide whether CSU’s determination had satisfactorily addressed the complaint. It remanded the case

so the whistleblower could amend his complaint to add a petition challenging the university’s determination. In this decision, the court explains what CSU must do to satisfactorily address the complaint.

Cooperation With Auditor

David Ohton was a strength and conditioning coach at San Diego State University. He worked at times with the head football coach, Tom Craft. In response to a request from a university auditor, and in reliance on assurances of confidentiality, Ohton reported that athletic department personnel were mishandling and misappropriating department property. When the auditor requested additional information, Ohton wrote a confidential 103-page statement that contained allegations ranging from violation of the National College Athletic Association rules to a second-hand account of Craft being drunk in public the night before a game.

The auditor issued a report. A month later, Ohton discovered that Craft had obtained a copy of his confidential statement.

Ohton filed an internal administrative complaint. He alleged that, after seeing his statement, Craft began

a campaign to have him removed. When the university did not consent to Ohton’s removal, Craft requested and hired a new strength and conditioning coach. After the hire, Ohton was told to work only from 6 a.m. to 2 p.m. so that he would not be around the football players.

CSU retained an outside investigator to look into Ohton’s claims. Although the investigator found that Ohton’s allegations of NCAA rule

Ohton’s report was not protected because it had been filed for personal reasons.

violations were a factor in his removal from football conditioning, he found that Ohton’s allegations about the equipment room, the subject of the audit, did not motivate the removal.

The investigator concluded that Ohton’s lengthy report was not a protected disclosure because it had been filed for personal reasons, not to remedy the improper equipment handling issues that the auditor was pursuing. The investigator explained that Ohton’s statement about Craft was not protected because it was not made in good faith, as required by the whistleblower statute. It was a personal attack based on innuendo that did not involve improper governmental

activities. In particular, he criticized Ohton for accusing Craft of public drunkenness based on hearsay that had been refuted.

It was this attack that led Craft to remove him from his football duties and change his hours, the investigator found. He concluded that the change in hours was a legitimate reassignment due to Ohton's hostility toward the football program and his refusal to voluntarily give up football duties. However, he criticized the shift in hours as punitive, since it negatively affected Ohton's ability to work with 16 other athletic teams.

In her final decision on the complaint, the university's vice chancellor for human resources, Jackie McClain,

concluded that most of Ohton's disclosures were protected. However, she determined that the drunkenness claim was not protected because she viewed the accusation as knowingly false and vindictive. A university vice president had investigated the allegation and concluded it was false, according to McClain, because the eyewitness to the coach's condition denied seeing it and no one else corroborated the claim. Having found the allegation false, she concluded that Ohton's removal from the football program was not illegitimate because it was based in part on the unprotected false drunkenness claim. She found that the removal also was based on two factors that preceded the audit — Ohton's antipathy toward

Craft and Craft's desire to change the emphasis of strength and conditioning for football.

McClain acknowledged that the decision to change Ohton's hours was retaliation because there was no legitimate reason for the change since the football players were not present in the afternoon. Because she found the retaliation stemmed from protected statements to the auditor, CSU reinstated Ohton's hours of access to the weight room. After Ohton received McClain's decision, the eyewitness revealed that he had told the SDSU vice president about seeing Craft drunk, but asked her to keep it confidential unless no one else would corroborate his information.

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

-- James Thurber, writer

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

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

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

Pocket Guide to the Higher Education Employer-Employee Relations Act

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

‘Good Faith’ Defined

The trial court denied the petition to overturn McClain’s decision. On appeal the second time, the court stood by its prior decision that Ohton had to file a petition to overturn the university’s decision before bringing a civil action for damages. The appellate court did find, however, that CSU had not satisfactorily addressed Ohton’s complaint because it applied the wrong standard of good faith when it determined his allegations about Craft’s drunkenness were not protected.

The Whistleblower Act defines a protected disclosure as a good faith communication about an improper governmental activity or dangerous condition “if the disclosure...was made for the purpose of remedying that condition.” It allows the whistleblower to file a complaint along with a sworn statement that the contents are or are believed to be true. Elsewhere in the law, the term “good faith” means the absence of dishonesty or deceit, the court observed. The court concluded that the good faith requirement is met when the complainant files a statement under penalty of perjury which the complainant believes to be true and provides honest information to the investigator.

The court found no evidence that Ohton had made the allegation about Craft’s public drunkenness in bad faith. McClain’s decision reported that the investigator did not conclude that Ohton was dishonest.

The court criticized the reasons the investigator found an absence of good

faith. One reason given was that Ohton had relayed hearsay. “We disagree that a whistleblower’s reliance on hearsay precludes a finding the complaint was a good faith protected disclosure,” the court said, pointing out that improper governmental activity is often hard to uncover. The rationale that the allegations were refuted fared no better. “A post-investigation conclusion that the complaint was unfounded does not necessarily mean the complaint was made in bad faith,” the court advised. Nor did the possibility of a personal agenda persuade the court that Ohton’s disclosure

*‘We disagree that
a whistleblower’s
reliance on hearsay
precludes a finding the
complaint was
protected.’*

was not made in good faith. The act “does not require the impossibly high standard that the complainant’s motives be pure, or untainted by a personal or vindictive agenda,” the court declared.

Moreover, the allegation was not entirely refuted, the court pointed out. The reluctant eyewitness confirmed that he had seen Craft drunk, but at a different game. Yet CSU had relied on its finding of falsity when it concluded that Ohton had not made a protected disclosure.

Without the erroneous application of the good faith standard, the university likely would have analyzed the retaliation complaint differently, the court concluded. Therefore, CSU did not satisfactorily address Ohton’s complaint.

Punishment and Discipline

The appellate court concluded that the act required CSU to identify the retaliators in its final determination letter and state whether they were referred to criminal prosecution or disciplined. It stated:

To effectuate the goal of protecting whistle blowers, [the act] makes retaliatory conduct a criminal offense and authorizes CSU to impose discipline, in addition to whatever criminal punishment might be pursued.

Because the university did not disclose whether the retaliators had been disciplined or referred for prosecution, the court found that CSU did not “satisfactorily address” the complaint. The appellate court directed the trial court to grant the petition to overturn McClain’s decision. (*Ohton v. Board of Trustees of California State University* [2010] 1402 Cal.App.4th 180.) *

After the Last, Best, and Final

THE UNIVERSITY of California has imposed terms on one of the most powerful unions representing U.C. employees, the California Nurses Association. Despite a factfinding report recommending a 4 percent increase over the next year for most nurses, the university implemented no general salary increases. The Coalition of University Employees and the health care unit

The university hired an attorney from Littler Mendelson to bargain the contract.

represented by the University Professional and Technical Employees, CWA, are facing “final” offers and requests for impasse. In recognition of the dire economic conditions, the University of California-American Federation of Teachers librarian unit tentatively agreed to extend its agreement until September 30, 2012.

Raise Recommended

CNA and U.C. began reopener negotiations in August 2009, on benefits, staffing, and 2009-10 wages for 11,000 nurses. In an unusual move, the university hired an attorney from Littler Mendelson to bargain the contract instead of using an in-house negotiator.

The union pointed to record medical center profits and demanded an 8 percent increase effective October 2009. U.C. asserted it would be unfair to raise nurse salaries while other university employees are suffering pay cuts from furloughs. To protect patient care, medical center employees, other than senior managers, have not been subject to the sliding-scale furloughs that began in September 2009. (See story on furloughs in *CPER* No. 196, pp. 53-56.)

U.C. demanded that the union agree to employee contributions to the university’s defined benefit plan, which has not required contributions from either employees or U.C. since 1990. The university is restarting employer and employee contributions for unrepresented employees in April 2010, but has been unable to persuade unions to agree to contributions by employees they represent. (See stories in *CPER* No. 193, pp. 46-48; *CPER* No. 181, pp. 42-44.) U.C. also announced it was increasing contributions to health benefit premiums for retirees not in Medicare. For the first time, the rates were not tied to the rates of active employees. CNA was alarmed that the university’s move signaled the first step toward eliminating retiree health benefits.

The parties also sparred over staffing levels. CNA asserts that the university is not meeting state regulations at one medical center and staffing

so sparsely in three other hospitals that nurses are forced to skip meal and rest breaks to provide continuity of care to patients.

After nine sessions in August, CNA declared impasse. In November, neutral factfinder John Kagel issued his recommendations based on 10 days of evidence presented to a three-member factfinding panel.

The panel observed that each medical center had some arrangements for meal and break relief. The neutral factfinder recommended that break

After nine sessions in August, CNA declared impasse.

relief staffing “be provided as adjusted for conditions within each medical center.” He also urged that each facility notify and discuss with the professional practice committee any changes in base staffing. The committees, which consist of bargaining unit nurses, are set up to suggest improvements in patient care and nursing practice, including health and safety and staffing matters. Kagel advised administrators to discuss staffing with the committees before implementing changes.

The neutral factfinder sided with the university on benefits. He recommended the union accept university offers on health benefits that are provided to all employees. Although he noted the union’s concern with future erosion of

retiree health benefits, he recommended that CNA accept U.C.'s proposal and discuss the issue during the next round of negotiations. U.C. also convinced the neutral factfinder that it needs to restart pension contributions. Kagel recommended that the parties agree to shift to the pension plan the 2 percent contributions employees now make to a defined contribution plan.

Kagel urged the university to raise salaries, but not immediately. He cited evidence that there were plenty of qualified applicants for nurse vacancies at the medical centers, so there was no present need to attract employees with wage increases. "But what is apparent," he continued, "is that as time moves on, even in the short-term the contractual wage rates of major competitors will move ahead of current [clinical nurse] II Medical Center wage rates." Catholic Healthcare West just agreed to a 2 percent increase, another in May 2010, and a 1 percent lump payment in July, he observed. Kaiser's contract provides a 5 percent raise each year. Kagel recommended a 2 percent increase in clinical nurse II wages in late March and a 2 percent increase in September, as well as the usual step increases that all major hospital systems give for every year of service.

Pension Contribution Implemented

The parties were unable to reach agreement after the factfinding report was issued. As suggested by the factfinder, U.C. offered step increases in July 2010, and backed off its proposal

for a multi-year agreement. But the university did not offer a general salary increase. Instead it dangled longevity increases only for clinical nurse IIs and IIIs at the Los Angeles medical center. CNA did not bite.

On December 30, U.C.'s negotiator announced the university was implementing the terms of its last, best, and final offer. Active and retiree health benefit contributions increased. In April, nurses will begin to contribute 2 percent of salary to the pension plan. Although all eligible nurses will receive step increases in July, the only improvements to the salary scale are new 2 percent steps for nurses in clinical nurse II positions with 20 years of experience and 12 years of U.C. service, or those in CN III positions with at least 20 years of experience and 18 years of university service.

Nurses insist the university has enough money for the raises recommended by the factfinder. On January 21, 2010, the U.C. regents approved bonuses for 38 senior executives at the medical centers for achieving savings through joint purchasing, increasing net revenues, and decreasing catheter-related infections. A bonus of more than \$218,000 went to David Feinberg, chief executive officer of UCLA Medical Center, whose base salary is \$739,000. Mark Laret, CEO of U.C. San Francisco Medical Center, will enjoy a \$181,000 incentive payment. Although bonuses also went to other medical center workers, including bargaining unit employees, CNA asserts that nurses received a few hundred dollars, and that

non-senior managers received bonuses of 5 to 15 percent. The university did not answer *CPER* requests for more detailed information. It is clear, though, that \$3.1 million — more than 9 percent of the incentive pay total — went to 38 senior managers.

As *CPER* went to press, CNA spokesperson Beth Kean warned that nurses are preparing to strike, but have not set a date.

Negotiations Stalled

Other unions that may be looking at a similar path in the near future are CUE and UPTE. CUE and U.C. are in mediation after the Public Employment Relations Board certified the parties were at impasse, over CUE's objection. UPTE received a "final" offer from U.C. for its health care unit in October. The parties are not bargaining, but also have not reached impasse.

As *CPER* went to press, librarians represented by UC-AFT were deciding whether to ratify a tentative agreement that extends the contract. The parties have been in reopener negotiations on 2008-09 salary and professional development for nearly two years. The move would preserve salaries and provide a small increase in professional development funds in return for extending the contract one year to September 30, 2012. Severance pay rights were established for librarians in small units at certain campuses. Pension benefits were not at issue since librarians receive the same benefits and merit increases that tenured and tenure-track faculty receive. *

Discrimination

California Supreme Court Restricts Attorney's Fees in Certain FEHA Cases

THE CALIFORNIA Supreme Court, in a unanimous decision, ruled that cases brought under the state's Fair Employment and Housing Act are not exempt from Code of Civil Procedure Sec. 1033(a). The section provides that a court has discretion to deny attorney's fees when it finds that the matter should have been brought as a "limited civil case," where the amount in controversy does not exceed \$25,000. The high court rejected the argument that its holding would discourage attorneys from representing individuals who had been discriminated against, thereby undermining enforcement of the FEHA. Employers' attorneys welcomed the decision.

Background

Robert Chavez, a police officer with the Los Angeles Police Department, filed several lawsuits against the city alleging a number of violations of the FEHA, including retaliation for having filed administrative complaints with the Fair Employment and Housing Commission. The case went to trial and the jury decided in favor of Chavez on only the retaliation provision, awarding him \$11,500 in damages. Chavez' attorney requested fees in excess of \$870,000. The trial court denied the

request, applying its discretion under Sec. 1033(a).

The Court of Appeal reversed, holding that Sec. 1033(a) did not apply in FEHA actions. It reasoned that the purpose of the code section was "to encourage pursuit of minor grievances in courts of limited jurisdiction" and that this rationale does not apply in statutory discrimination or civil rights actions where "even a modest financial recovery can serve to vindicate a substantial legal right." Also, it said that denying attorney's fees under Sec. 1033(a) "would discourage attorneys from taking meritorious cases." The appellate court agreed with Chavez' attorney that, if the case had been brought as a limited civil action, she could not have deposed all the named defendants, let alone other witnesses. It also noted that the city had refused to engage in settlement discussions, forcing Chavez to litigate his claims for five years and through various courts.

Supreme Court Decision

The high court, in an opinion authored by Justice Joyce L. Kennard, reversed the Court of Appeal. It explained that Sec. 1033(a) "applies when a plaintiff has obtained a judgment for money damages in an amount (now \$25,000 or

less) that could have been obtained in a limited civil case, but the plaintiff did not bring the action as a limited civil case and thus did not take advantage of the cost- and time-saving advantages of limited civil case procedures."

The court acknowledged that the FEHA, at Government Code Sec. 12965(b), provides for an award of attorney's fees to the prevailing party and that FEHA fee awards "are intended to provide fair compensation to the attorneys involved in the litigation... and encourage litigation of claims that in the public interest merit litigation."

The plaintiff did not take advantage of the cost- and time-saving advantages of limited civil case procedures.

It also recognized that California courts have applied the United States Supreme Court's holding regarding fee awards in Title VII cases to the FEHA, that is, "a *prevailing plaintiff* should ordinarily recover attorney fees unless special circumstances would render the award unjust, whereas a *prevailing defendant* may recover attorney fees only when the plaintiff's action was frivolous, unreasonable, without foundation, or brought in bad faith."

The state Supreme Court perceived no conflict between these two statutes. "In exercising its discretion

under section 1033(a) to grant or deny litigation costs, including attorney fees, to a plaintiff who has recovered FEHA damages in an amount that could have been recovered in a limited civil case, the trial court must give due consideration to the policies and objectives of the FEHA and determine whether denying attorney fees, in whole or in part, is consistent with those policies and objectives,” the court said. If so, it continued, the plaintiff’s failure to file the suit as a limited civil case “may be considered a special circumstance that would render a fee award unjust.”

The court gave detailed instructions to the trial court to “evaluate the entire case in light of the information that was known, or should have been known, by the plaintiff’s attorney when the action was initially filed and as it developed thereafter.” This evaluation, the court said, should avoid “‘hindsight bias,’ which is the recognized tendency for individuals to overestimate or exaggerate the predictability of events after they occur.” “If, based on the available information, the plaintiff’s attorney might reasonably have expected to be able to present substantial evidence supporting a FEHA damages award in an amount exceeding the damages limit for a limited civil case, or if the plaintiff’s attorney might reasonably have concluded that the action could not fairly and effectively be litigated as a limited civil case, the trial court should not deny attorney fees merely because, for example, the trier of fact ultimately rejected the testimony of the plaintiff’s

witnesses or failed to draw inferences that were reasonably supported, although not compelled, by the plaintiff’s evidence,” said the court. However, if the trial court is “firmly persuaded” that the plaintiff’s attorney could not reasonably have had that expectation or reached that conclusion, “the trial court may deny, in whole or in part, the plaintiff’s claim for attorney fees and litigation costs.”

A reduced award is appropriate where a plaintiff achieves only limited success.

The court found no statutory provisions indicating that the legislature ever intended to prohibit the use of limited civil case procedures in the prosecution of FEHA claims. It also disagreed with the Court of Appeal’s reasoning that litigating an FEHA claim is “invariably expensive and time consuming.” In addition, it noted, although discovery is restricted in limited civil cases, the trial court has the authority to grant additional discovery if warranted.

Applying its holding to the case before it, the court found that the trial court did not abuse its discretion when it denied Chavez’ attorney an award of fees. Under California law, a reduced fee award is appropriate where a plaintiff achieves only limited success, instructed the court, citing *Sokolow v.*

County of San Mateo (1989) 213 Cal. App.3d 231. Here, it said, the plaintiff’s success “was modest at best.” Further, Chavez did not claim that the jury’s favorable decision on the retaliation claim “had any broad impact or resulted in significant benefit to anyone other than himself.”

The court cited another established principle governing attorney fee awards applicable to this case: “A fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether,” according to *Serrano v. Unrub* (1982) 32 Cal.3d. 621. In this case, the court surmised, the trial court probably concluded that the fee request was “grossly inflated in light of the single claim on which plaintiff succeeded.”

And, said the Supreme Court, because the trial court was familiar with all of the trial proceedings and with the evidence presented at trial, “it was in a much better position than this court, or the Court of Appeal, to determine whether this action could have fairly and effectively been litigated as a limited civil case” and whether Chavez’ attorney should have realized that the recovery would be under \$25,000 before the case proceeded to trial. “We have no reason to question the trial court’s determinations on these points,” said the court. (*Chavez v. City of Los Angeles* [2010] 47 Cal.4th 970.) *

No Punitive or Compensatory Damages Available for ADA Retaliation Claims

THE NINTH Circuit Court of Appeals has ruled that plaintiffs who claim that their employer retaliated against them in violation of the Americans with Disabilities Act are not entitled to a jury trial or to compensatory or punitive damages. In *Alvarado v. Cajun Operating Co.*, the court determined that such claims are redressable only by equitable relief according to the plain language of the act.

Tannislado Alvarado, age 65, worked as a cook at Church's Chicken. He performed satisfactorily for three and one-half years, according to job evaluations by his supervisors. That changed after Alvarado called Church's

hotline to complain that his supervisor, Tina Montague, had made inappropriate comments about his age. Three days later, Montague gave Alvarado his first performance counseling record. He then received six more over the next nine months. Alvarado called the hotline again to complain, arguing that the counseling records were in retaliation for his first call.

He also complained to Montague about pain he experienced in his hands when he worked in the walk-in refrigerator. She sent him to a doctor who diagnosed arthritis and cleared him to return to work the same day.

Alvarado was terminated. He filed a lawsuit alleging, in part, employment discrimination and retaliation in violation of the ADA. The district court granted the employer's motion to bar him from seeking punitive and compensatory damages for his retaliation claim and precluding him from a trial by jury on that claim.

The appellate court agreed with the district court's reading of the statute. It was not persuaded by Alvarado's argument that because compensatory and punitive damages are available under the Civil Rights Acts of 1964 and 1991, they are available for ADA retaliation claims.

The court examined the language of the act's anti-retaliation provision at 42 USC Sec. 12203 and noted that it does not delineate specific remedies

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The cure for boredom is curiosity. There is no cure for curiosity.
-- Dorothy Parker, writer

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

This Guide provides a thorough description of the Dills Act—how it works, its history, and how it fits in with other labor relations laws. Also included are Public Employment Relations Board enforcement procedures, the text of the act, and a summary of all key cases that interpret the act, with complete citations and references to CPER analyses. In addition, there is a summary of PERB rules and regulations, a case index, and a glossary of terms designed for Dills Act users.

Pocket Guide to the Ralph C. Dills Act

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

available for retaliation claims. Rather, it references remedies contained in 42 USC Sec. 2000e-5(g)(1), which provides that the court may enjoin an employer from engaging in the unlawful practice, “and order such affirmative action as may be appropriate, which may include but is not limited to, reinstatement or hiring of employees, with or without back pay..., or any other equitable relief as the court deems appropriate.” While 42 USC 1981a of the 1991 Civil Rights Act expanded those remedies to include punitive and compensatory damages for specified disability claims, it did not include ADA retaliation claims among them.

Although this issue was one of first impression for the Ninth Circuit, the

court noted that the Seventh Circuit, in *Kramer v. Banc of Am. Sec.* (2004) 355 F.3d 961, cert. denied (2004) 542 U.S. 932, ruled that compensatory and punitive damages are not available for ADA retaliation claims, concluding that “a close reading of the plain language of Sec. 1981a(a)(2) makes it clear that the statute does not contemplate compensatory and punitive damages for a retaliation claim under the ADA.” While several district courts have held to the contrary, “we are persuaded that the Seventh Circuit’s reliance on the plain language of 42 USC Sec. 1981a(a)(2) adheres more closely to the precepts of statutory construction,” said the court. (*Alvarado v. Cajun Operating Co.* [9th Cir. 2009] 588 F.3d 1261.) *

Covered entities are now prohibited from discriminating against an individual on the basis of genetic information in regard to any aspect of employment, including hiring, discharge, job assignment, compensation, promotion, layoff, training, benefits, or any other term, condition, or privilege of employment.

GINA also provides that no covered entity may request, require, or purchase genetic information relating to employees or applicants. The act, however, provides for six narrow exceptions.

Employers and other covered entities do not violate the act where they *inadvertently* acquire genetic information, such as during an impromptu conversation about the well-being of one of the employee’s family members. The test is the intent of the employer or other covered entity in acquiring such information.

The second exception protects employers that obtain genetic information as part of an employer-sponsored health or genetic services program, such as a wellness program. This only applies to aggregated, anonymous data about groups, not data that identifies specific individuals.

The third applies to information that is voluntarily shared by the employee. This exception is meant to cover medical and genetic information provided by the employee, or his or her physician, to comply with medical certification requirements of the Family and Medical Leave Act or other similar laws.

GINA Employer Provisions Now in Effect

THE GENETIC Information Non-Discrimination Act of 2008 prohibits discrimination by health insurers and employers on the basis of genetic information. Title I of the act covers health insurers. Title II of the act, which imposes significant restrictions on the ability of employers to obtain and use genetic information, took effect on November 21, 2009.

Genetic information includes information about an individual’s genetic tests and the genetic tests of an individual’s family members, as well as information about any disease, disorder, or condition of an individual’s family

members, i.e., an individual’s family medical history.

With the exception of the United States government, GINA applies to both private and public employers with 15 or more employees, employment agencies, labor unions, and apprenticeship and training programs. It prohibits discrimination on the basis of genetic information, the intentional gathering of genetic information about employees or applicants, and retaliation against any employee who complains about a violation of the act. It also contains new rules protecting genetic information obtained by employers.



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

-- Sir Winston Churchill, statesman

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

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

Pocket Guide to Due Process in Public Employment

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

<http://cper.berkeley.edu>

Another, fourth, exception protects employers that acquire genetic information through commercially and publicly available materials, such as newspapers, magazines, periodicals, and books, providing the employer is not searching those sources with the intent of finding genetic information.

The fifth exception protects covered entities that gather genetic information while monitoring the effects of toxic substances in the workplace in accordance with the law or where the employer has first obtained the employee's knowing and voluntary authorization. The employee must be provided with the results of the monitoring.

The last exception protects employers that conduct DNA analysis for law enforcement, such as a forensic

laboratory, or in order to identify human remains. Such an employer may conduct genetic testing of its employees for quality control to detect sample contamination.

GINA requires that all employers safeguard genetic information, regardless of how it is obtained. It must be kept separate from personnel files.

The act permits covered entities to disclose genetic information if it is requested by the employee or his or her union, in response to a court order, in support of certain occupational health research or investigations into GINA compliance, as part of the administration of disability and medical leave laws, or requested by contagious disease officials.

Retaliation against an employee

because he or she has opposed any act or practice made unlawful by GINA, or who makes a charge, testifies, assists, or participates in any manner in an investigation, proceeding, or hearing under the act is prohibited. It is also illegal to harass a person because of his or her genetic information.

The same remedies, including compensatory and punitive damages, are available under Title II of GINA as are available under Title VII of the Civil Rights Act and the Americans with Disabilities Act.

The Equal Employment Opportunity Commission is charged with issuing regulations implementing Title II of the act. On March 2, 2009, it published a Notice of Proposed Rulemaking with proposed regulations. It

received over 40 public comments in response. The EEOC has announced that the final regulations are now under

review by the Office of Management and Budget and will be issued when the review process is completed. *

Employee with TMD Not Disabled Under ADA

THE NINTH Circuit Court of Appeals, in *Becerril v. Pima County Assessor's Office*, found that the plaintiff's temporomandibular disorder was not a disability within the meaning of the Americans with Disabilities Act and that, therefore, she was not entitled to reasonable accommodation. The court also held that

The employer articulated nondiscriminatory reasons for the reassignment.

she failed to state a prima facie case of discriminatory reassignment.

Becky Becerril, who suffers from TMD, worked originally in the mobile home section of the county assessor's office. Her supervisor, Richard Lyons, reassigned her to the office's public service section. The public service section is stressful, and Becerril's condition is aggravated by stress. Becerril requested a transfer as a reasonable accommodation under the ADA. Her request was denied.

Becerril filed a lawsuit, claiming that the office had discriminated against

her by reassigning her because of her disability and by refusing to engage in the interactive process after she requested reasonable accommodation. The district court dismissed her case, and she appealed.

The Ninth Circuit upheld the district court's ruling. The appellate court concluded that, even if it assumed that Becerril had established a prima facie case of discriminatory reassignment, her claim would fail because the employer articulated several legitimate, nondiscriminatory reasons for the reassignment. There was no evidence that Becerril was reassigned because of her disability. Rather, the evidence showed that the reassignment was the result of complaints about her misconduct. The fact that Lyons never articulated his concerns about the misconduct or investigated the complaints does not show pretext, the court said, because he testified he was concerned about the "morale problem" caused by the allegations, not about the allegations themselves.

Before turning to the failure to accommodate claim, the appellate court ruled that the ADA Amendments Act of 2008, which expanded the definition of disability, cannot be applied retroactively because Congress did not show

clear retroactive intent. In so holding, it noted that it was "following our sister circuits," those being the District of Columbia Circuit, and the Fifth, Sixth, and Seventh Circuits.

Applying the law as it stood prior to the amendments, the court found that Becerril was not entitled to reasonable accommodation because she did not produce evidence sufficient to support her claim that she has a disability. She asserted that she has "a physical or mental impairment that substantially limits one or more major life activities" because the TMD substantially limits

The court found that Becerril was not substantially limited in speaking.

her in speaking, eating, seeing, sleeping, and thinking and concentrating. The court disagreed. It found that Becerril was not substantially limited in speaking because "she is limited only in talking constantly for a long time, and under stress." Her limitation in eating hard foods is not "of central importance in daily life." She produced no evidence on how her impairment substantially limits her seeing or sleeping. "And though her pain and grogginess limited her thinking and concentrating at times when she was working, Becerril has not raised a genuine issue of material fact on whether her intermittent symptoms *substantially* limited her ability to think

and concentrate not just at work but outside of work as well.” (*Becerril v. Pima County Assessor’s Office* [9th Cir. 2009] 587 F.3d 1162.) *

Personnel Management Decisions Can Be Basis for Harassment Claim

THE CALIFORNIA Supreme Court, in *Roby v. McKesson Corp.*, held that the Court of Appeal erred when it excluded personnel management actions as evidence in support of a claim of workplace harassment. In its opinion, the court discussed the differences between harassment and discrimination under the Fair Employment and Housing Act, while recognizing that “they are sometimes closely interrelated, even overlapping, particularly with regard to proof.”

Charlene Roby, a McKesson employee, suffered from “panic attacks” that came on with short notice and temporarily kept her from doing her job. The medication she took to treat her condition caused unpleasant body odor. Roby also developed a connected disorder that caused her to dig her fingernails into her arms, resulting in open sores.

McKesson’s attendance policy required 24-hour advance notice for all absences, and provided for progressive discipline based on the number of absences without advance notice. Roby accrued a number of such absences in connection with her panic attacks. Although her supervisor, Karen Schoener, was aware of Roby’s unpredictable ail-

ment, Schoener disciplined Roby for her absences.

Schoener also made negative comments about Roby’s body odor even though she knew that it was a side effect of the medication. Schoener called Roby “disgusting” because of the sores on her arms and her excessive sweating. Schoener ignored her at staff meetings, did not give her gifts that she gave to other employees on her staff, and effectively excluded Roby from office parties by requiring her to cover the office telephones. She frequently reprimanded Roby in front of coworkers and spoke to her in a demeaning manner. She made demeaning comments about her to other employees.

McKesson disciplined and ultimately terminated Roby because of her absences. Roby brought suit alleging harassment, disability discrimination, and failure to accommodate under the FEHA. The case went to trial, and the jury found for Roby and awarded her over \$4 million in economic and non-economic damages, and over \$15 million in punitive damages. On appeal, the court reduced the damages awards and ruled that the evidence was insufficient to support the harassment verdict.

Supreme Court Decision

By a unanimous vote, the justices agreed with Roby that the Court of Appeal erred when it excluded personnel management actions as evidence of harassment. The lower court had relied on *Reno v. Baird* (1998) 18 Cal.4th 640, 131 CPER 62, which said “necessary personnel management actions do not come within the meaning of harassment,” to bar plaintiffs from using personnel management decisions

*Harassment and
discrimination are
sometimes closely
interrelated with
regard to proof.*

to support harassment claims. Absent that evidence, the Court of Appeal found insufficient evidence to support Roby’s claim.

The Supreme Court instructed that, “the FEHA’s discrimination provision addresses only *explicit* changes in the ‘terms, conditions, or privileges of employment’; that is, changes involving some *official action taken by the employer.*” Where the employer is an institution or a corporation, it must have taken some official action with respect to the employee, “such as hiring, firing, failing to promote, adverse job assignment, significant change in compensation or benefits, or official disciplinary action.”

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

-- Bob Edwards, NPR radio host

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

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

Pocket Guide to Workplace Rights of Public Employees

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

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On the other hand, said the court, “harassment often does not involve any official exercise of delegated power on behalf of the employer.” Relying on its opinion in *Reno*, the court explained that “harassment focuses on situations in which the *social environment* of the workplace becomes intolerable because the harassment (whether verbal, physical, or visual) communicates an offensive message to the harassed employee.”

While discrimination and harassment are separate wrongs, they are sometimes closely interrelated, and can be overlapping, particularly with regard to proof, the court explained. It saw no reason why an employee who is the victim of discrimination based on an employer's official action cannot also be

the victim of harassment by a supervisor who conveys abusive messages that create a hostile working environment. This would give the employee two separate claims for injury under the FEHA.

In support, the court pointed to *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 174 CPER 60, in which it determined that widespread sexual favoritism in the workplace could constitute sexual harassment against the non-favored employees. “Significantly, the favoritism at issue in *Miller* took the form of official employment actions, including promotions and favorable job assignments given to female employees involved in sexual relationships with a particular male supervisor,” the court said. These actions conveyed a demeaning message to female employees that

the way to get ahead in the workplace was to engage in sexual conduct with their supervisors. The court held that this demeaning message could give rise to an actionable hostile work environment.

“Thus, in *Miller*, the immediate source of the plaintiffs' alleged injuries was the offensive sex-based *message* that the supervisor conveyed, not a demotion or an unfavorable job assignment, and therefore, the plaintiffs' cause of action was for *harassment*, not for discrimination,” the court explained. “Nevertheless, official employment actions constituted the *evidentiary basis* of the harassment cause of action, because the supervisor used those official actions as his means of conveying his offensive message.” *Miller* “makes it

clear that in some cases the hostile message that constitutes the harassment is conveyed through official employment actions, and therefore evidence that would otherwise be associated with a discrimination claim can form the basis of a harassment claim," it continued. "Moreover, in analyzing the sufficiency of evidence in support of a harassment claim, there is no basis for excluding evidence of biased personnel management actions so long as that evidence is relevant to prove the communication of a hostile message."

In this case, said the court, Roby's discrimination claim sought compensation for official employment actions motivated by improper bias, such as the progressive disciplinary warnings, assigning her to answer the telephones during office parties, and her termination. On the other hand, Roby's harassment claim sought compensation for hostile social interactions that affected the workplace environment because of the offensive messages that they conveyed to her, such as Schoener's comments about her body odor and arm sores. Other examples were Schoener's refusal to return Roby's greetings, her gestures towards Roby, and her refusal to give gifts to Roby that she gave to others. "None of these events can be fairly characterized as an official employment action," said the court, because "none involved Schoener's exercising the authority that McKesson had delegated to her so as to cause McKesson, in its corporate capacity, to take some action with respect to Roby." They were not done in

Schoener's managerial role, but rather for her own purposes.

However, the court instructed, *Miller* "makes it clear that some official employment actions done in furtherance of a supervisor's managerial role can also have a secondary effect of communicating a hostile message. This occurs when the actions establish a widespread pattern of bias." In this case, the court concluded that while some of Schoener's actions towards Roby could be characterized as official employment actions rather than hostile social interactions, "they may have contributed to the hostile message that Schoener was expressing to Roby in other, more explicit ways." The court cited Schoener's shunning of Roby during staff meetings, her belittling of Roby's job, and the reprimands she gave Roby in front of coworkers. "Moreover," said the court, "acts of discrimination

can provide evidentiary support for a harassment claim by establishing discriminatory animus on the part of the manager responsible for the discrimination, thereby permitting the inference that rude comments or behavior by the same manager was similarly motivated by discriminatory animus."

When all of Schoener's actions are considered, including official employment actions, there was ample evidence to support the jury's finding of harassment in violation of the FEHA, said the court. It ordered the jury's judgment against both McKesson and Schoener reinstated.

The court also held, by a vote of five to two, that the jury's award of punitive damages against McKesson exceeded the amount permitted under the federal constitution, and lowered the award to \$1,905,000. (*Roby v. McKesson* [2009] 47 Cal.4th 686.) *

Adverse SPB Decisions Do Not Foreclose Retaliation Claim

THE STATE PERSONNEL BOARD partially upheld two of the three suspensions challenged by a California Unemployment Insurance Appeals Board employee. Those decisions, however, did not eliminate a necessary element of the employee's claim that the CUIAB had suspended her in retaliation for filing a sex discrimination charge with the Department of Fair Employment and Housing, the Fifth District Court of Appeal held. The court ruled that the employee did not need to prove she had

a reasonable, good faith belief that her DFEH charge was well-founded. It also found there was substantial evidence to support the jury's verdict in favor of the employee.

Travel Discrimination

Cynthia George had been an administrative law judge for 12 years in the Fresno office, where ALJs are required to travel to outlying areas to conduct hearings. When she began to inquire about travel assignments,

a calendaring supervisor told her that travel assignments favored two male ALJs. After examining past assignments, George told the presiding ALJ that she believed male ALJs were receiving preferences, leaving less desirable schedules for the female ALJs.

A coworker, ALJ Betsy Temple, told George that if she pursued her complaint, headquarters would change the practice of assigning travel, limiting the flexibility to respond to

The first suspension was overturned.

individual preferences. She warned George that she would be “sorry” she had complained.

Nevertheless, George filed a charge with the DFEH, alleging sex discrimination. Within a month, the department changed the assignment system to a standardized procedure.

Five months later, in March 2002, Temple became presiding ALJ. In October 2002, she suspended George for attendance problems. George was suspended again for three weeks in November 2002, for refusing to conduct a hearing, being abusive to office staff, disobeying an order from Temple, and mocking Temple in front of staff.

At the SPB hearings, George contended that misconduct did not occur or that it did not warrant discipline. She did not argue that the suspensions were in retaliation for her discrimina-

tion complaint. Although the first suspension was overturned, the SPB did not overturn the second suspension. The board found she had been abusive to staff, improperly refused to conduct a hearing, and mocked Temple, but the suspension was reduced by a week.

In July 2003, George filed a retaliation complaint with the DFEH. A month later, she was suspended again for an inexcusable absence and two other incidents. The SPB found only the absence substantiated and reduced the suspension.

George sued for retaliation under the Fair Employment and Housing Act. The trial court denied the CUIAB’s motions for summary judgment on the ground that the issues before the SPB were not the same and did not preclude litigation of the retaliation issues George presented in court. At trial, the jury awarded George damages. CUIAB appealed.

Not Res Judicata

The appellate court rejected the argument that George’s retaliation claim was barred by the doctrine of res judicata, meaning the same claim had already been adjudicated by the SPB. George did not claim retaliation in her SPB hearings, the court pointed out. And, even though the SPB has jurisdiction over retaliation claims, she was not required to raise her retaliation claim at the SPB.

The CUIAB argued that the SPB and retaliation complaints were based on the same claim — the impropriety

of her suspensions. The court found that the claims were different. At the SPB, the employee pursues the right to remain employed under the merit system. An FEHA claim is based on the right to be free from discrimination and retaliation for opposing discrimination. The court reiterated prior case law holding that an employee is not required to raise an FEHA claim in the civil service process, and the doctrine of res judicata does not completely

An employee is not required to raise an FEHA claim in the civil service process.

bar the FEHA lawsuit if the employee pursues remedies through the civil service administrative process. But, as the Supreme Court held in *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 144 CPER 33, while the doctrine of res judicata does not apply, issues decided in a prior proceeding may not be relitigated in a later FEHA lawsuit, the court advised.

Issues Not Precluded

The court explained that when an issue involved in a prior proceeding is also essential to prove a later FEHA claim, an adverse finding on the issue may preclude the FEHA lawsuit. For example, a prior finding that a termination was for incompetency

or poor attendance may decide a key issue in a discrimination claim — that the termination was not based on race — because the prior determination establishes that the employer’s reason for termination was not a pretext for discrimination.

In George’s case, though, the court found that the SPB’s rulings did not establish that George’s suspensions were not retaliatory. While the SPB did decide that some of the reasons for the suspensions were legitimate, the decisions did not preclude George’s claim that the CUIAB accumulated several minor incidents and used them to issue a retaliatory suspension. As the trial court had noted, the board found the first suspension was not justified and that several allegations used to support the second and third suspensions were not substantiated. Although the findings that certain incidents justified discipline were binding on George, the court held that the rulings against the CUIAB “leave the question whether George was treated more harshly than other employees because she had challenged the ALJ travel policy as being discriminatory.” Therefore, the FEHA claim was not precluded in its entirety.

***Yanowitz* Not Applicable**

CUIAB argued that George did not show that her DFEH charge was the result of a reasonable and good faith belief that the employer acted unlawfully as required under *Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 174 CPER 23. The FEHA bars

retaliation against an employee who opposes a discriminatory action or who participates in the FEHA process. The court ruled that the *Yanowitz* standard of reasonable and good faith belief applied only to a plaintiff’s opposition conduct, not to participatory conduct. *Yanowitz* required that an employee who refuses to follow an employer’s directive show that she acted because she had a reasonable, good faith belief that the directive was discriminatory. Because disobeying a directive would ordinarily be grounds for discipline, the *George* court explained, the employee must prove the conduct is protected. But the statute does not require a reasonable, good faith belief before an employee is protected from filing a DFEH charge, the court held.

Substantial Evidence of Retaliation

The court found that Temple’s statement that George would be sorry she complained about the travel assignment scheme showed a nexus between George’s DFEH complaint and Temple’s later actions suspending her. The fact that the statement was

made before the DFEH complaint did not make it irrelevant and inadmissible. The statement was relevant to whether Temple acted with retaliatory intent, and Temple admitted that she knew about the DFEH complaint before she became presiding ALJ, the court noted. While Temple’s intention may have been innocent, the jury was free to find that Temple intended to warn George that she would suffer retaliation, the court said, or to find that Temple’s displeasure with the resulting standardized assignment system caused her to retaliate against George.

Other evidence that supported the verdict was George’s discipline-free 12-year work history, the close timing between Temple’s promotion to presiding ALJ and the change in George’s treatment, and the number of unsubstantiated allegations used to support the suspensions. All would tend to prove that retaliatory intent was a substantial and motivating factor in the series of suspensions, the court explained. (*George v. California Unemployment Insurance Appeals Board* [2009] 179 Cal.App.4th 1475.) *

Evidence of Non-Discriminatory Intent Entitles Employer to Mixed-Motive Instruction

WHERE AN employee establishes a prima facie case of workplace discrimination in violation of California’s Fair Employment and Housing Act, and the employer claims that it had a legitimate non-discriminatory reason for its actions

which, if standing alone, would have induced the employer to make the same decision, the employer is entitled to a mixed-motive jury instruction. In *Harris v. City of Santa Monica*, the Second District Court of Appeal held that the

trial court deprived the employer of a legitimate defense when it refused to give the requested instruction.

Wynona Harris was hired by the City of Santa Monica as a bus driver. She had a “preventable” accident within her 40-day training period, which she successfully completed. She was made a part-time probationary employee, an at-will position. She had a second “preventable” accident within the first three months of her probationary period. Her supervisor, in grading her overall performance for that time, indicated “further development needed.” According to Harris, her supervisor told her that she was doing a good job and that, but for the second accident, she would have graded her “demonstrates quality performance.”

Harris reported late to work two times during the next three months. Bob Ayer, the transit services manager, was instructed to examine her file and told the assistant director that Harris was not meeting the city’s standards for continued employment. About one week later, Harris told her supervisor that she was pregnant. He reacted with displeasure and asked her to get a note from her doctor clearing her to work. Two days after presenting such a note, Harris was fired.

Harris sued the city, alleging pregnancy discrimination in violation of the FEHA. The city maintained that it had a legitimate, non-discriminatory reason to fire her. The trial court refused to give the jury an instruction on the mixed-motives defense. The jury

returned a verdict in Harris’ favor, and the city appealed.

Court of Appeal Decision

In cases where the evidence establishes that the employer had “mixed motives” for its employment decision, that is, where both legitimate and illegitimate factors contribute to the decision, “the burden falls to the employer to prove by a preponderance of the evidence that it would have made the same decision even if it had not taken the illegitimate factor into account,” said the appellate court, citing *Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361.

In this case, explained the court, Harris was an at-will employee, meaning that she could be fired for “a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason.” The city asserted that it had sufficient non-discriminatory reasons to terminate Harris: two preventable accidents, two incidents when she was late to work, and a performance evaluation of “further development needed.”

The city asked the trial court to give the jury the following instruction: “If you find that the employer’s action was actually motivated by both discriminatory and non-discriminatory reasons, the employer is not liable if it can establish by a preponderance of the evidence that its legitimate reason, standing alone, would have induced it to make the same decision.” The

trial court refused, and instead gave an instruction that the city was liable if Harris’s pregnancy “was a motivating reason/factor for the discharge.” This instruction did not provide the city with a complete defense, the court explained. It failed to instruct the jury that the city could escape liability “if the jury found the city would have terminated Harris anyway for performance reasons even if she had not been pregnant.” The trial court’s refusal to give that jury instruction therefore prejudiced the city, concluded the appellate court.

The court was dismissive of Harris’ contention that the city waived the mixed-motive defense when it did not plead it in its answer to her complaint, but rather that the defense was an afterthought developed by the city during trial. Harris cited no authority that the mixed-motive instruction constitutes an affirmative defense that a defendant waives if not alleged in its answer to the complaint. “A defendant’s answer must allege affirmative defenses that involve a ‘new matter’ or risk waiving the defense,” the court explained. “The city’s motive for firing Harris is not a new matter....”

Although the trial court erred by failing to give the mixed-motive jury instruction, the city is not entitled to judgment notwithstanding the verdict, ruled the Second District, “because there was substantial evidence to support the jury’s verdict.” “The jury was entitled to disbelieve the city’s evidence that Harris’s pregnancy played no role in her discharge,” and “moreover, Harris

offered sufficient evidence to permit a jury to conclude the city acted with discriminatory animus against her.”

The appellate court sent the matter back for a new trial. (*Harris v. City of Santa Monica* [2009] 178 Cal.App.4th 1157.) *

Teacher Who Advocated for Disabled Students Can Sue for Retaliation

A TEACHER WHO claimed she was retaliated against because she complained about the treatment of her disabled students has standing to sue her employer pursuant to the anti-retaliation provisions of both Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act, held the Ninth Circuit Court of Appeals in *Baker v. Riverside County Office of Education*. Overruling the district court, the Court of Appeals found that Sec. 504's anti-retaliation provision grants standing to non-disabled people who are retaliated against for attempting to protect the rights of the disabled.

Susan Lee Barker, employed as a resource specialist program teacher for disabled students, voiced concerns to her supervisors that the special education services provided by the county violated federal and state law. She filed a class discrimination complaint with the Office for Civil Rights alleging that the county office of education denied its disabled students a free and appropriate public education.

In her lawsuit, Barker claimed that after her supervisors learned of the class discrimination complaint, they retaliated by intimidating her, failing

to respond to her emails and phone calls, excluding her from important staff meetings, changing her work assignments to sites further from her home, reducing her caseload, and refusing to let her fill in for other teachers during their vacations. She also alleged that she was forced to leave her job because her supervisors subjected her to an intolerable work environment. The district court dismissed her complaint, finding that she did not have standing to sue because she herself was not disabled.

The Ninth Circuit reversed the district court. It found that “the broad language in section 504 and its corresponding anti-retaliation provision in Title VI of the Civil Rights Act does not demonstrate that Congress intended to limit standing under section 504 to only those with disabilities.” The court noted that Sec. 504 and its anti-retaliation provision use the “all-inclusive phrases ‘any person aggrieved’ and ‘any individual,’ and no language further limits who ‘any person aggrieved’ or ‘any individual’ may be.” “In particular,” continued the court, “the statutes do not include language requiring such individuals to have disabilities in order to have standing” nor to have any “close

relationship” to a disabled person. It reasoned that such broad language “evinces a congressional intention to define standing to bring a private action under 504...as broadly as is permitted by Article III of the Constitution” and that this conclusion is consistent with Congress’ statutory goal to protect the rights of the disabled. “Indeed,” it said, “empathetic people who teach and interact frequently with the disabled are those most likely to recognize their mistreatment and to advocate on their behalf.”

The court also found that for the same reasons, Barker had standing to sue under the anti-retaliation provisions of the ADA. The statute provides that no private or public entity shall discriminate against or coerce, intimidate, threaten, or interfere with “any individual” because that individual has opposed any act or practice made unlawful by the act or has enjoyed or aided or encouraged any other individual in the exercise or enjoyment of any rights under the act. Here again the use of the phrase “any individual” without limitation indicates congressional intent to grant standing “as broadly as is permitted by Article III of the Constitution,” said the court.

The court reversed and remanded the case to the district court. (*Barker v. Riverside County Office of Education* [9th Cir. 2009] 584 F.3d 821.) *

Local Government

Mayor Takes Action as L.A. Budget Deficit Grows

THESE ARE not happy times in the City of Los Angeles. As employee unions fought to stave off more layoffs, the chief administrative officer, Miguel Santana, painted a dire picture of the financial crisis facing the city. Even the “b-word,” bankruptcy, has been uttered by some city council members. In January, political pressure caused some

Villaraigosa issued an order to take ‘immediate action.’

early supporters to rethink a proposal to cut 1,000 jobs — even though city budget advisors said it would save the city \$65 million. Other voices said that delays in addressing the shortfall would only make matters worse. In fact, what was considered to be a \$208 million shortfall just last month has now ballooned into a \$212 million deficit. That number is expected to jump higher next year when a \$484 million shortfall is projected by CAO Santana.

At its last meeting, the city council ducked the issue and put off for 30 days a decision to cut an additional 1,000 jobs. Union leaders have urged the city to forgo layoffs and search for different

ways to resolve the budget crisis. But others, like Councilman Jose Huizar, opined that the city has “a \$15 million plan to address a \$200 million gap.”

The next day, Mayor Antonio Villaraigosa issued an order to the heads of all city departments, demanding that they take “immediate action.” The mayor’s detailed directive calls for the transfer of 360 jobs into special-funded departments, 1,000 layoffs, limitations on hiring, quicker processing of early retirement applications, and a loan from the council of \$40 million in discretionary funding to shore up the city’s reserves. “We will deplete at least \$300,000 of our much needed reserves every day we spend studying these options, rather than taking action.”

Soon after the mayor’s order was circulated, the Los Angeles city attorney wrote a memo asserting that the mayor does not have the authority to order layoffs.

Like other local governments, Los Angeles’ finances have fallen prey to the state’s general malaise. Over 2,000 city jobs have been lost since July. But, the situation worsened this fall, when city officials prepared to order 22,000 employees to take 26 furlough days, and planned to issue more than 900 layoff notices. In one effort to preserve jobs and services, the L.A. city

counsel unanimously voted in favor of an agreement with the Coalition of LA City Unions to implement an early retirement plan. The goal was to retire 2,400 of the longest-serving and highest-paid city employees. It was first proposed by the coalition in May 2008. The agreement includes an increase in employee contributions to their retirement plan and deferral of wage increases. In exchange, the coalition got a pledge from the city that there would be no furloughs or layoffs of employees represented by its member unions for the duration of their contract.

The city’s pension system faces a huge unfunded liability.

Part of the problem is that the city’s pension system faces a huge unfunded liability. CAO Santana, who has asked the city council to consider a ballot measure that would significantly reduce the pension payments for newly hired city workers, asserts that the current system is unsustainable.

In January, as revenues fell far short of projections, city leaders raised the prospect of eliminating 1,000 more jobs, cutting “less-essential” city services, and privatizing some city-owned enterprises, such as parking garages and golf courses. Officials began to project that the city might not be able to cover its operating expenditures through the fiscal year. This prompted

Mayor Villaraigosa to suggest that the city might have to tap into its emergency reserves to stay afloat. Council Member Bernard Parks said “the threat of bankruptcy is real.”

Coalition leaders complained that the city was not processing the early retirement applications fast enough. While 3,000 workers applied for early retirement, by January, only 400 had been removed from the payroll. The unions charged that the city “has not moved with the urgency or diligence that is expected given the current shortfall.” It has failed “to maximize negotiated savings and expenditure reduction opportunities.” “Without leadership,” the coalition said, the city “is on course to lose as much as \$58 million in savings.”

In the midst of this debate, Villaraigosa was criticized for his plan to continue to hire police officers to replace those who retire or resign. The mayor has pledged to maintain a police force of nearly 10,000 officers. But Council Member Parks, who used to serve as police chief, said that police hiring could be avoided. CAO Santana told the council that the city could save \$63 million by cancelling plans to hire 100 officers and by laying off about 600 probationary officers on the force and in the police academy. That idea was “a non-starter” for some members of the council.

At its last meeting, the council asked for another list of possible job cuts and, after an eight-hour hearing, tabled the layoff plan for a month.

The council also postponed plans to eliminate three city departments — the Department on Disability, the Environmental Affairs Department, and the Human Services Department — and to search for new revenue sources, including federal stimulus money. The council also voted to move 300 workers into positions that operate outside the general fund.

CAO Santana continued to voice concerns that the city would have to drain a large portion of its reserve fund to make it to the end of the fiscal year. And, he said, the city’s failure to act could cause Wall Street to downgrade the city’s bond rating and raise the cost of borrowing the money it will need to make it through the next few years.

cper

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

-- Will Roger, humorist

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

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

Pocket Guide to the Meyers-Milias-Brown Act

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

<http://cper.berkeley.edu>

The following day, in his capacity as the city's chief executive officer, Villaraigosa announced he was using the powers provided to him by the city charter to direct transfers and layoffs.

The mayor's "Urgent Directive" ordered department heads to take immediate action to transfer general fund employees to positions in special funded and proprietary departments.

*The failure to act
could cause Wall
Street to downgrade
the city's bond rating.*

This move will permit 360 employees to avoid layoffs, he projected. The mayor directed that his transfer plan be completed in two weeks, with a detailed day-by-day timeline included in the ambitious scenario.

Department heads also were ordered to eliminate 1,000 filled, full-time positions. He instructed the personnel department to "immediately" begin the process of calculating seniority and displacement rights. Managers in proprietary departments, like the airport, harbor, and Department of Water and Power, were asked to hire as many displaced workers as feasible. He asked those managers to report back in one week with their projected hiring needs over the next 12 months.

The mayor also said the city had to retire as many persons as possible and "as quickly as possible." He told

department heads not to ask for exceptions from the list of potential retirees.

Mayor Villaraigosa also asked for authority from the city council to allow employees covered by the Los Angeles County Employee Retirement System to retire without the usual 30 to 60 day advance notice. "Waiving this advance application requirement," he said, "will not only expedite retirements, which will provide needed relief to the General Fund, but also will allow those employees who are facing layoffs and who are retirement eligible to leave the City family in the most humane way possible."

Finally, the mayor asked the city council to move \$40 million in uncommitted special and discretionary funds into the city's reserve until it reaches 5 percent of the overall city budget.

The mayor warned department heads that spending more than the city is taking in "is unsustainable." These actions must be taken immediately, he said, "to address the current year shortfall within the remaining five months of our fiscal year." The job cuts he announced would save \$50 million this fiscal year.

But these savings may not materialize. In a memo sent to employees in the city attorney's office, Chief Deputy City Attorney Bill Carter said the charter does not give the mayor the authority to compel department heads to lay off employees. Brian Curry, legal counsel to the mayor, reacted by saying that, as the city's chief executive officer, the department heads answer to him. Villaraigosa expects those managers to comply with his wishes and make the transfers and layoffs he asked for, Curry said. *

Once Employee Retires, Civil Service Commission Lacks Jurisdiction

THE JURISDICTION of the Los Angeles Civil Service Commission is divested when a county employee whose appeal is pending before the commission elects to retire. Because her future status as an employee is no longer an issue, ruled the Court of Appeal, the challenge to her discharge becomes a wage claim, over which the commission has no jurisdiction.

The case began when Margaret Latham filed an appeal with the Los

Angeles Civil Service Commission challenging the health services department's decision to suspend her without pay for 30 days pending an investigation into allegations of inappropriate conduct. The department then notified Latham of its intent to discharge her.

Latham filed an appeal with the civil service commission that challenged both actions. A hearing officer assigned by the commission began receiving evidence on Latham's ap-

peal. Six months later, before the commission hearing officer issued a decision on the appeal, Latham voluntarily retired. She did not advise the commission or the department of her retirement and the hearing officer conducted a two-day hearing.

A person who has retired is no longer a member of the civil service.

A month later, the hearing officer issued an extensive report. He found that the department had wrongly suspended Latham for 30 days without pay pending an investigation because her errors and omissions did not present any emergency circumstances justifying a pre-investigation suspension. The hearing officer also found that the evidence did not support the decision to discharge her, finding instead that the appropriate discipline for Latham's errors was a 30-day suspension.

While the appeal was pending before the full commission, the department requested that Latham's appeal be dismissed, arguing that the commission had lost jurisdiction over the matter. The department charged that Latham's intervening retirement meant that any further proceedings by the commission would be meaningless because she could not be reinstated once she had retired.

The commission then issued its final opinion, rejecting the department's request to dismiss the appeal and adopting the hearing officer's report. The ultimate decision imposed a reduction in rank, not a suspension.

The department filed a petition asking the superior court to vacate the commission's decision and dismiss Latham's appeal on the ground that her retirement had divested the commission of any jurisdiction to render a decision in her civil service appeal.

The superior court granted the department's petition, and the commission complied with the court's order setting aside its decision and adopting a new final order dismissing her appeal.

Latham argued on appeal that her election to retire did not eliminate her claim that she should have retained her job and that she is entitled to back pay from the date the department discharged her until the date she retired. She also argued that her subsequent retirement did not negate the fact that she had been discharged 20 months earlier and did not alter the nature of her separation from employment.

Latham is correct, the Court of Appeal said, that the commission had jurisdiction over her civil service appeal at the time she first contested her discharge. But the case "does not end there." "We agree," said the court, "that her retirement had no transformative effect on her discharge to the extent that, if the discharge was unlawful, her retirement did not 'cure' the unlawfulness." But, said the court,

relying on *Zuniga v. Los Angeles County Civil Service Commission* (2006) 137 Cal.App.4th 1255, the "bright line proposition" is that "where an employee retires during the pendency of a civil service appeal, her future status as an employee by definition is no longer at issue. The then-pending appeal becomes a wage claim brought by a

The commission does not retain jurisdiction over a former employee.

former civil servant." Under *Zuniga*, the commission has no jurisdiction over such a wage claim because neither the Charter nor Civil Service Rules vests such jurisdiction. "In short," said the court, "the Commission only has authority to address matters involving a member of the civil service, and a person who has retired is no longer a member of the civil service."

Latham argued that *Zuniga* was not controlling because, in her case, the hearing officer had taken significant testimony before she retired. That factual difference does not change the legal analysis, said the court. In both cases, the civil service appeal had commenced before the employee retired. "If there were a 'once jurisdiction vests it vests forever rule,' then *Zuniga* would have come out the other way." But *Zuniga* rejected that argument, explained the court, and concluded

that the commission does not *retain* jurisdiction over a former employee. At the time of resignation, said the court, whether evidence has been received or not, the underlying claim becomes one for back pay. And, without an express grant of jurisdiction, the commission lacks the authority to investigate the charges and award back pay.

The court noted that Latham's retirement only affected the availability of relief through the civil service. "We express no view on whether she has a viable civil claim for back pay which

may be asserted in another forum," said the court, citing Sec. 6.20.1000(B) of the Los Angeles County Code that authorizes the restoration of salary or earned paid leave of absence under certain circumstances. Underscoring the basis of its ruling, the court commented that commission jurisdiction must be based on express authority in the charter, not on the absence of any other designated forum. (*County of Los Angeles Dept. of Health Services v. Civil Service Commission; Latham, RPI.* [2009] 180 Cal.App.4th 391.) *

opting to use furloughs. To avoid layoffs, Sacramento County reached an agreement with United Public Employees to delay for two years a 6 percent upcoming wage increase and to take 13 mandatory furlough days. In Santa Cruz, court employees agreed to 23 furlough days rather than have layoffs imposed.

A "Court Funding Coalition" formed, urging the AOC to redirect money earmarked for the construction of new courtrooms and to inaugurate a new computerized case management system. Protest rallies were staged by court staff in Burbank and Alameda. The Deputy Sheriffs Association

Court Closures, Furloughs Focus Critical Attention on AOC

LAST APRIL, the State Judicial Council, the policymaking body of the California courts, discussed employee furloughs at its meeting. The Administrative Office of the Court, the agency responsible for implementing council policies, campaigned for a uniform plan covering the trial courts, the Courts of Appeal, and even the Supreme Court with a predictable schedule to lessen public confusion. In May, because the courts' budget had been slashed by approximately \$400 million, a plan emerged to close all state courthouses one day a month.

The Board of Governors of the State Bar endorsed the monthly closure plan and, in Sacramento, the legislative budget conference committee signed off on it.

But opposition quickly was voiced by unions representing court employ-

ees, like SEIU and the California Federation of Interpreters, and from the California Sheriffs Association, whose members serve as the courts' security personnel. Union members rallied in front of the Supreme Court in San Francisco, asking that they be allowed to participate in the discussion of how to address the budget cuts.

While a statewide plan was debated, the Los Angeles County court system — the largest in the country — announced it would close all of its 600 courthouses one day a month beginning in July. To L.A. court employees, this amounted to a 4.5 percent pay cut. Alameda County courts took more drastic action, sending out 73 pink slips. With those layoffs set to begin in June, employees circulated a "no confidence" petition critical of the Alameda court's CEO for not

The debate began to focus on the AOC itself.

announced it would explore its legal options should the AOC go forward with a proposed plan to replace its sworn deputy sheriffs with non-sworn security guards.

In July, the debate began to focus on the AOC itself. Unions called for legislation that would make court financial records available for scrutiny by outsiders. Judges in Sacramento County signed a petition opposing the court closures, calling the AOC "bloated" and "impervious." This group charged that administrators made court closures the first cost-cutting option instead of the last.

Other critics pointed out that the AOC budget had increased 77 percent since 2004; the number of employees had risen from 491 to 785. The AOC responded that the growth of the organization became a necessity when lawmakers transferred court oversight from the 58 individual counties to the centralized AOC staff.

But when salary data acquired by the *Sacramento Bee* reported that 29 percent of AOC employees earned

Some jurists opted to donate one day's pay.

more than \$100,000 a year, and when a provision hidden in a budget trailer bill surfaced that would have given the AOC more power to scrutinize local court spending, groups impacted by the court closure plan called for an audit of the agency.

Despite the vocal opposition, however, the judicial council approved the one-day-a-month furlough plan, effective September 16.

Several judges attacked the plan for seriously impacting the public's constitutional right of access to the courts. In particular, the judiciary said it would delay juvenile dependency cases, applications for restraining orders, and criminal arraignments. In Sacramento, Superior Court Judges Maryanne Gilliard and Loren McMaster became vocal critics of the closure plan, predicting that it would create a "monstrous" backlog. They also

said that the AOC's across-the-board approach was inappropriate since 20 county court systems had the resources to avoid closures.

Because the California Constitution does not permit a reduction in a judge's salary mid-term, the court closure plan could not apply to them. Most judges were willing to surrender a day's worth of compensation. For example, in Los Angeles County, 93 percent of the judges took a voluntary furlough day. But, when it was publicized that the AOC had spent \$337,000 on a judges' training program and \$86,000 for a retreat in San Francisco, some judges were outraged and became resistant to diverting their salary savings to the state's court budget. In Orange County, some jurists opted to donate one day's pay directly to the county court system. Sacramento County judges donated their one-day salary to a private foundation that directed money to programs for children and the elderly. Judges in San Mateo and San Luis Obispo counties exercised alternative donation options. In Los Angeles, \$1 million collected from the bench was redistributed directly to court employees via a local fund — Contributions for Access and Retention of Employees, i.e., CARE.

On the first furlough day, September 16, court workers picketed the AOC office in San Francisco.

In October, the legislature launched an investigation into the AOC's budget, the significant increase in its staff, and the price tag for the centralized case management system.

Just prior to a hearing before the Assembly Committee on Accountability and Administrative Review, new costs associated with the computer system put the tally at \$1.75 billion, five times more than originally projected. And the planned rollout got pushed from 2009 to 2013. Critics also complained that there was little oversight of spending for the project; others charged that the AOC's budget projections did not include millions of dollars spent by individual counties to interface

Sheriffs said a change would compromise the safety of the courtrooms.

with the computerized system or the considerable staff time devoted to the project.

The legislative committee convened on October 28 to an overflow crowd that heard from judges, law enforcement officers, and labor unions. SEIU legislative advocate Michelle Castro explained that the union had long pushed hard for AOC accountability and transparency, and that need was exacerbated when it made the decision to close the courts and furlough workers.

The AOC continued its call to use non-sworn court security personnel instead of deputy sheriffs, a switch it estimated would save \$100 million a year. But the California Sheriffs Asso-

ciation took issue with that claim and countered that such a change would displace 4,000 deputies and seriously compromise the safety of the state's courtrooms.

In an editorial in a legal newspaper, Los Angeles County Presiding Judge Charles W. McCoy asserted that the budget crisis has brought the judicial branch of government "to a crossroads." He chided that the AOC and the Judicial Council must decide what matters most — keeping the courts open, laying off thousands of employees, or rushing to build expensive new courtrooms. Days later, the legal newspaper revealed that AOC employees had received raises and promotions which added \$4.2 million to payroll costs. Regional administrators got a 10 percent pay hike, on top of a base salary of \$198,000.

As if operating in a parallel universe, the San Francisco court system contemplated closing half of its 30 civil departments, causing delays of over a year.

Last month, the Alliance of California Judges continued to question the AOC on the propriety of allocating court operating funds to finance the case management system. The group of about 200 judges charged that the Government Code requires the AOC to get the courts' consent before using operation funds for information technology purposes.

On January 21, the judicial council voted to extend the monthly court closures until June. *

County's Effort to Win Unions' 'Non-Support' for Arbitration Measure Not Misuse of Public Funds

THE COUNTY OF Santa Clara did not impermissibly expend public funds for partisan electoral purposes when, during negotiations, it bargained for unions' non-support of an initiative measure calling for binding interest arbitration. Applying the *Stanson* rule, which bars the use of public funds for campaign activities, the Court of Appeal found that the Meyers-Milias-Brown Act authorized the county's discussion of the ballot measure while bargaining with the unions.

The court also found that the county had made no *quid pro quo* offers to the unions to win their agreement to a bargaining proposal that they withhold their support for the initiative and disassociate themselves from the petition drive to get the arbitration measure on the ballot.

In 2004, several unions representing county employees began an effort to add a provision for binding interest arbitration to the county charter. During negotiations with the Correctional Peace Officers Association and the Registered Nurses Professional Association, the county presented officials of both unions with a proposal seeking their agreement for a contract term not to "directly or indirectly initiate or support any effort to place binding interest arbitration on the ballot." The proposal also obliged each union and their officials to "take immediate action

to disassociate itself from such action" and agree to "not directly or indirectly initiate or support" any future efforts to place binding interest arbitration on the ballot. Neither union agreed to the "non-support" clause, and talks with the county languished for months without a settlement.

The lawsuit was brought by coun-

*The line between
authorized and
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ty taxpayers alleging that the county improperly spent public funds for partisan electoral purposes by bargaining for the unions' non-support of the ballot measure. They also challenged the legality of an email sent by one member of the board of supervisors urging voters to reject the proposed arbitration amendment. When the trial court sided with the county, the thorny legal issue advanced to the Court of Appeal.

The appellate court's lengthy decision includes an exhaustive review of California case law that proscribes the use of public funds for partisan political activities. These cases draw

a distinction between expenditures by a government body for informational purposes, which generally are permissible, and expenditures for campaign activities, which generally are not. But, the court cautioned, the line between authorized and unauthorized activities is not always clear and depends on the style, tenor, and timing of the activity, and the audience to whom it is directed.

Relying on the Supreme Court's ruling in *Vargas v. City of Salinas* (2009)

A public entity frequently will 'take sides.'

46 Cal.4th 1, the court explained that the constitutionally suspect conduct is a public entity's use of the public treasury to mount an election campaign. But the law does not preclude a governmental entity from publicly expressing an opinion about the merits of a proposed ballot measure. The court recognized that a public entity frequently will "take sides" and not remain neutral. The mere circumstance that a public entity may have an opinion or position on the merits of a ballot measure is not improper.

Citing the leading case, *Stanson v. Mott* (1976) 17 Cal.3d 206, the court explained that, in the absence of clear and unmistakable language specifically authorizing a public entity to expend public funds for campaign activities or

materials, the entity lacks authority to make such expenditures.

In this case, the county looked to the MMBA as authorization for its conduct during collective bargaining, and the court agreed. Relying on federal case law, the court concluded that interest arbitration is a permissible subject of bargaining. And it was not persuaded that it was outside the confines of union and management collective bargaining because the arbitration measure was presented to voters as an initiative.

In *Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 60X CPER 9, the Supreme Court recognized that the electoral process and the MMBA can coexist. Likewise, said the Court of Appeal, collective bargaining and the initiative process are not mutually exclusive.

Because the MMBA does not explicitly authorize expenditures for partisan campaigning in clear and unmistakable language, the court carefully looked at the factual circumstances surrounding the county's negotiations with CPOA and RNPA. Deferring to the factual findings of the trial court, the Court of Appeal found insufficient evidence that the county's wage offer to CPOA was made as a *quid pro quo* for the union's agreement not to support the binding interest arbitration ballot measure. Regarding the nurses, the court accepted the trial court's findings that the county's offer of a wage increase was not conditioned on their acceptance of a contract provi-

sion demanding that RNPA withdraw its support for the taxpayer measure. As determined by the trial court, the county's increased wage offer was based on its receipt of information about a wage increase obtained by nurses at Stanford University and salary rates at other local area hospitals.

Having found no *quid pro quo*, the court addressed whether the county engaged in campaign activity or informational activity when it discussed the unions' non-support of the proposed

The county's proposal was 'basically informative and factual.'

initiative during negotiations. This conduct does not resemble typical campaign activity, said the court. "It more closely resembles pursuit of a proper informational role by presenting the agency's view of a ballot proposal at a meeting of an organization that has expressed interest in the topic."

The court read the language of the county's proposals to be "basically informative and factual" and not intended for further distribution as campaign material. The fact that the county expressed an opinion about the merits of the ballot measure is not improper, said the court, noting that the proposals were "framed in the dispassionate language of contract, not in the exhortatory tone of persuasion."

Adopting the reasoning of *Jordan v. City of Santa Barbara* (1996) 46 Cal. App.4th 1245, the court concluded that, since the collective bargaining activity occurred before the initiative had qualified for the ballot, the action was not an attempt to influence voters because there was no ballot measure for which to campaign. It found the formulation and drafting of a proposed ballot measure before it qualifies for the ballot is not itself partisan campaigning and, in this case, the election campaign was not yet underway. Further, the bargaining proposals were intended to influence the unions, not the voters.

The lawsuit also challenged an email sent by Supervisor Blanca Alvarado encouraging 1,500 individuals to educate themselves about the initiative and attaching a copy of a newspaper editorial urging a “no” vote. The court concluded that the text of the email urged the recipients to educate themselves; it did not urge defeat of the ballot measure. The text of the email reflected a neutral style and tenor, the court commented, and while Alvarado’s email was sent less than a month before the election, it was one in a series of email blasts and was informational.

As for the attached editorial, which expressly exhorted voters to defeat the ballot measure sponsored by the union, the court concluded it was advocacy. However, because it was prompted by the supervisor’s concern over voter confusion, and the expense

associated with sending the email was minimal, the court found it was exempt from the statute barring the use of public resources for campaign purposes. (*DiQuisto v. County of Santa Clara* [1-22-10] H032345 [6th Dist.] ___Cal.App.4th___, 2010 DJDAR 1122.) *

Public Sector Arbitration

Arbitrator's Resolution of Remedy Dispute Did Not Exceed Her Jurisdiction

IN 2004, THE California Faculty Association challenged a California State University policy regarding the teaching assignments of retired faculty. Arbitrator Bonnie Bogue found in favor of CFA on two consolidated grievances. When CSU did not implement the remedy as CFA expected, the association asked the arbitrator for clarification. CSU contended the supplemental remedial ruling modified the award and, therefore, exceeded the arbitrator's jurisdiction. The university petitioned a court to vacate the ruling. In an unpublished decision, the Court of Appeal held that Arbitrator Bogue did not exceed her jurisdiction.

Excessive Teaching Assignments

The Faculty Early Retirement Program allows faculty who are at least 55 to retire but continue to work up to 50 percent of the time base they worked in the year prior to retirement. As set out in the labor contract between the parties, faculty workload consists of direct teaching duties and indirect instructional duties, such as student advisement. In 2004, a CSU top administrator informed campus administrators that they could make all-teaching assignments because the contract did not state how much of

the FERP assignment should be direct teaching duties. CFA filed a grievance on behalf of all of its members system-wide, claiming that the policy ignored indirect instructional workload credits for FERP employees.

In 2005, the union filed another grievance, on behalf of Jon Meisenholder, because his FERP workload was not proportional to the normal

*CFA asked the
arbitrator to clarify
her remedy.*

responsibilities, duties, and course load in his department during the academic year prior to his retirement. The normal load in his department was seven four-unit courses a year. Meisenholder elected to work one-third his time base. During his second year of retirement, he was assigned to teach three four-unit courses, 42 percent of a full-time assignment.

Arbitrator Bogue consolidated the grievances for the arbitration and ruled for the association on both. In the systemwide grievance, she ordered CSU to issue a directive that the collective bargaining agreement required

FERP employees to be assigned "proportionate workloads, consisting of direct and indirect instructional duties, in the same manner as regular tenured faculty are assigned." She also awarded a "make-whole" remedy that required CSU to review FERP records to identify any faculty who were assigned an "all-teaching workload" and make them whole unless the FERP employee had volunteered for the workload. She continued:

The award will compensate each FERP faculty member for the excess workload during terms in which that individual was not allowed compensated time for indirect instructional duties.

Or, the faculty member could opt to accept a reduced workload in subsequent academic terms to offset the excessive workload. In the Meisenholder grievance, Arbitrator Bogue ordered CSU to compensate the grievant for the excessive workload by the difference between 33.3 percent and 42 percent of salary.

CFA then asked the arbitrator to clarify her remedy because CSU was compensating only those FERP employees who had been assigned all-teaching loads, not those who had been assigned other excessive direct instructional loads. CSU objected, claiming that the award limited the make-whole remedy to those with all-teaching assignments, and that CFA improperly was asking for the Meisenholder remedy to be applied systemwide.

The parties had stipulated during the hearing that the arbitrator would retain jurisdiction to resolve any dispute over the implementation of the remedy, but not to reconsider the merits of the award. Arbitrator Bogue concluded in her remedial ruling, "The remedy ordered in the [systemwide] grievance requires a make-whole remedy for every FERP participant who had a classroom teaching assignment that was not proportional to that individual's pre-FERP teaching assignment."

CSU filed a petition to vacate the ruling, and CFA filed a petition to confirm it. When the trial court confirmed the award, CSU appealed.

Deferential Review

The appellate court recited case law that establishes a deferential standard of review of an arbitrator's award. Courts generally will not examine an award for errors of fact or law. The court reviewed the remedial ruling in light of the restriction on the arbitrator's authority that she not reconsider the merits of the award.

In her original award, Arbitrator Bogue concluded that, absent voluntary agreement of a FERP participant, the contract required that the workload must be a combination of direct teaching and indirect instructional duties that "is to be proportionate to that which was assigned to that individual prior to retirement." The arbitrator's injunctive remedy in the systemwide grievance reflected the

concept that CSU was required to assign proportionate workloads. Her make-whole remedy, however, directed the university to identify only those retired faculty who had been assigned all-teaching loads.

In her supplemental remedial ruling, Arbitrator Bogue pointed out that the systemwide grievance challenged the administrator's statement that campuses could assign "all-teaching" loads before the new policy was implemented. She acknowledged that, to be

Case law establishes a deferential standard of review of an award.

consistent with the contract, the remedy must include FERP participants who later had been assigned disproportionate direct teaching loads. She stressed that the original remedy had directed that each FERP participant be compensated "for the excess workload during terms in which that individual was not allowed compensated time for indirect instructional duties." Relying on this language, she concluded that the remedy in the systemwide grievance required a make-whole remedy "for every FERP participant who had a classroom teaching assignment that was not proportional to that individual's pre-FERP teaching assignment."

The court pointed out that the arbitrator's jurisdiction in the supplemental remedial phase of the arbitration was to resolve a dispute over the implementation of the remedy, which essentially required that she interpret the remedy she previously had awarded. Although the remedy provisions focused on all-teaching assignments, they did not expressly limit the remedy to FERP participants with all-teaching assignments, the court noted. And, the award included salary for uncompensated indirect instructional duties. Particularly since the injunctive relief required proportionate workloads, the court found that the narrow remedy advocated by CSU was "illogical."

The court also held that, even if the remedial ruling was an amendment of the award, the ruling was properly confirmed. California's contractual arbitration law permits an arbitrator to amend an award to resolve an issue omitted from the original award through mistake, inadvertence, or excusable neglect of the arbitrator "if the amendment is made before judicial confirmation of the original award, is not inconsistent with other findings on the merits of the controversy, and does not cause demonstrable prejudice to the legitimate interests of any party." If viewed as a substantive amendment to the original remedy, the arbitrator's remedial decision resolved an issue regarding FERP participants with disproportionate direct teaching loads that inadvertently had been omitted from the original award, but

that was consistent with the findings on the merits of the controversy, the court found. The court rejected CSU's contention that the remedial ruling

was untimely because it was not issued within the timelines the Code of Civil Procedure sets for correcting an award. *

compared his testimony to that of the grievant, who the board found to be a credible witness. And, the city would not have had to rely on hearsay to establish that the coworker had received a call requesting sexual favors after his cell phone number was written on the bathroom wall.

Based on the facts presented to the board, it found just cause lacking to sever the grievant's nine-year employment with the city. The board ordered the grievant reinstated and made whole

Circumstantial Evidence Insufficient to Link Grievant With Bathroom Graffiti

AFTER HEARING contradicting opinions from two handwriting experts, the three-member City of Salinas Grievance-Arbitration Board found insufficient evidence to sustain the termination of an employee of the city's Wastewater Department. The panel's unanimous decision, written by William Riker as the chair of the panel, turned on the board's reluctance to uphold the penalty of discharge based only on circumstantial evidence.

The grievant was charged with writing a coworker's cell phone number on the wall of the men's bathroom and claiming that the coworker was available to give "blow jobs."

To make its case, the city relied on the testimony of a handwriting expert, who concluded it was the grievant who wrote the graffiti. The city also argued it was more than coincidental that, on the day the graffiti was discovered, the grievant was working in close proximity to bathroom. The grievant's past interactions with this coworker and his recent positive drug test also were cited by the city to support the discharge.

The union hired its own expert witness, who testified that the characteristics in the script of the graffiti were not specific to the grievant, but to a class of workers. And, the union demonstrated similarities between the graffiti and the penmanship of other crew members. It is a fairly common practice for employees on the wastewater crew to write graffiti on walls, lunch pails, and lockers.

The board found the city's expert did not establish with reasonable certainty that the grievant was the only person who could have written the graffiti. Circumstantial evidence can be probative, the board said, but "caution is warranted" when it is exclusively relied on to support a penalty of discharge.

One critical element in the case was the unavailability of the coworker who was the subject of the graffiti. The board was troubled by the grievant's inability to "face his accuser" and conduct cross-examination. If the coworker had come forward, Riker said, the board could have observed his demeanor and

The court found the narrow remedy advocated by CSU was 'illogical.'

for all lost wages and benefits. (*Service Employees International Union, Loc. 521, CTW/CLC, and City of Salinas*, 6-1-09. Representatives: Susan J. Matham [assistant city attorney] for the city; Manual A. Boigues [Weinberg Roger and Rosenfeld] for the union. Arbitration board: Dean Carothers [union appointed member], Kelly Halcon [city appointed member], William E. Riker [chairperson].) *

Arbitration Log

• Discipline

Franklin-McKinley School Dist. and Franklin-McKinley Education Assn. (2-9-09; 22 pp.). *Representatives:* Adrianna E. Guzman (Liebert Cassidy Whitmore), for the employer; Ballinger G. Kemp, for the union. *Arbitrator:* Jerilou H. Cossack (CSMCS Case No. ARB-07-0399).

Issue: Did the district violate the contract when it issued a letter of reprimand to the grievant?

District's position: (1) The written reprimand issued to the grievant was not a "complaint" under the terms of the parties' contract; it need not be placed in his personnel file. Viewing all routine supervisory tools as complaints would impede management's ability to direct staff.

(2) The grievant confronted the director of the after-school academic enrichment program in an angry manner, complaining that he had seen packs of unsupervised boys roaming the hallway. He told the director that if the students engaged in misconduct, she would be held responsible.

(3) Because the director perceived the grievant's conduct as condescending, threatening, and intimidating, she provided the school principal with a written statement describing the interaction.

(4) The grievant ignored a prior directive that he take all disputes with his colleagues to the administration.

Union's position. (1) The director's complaint about the grievant was the basis for the grievant's "needs improvement" rating concerning his "working with colleagues." Therefore, the collective bargaining agreement required that he be provided a copy of the director's complaint.

(2) The district failed to conduct an appropriate investigation into the director's accusations. The principal's decision to believe the director instead of the grievant does not prove the director's version of the interaction is accurate.

(3) The district violated the contract by placing an unverified complaint in the grievant's personnel file. The written reprimand was based on the director's unconfirmed allegations.

Arbitrator's holding: Grievance sustained.

Arbitrator's reasoning: (1) The rule verbally communicated to the grievant that he bring disputes with his colleagues to the administration is at variance with accepted protocol that staff discuss issues with other staff members before approaching the administration. The griev-

ant reasonably understood this directive to apply only to future disagreements with a particular substitute teacher. The grievant's conduct did not warrant a general admonition to bring all issues with staff members to the administration.

(2) The director's verbal and written communication to the principal about her interaction with the grievant is a complaint. The principal accepted the accusations as fact and repeated them as grounds for the written reprimand.

(3) While the grievant's evaluation did not mention the director's complaint, the written reprimand repeated her charges and was placed in the grievant's personnel file.

(4) The contractual requirement that complaints be "verified" is analogous to the due process requirement that the employer conduct a fair investigation. The district's investigation was perfunctory.

(5) The record supports the grievant's assertion that he observed an unsupervised group of male students acting inappropriately.

(6) The district lacked just cause to issue the reprimand. The director's letter was not provided to the grievant, and the district did not verify the allegations the director made.

(Binding Grievance Arbitration)

Attention Arbitrators, Attorneys and Union Reps

Celebrate your victories or let us commiserate in your losses! Share with *CPER* readers your interesting arbitration cases. Our goal is to publish awards covering a broad range of issues from the state's diverse pool of arbitrators. Send your decisions to *CPER* Editor Carol Vendrillo, Institute for Research on Labor and Employment, 2521 Channing Way, University of California, Berkeley, CA 94720-5555. Or email cvendrill@uclink.berkeley.edu. Visit our website at <http://cper.berkeley.edu>.

• **Dues Deductions**

California State University and State Employees Trades Council-United (3-5-09); 17 pp.). *Representatives:* Maria E. Osorio, for the university; Matthew D. Ross (Leonard Carder), for the union. *Arbitrator:* Bonnie G. Bogue.

Issue: Did the university comply with its contractual obligation to deduct and transmit all authorized dues to the union?

Union's position: (1) The parties' contract requires that the university deduct all authorized dues from union members' paychecks and change the amount of dues deducted upon the union's request.

(2) When the union dues' structure changed from a flat dollar amount to 1.2 percent of each employee's salary, the union was unable to recalculate the new amount and convey this data to the state controller's office (SCO) by the 15th of the month.

(3) Because the union does not receive the payroll deduction report showing each employee's actual salary until the last day of the month, after pay warrants have issued, there is a one-month delay in the union's receipt of the full amount of dues for employees whose salaries have changed and for new hires.

(4) A representative of the controller's office testified that the SCO could calculate the 1.2 percent of salary, but the current payroll system is not set up to do so. The university's senior personnel manager said that salary data for SETC-represented employees is readily available; the report could be produced on the day it is requested.

(5) The SCO's and CSU's refusal to provide the union with current salary data deprives the union of dues revenues to which it is entitled under the contract.

University's position: (1) The collective bargaining agreement does not require the university or the SCO to modify their procedures to match the union's needs.

(2) The legislature designated the SCO as the pay agent for CSU; the university has no authority over the SCO or its procedures.

(3) The union cannot shirk its contractual obligation to submit a written request for any changes in the amount of dues deductions and compel CSU and the SCO to make the calculations.

Arbitrator's holding: Grievance sustained.

Arbitrator's reasoning: (1) CSU has not deducted and transmitted the full amount of dues in months when changes in employees' pay rates required recalculation of the dollar amount of dues.

(2) The contract obligates CSU to change existing dues' deductions upon the union's request; the SCO is not a party to the labor agreement. CSU has no control over SCO procedures or legal authority to compel the SCO to change its procedures to accommodate the requirements of the parties' contract.

(3) Procedures of the SCO make it impossible for the union to make a written request for dues changes in time to receive the full amount of dues in the month the employee's salary is changed. This denies the union the full benefit of its bargain.

(4) The record supports the inference that CSU can readily produce the pay information. It offered no explanation why it could not, on a routine basis, produce such data prior to the monthly deadline for the union to submit new or changed dues calculations to the SCO.

(5) Since only CSU has the pay data that will allow the union to make timely calculations of the amount of authorized dues, the university's failure to provide that data causes its own failure to comply with its contractual obligation to deduct and transmit all authorized dues.

(Binding Grievance Arbitration)

• **Progressive Discipline**

• **Discharge — Hostile work environment**

Public Employees Union, Loc. 1, and West Contra Costa Unified School Dist. (10-9-09; 8 pp.). *Representatives:* Douglas N. Freifeld (Fagen Friedman & Fulfroast), for the district; Marcus L. Mitchell (business agent), for the union. *Hearing Officer:* C. Allen Pool.

Issue: Did the district have just cause to discharge the appellant?

District's position: (1) The charges against the appellant are sufficient to support the recommendation of dismissal. Despite a steady application of progressive discipline, including a written warning, written reprimand, and 30-day suspension, he continued to engage in a pattern of misconduct, such as insubordination, failure to follow directives, and neglect of duty.

(2) When the appellant returned to work following his 30-day suspension, he was counseled by management, told

what conduct was expected of him, and advised that anything less would not be tolerated.

(3) In the six months after the appellant returned to work, the district received a variety of complaints concerning misconduct similar to that which prompted the prior progressive discipline. He continued his practice of intimidating and harassing coworkers.

(4) Following an investigation, the board of education recommended that the appellant be dismissed from his classified position. The charges warrant discharge.

Union's position. (1) Dismissal is not supported by just cause. The district did not provide a fair investigation.

(2) The district did not present adequate proof of wrongdoing.

(3) The appellant was not aware that the district had any concerns regarding his conduct prior to receiving the statement of charges supporting dismissal.

(4) The appellant was treated differently than other employees who were not disciplined for their behavior.

Hearing officer's holding: Appeal is denied.

Hearing officer's reasoning: (1) The parties' contract reflects that the district will engage in progressive discipline and treat employees fairly when administering discipline.

(2) The union did not challenge the prior disciplinary actions. It acknowledges that the appellant engaged in the charged misconduct, but contends that it is not sufficient to recommend dismissal.

(3) The appellant was fully aware of the district's concerns about his behavior.

None of the prior discipline was grieved. With each disciplinary action, the appellant was forewarned that if he continued to engage in misconduct, he would be subject to further discipline, including discharge.

(4) After his return to work following the suspension, he continued to demonstrate a pattern of insubordination, failure to follow directives, and harassment of coworkers. There is no evidence to support disparate treatment.

(5) The district received complaints from several of the appellant's coworkers charging the appellant with intimidation and harassment that created a hostile work environment. The union filed a grievance on behalf of two coworkers alleging the appellant's behavior caused a hostile work environment.

(6) The appellant has a persistent pattern of misbehavior that is sufficient to support dismissal.

(Advisory Appeal)

- Layoff
- Retaliation
- Whistleblowing

University of California (Davis) and Complainant (10-30-09; 12 pp.).
Representatives: Jon Dannenberg for the complainant; Danesha N. Nichols, for the university. *Hearing Officer:* Paul Staudohar.

Issue: Was the complainant properly laid off by the university?

Complainant's position: (1) The complainant was laid off in retaliation for prior whistleblower claims and his refusal to change the record of individuals credited with inventing the operation of a supersonic atomizer.

(2) Over 75 percent of the complainant's salary was generated by grants that continued past the date of the layoff. The funding that ended accounted for only 25 percent of his time.

(3) When the complainant told the project director he could not legitimately include additional persons on the record of invention, the dean threatened the complainant with termination.

University's position: (1) The complainant failed to show that his layoff was in retaliation for protected disclosures or failure to obey an illegal order. The complainant was laid off because the grant funding for his position ended.

(2) The university is under no obligation to find the complainant work elsewhere in the university.

(3) The directive that the names of individuals who had been researchers on the project be added to the record of invention was not an illegal order; it was consistent with past practice.

Hearing officer's decision: Complaint is denied.

Hearing officer's reasoning: (1) It cannot be verified how much of the complainant's salary was derived from the discontinued grant. However, ongoing laboratory work was available and could have been performed by the complainant.

(2) The project director did not make an effort to find work for the complainant because of their disagreement over the names to be included in the record of invention.

(3) The order to change the record of invention was not illegal. The project director viewed it as an ethical act consistent with past practice.

(4) The verbal exchange between the complainant and the project director did not involve a personal threat to the complainant. The project director argued that, by not including the names of the scientists from the funding agencies, the complainant was running the risk that his position would be unfunded when the grant expired.

(5) There is no convincing evidence that retaliation was the motive for the complainant's layoff.

(Retaliation Complaint Under Personnel Policies)

• **Discipline — Neglect of Duty**

County of Sacramento and SEIU Loc. 1021 (11-24-09; 17 pp.). *Representatives:* Timothy D. Weinland, for the county; Leslie Freeman (Weinberg, Roger & Rosenfeld), for the union. *Arbitrator:* Katherine J. Thomson.

Issue: Did the county have good cause to discipline the grievant for inexcusable neglect of duty or incompetence?

County's position: (1) The grievant's failure to adequately supervise the social worker assigned to provide services caused the death of the child.

(2) The grievant did not ensure a timely face-to-face meeting with the medically neglected child or initiate follow-up contacts.

(3) Staffing problems in the child protective services department do not excuse the grievant's conduct.

(4) While the social worker received a 20-day suspension, the grievant's 30-day suspension is warranted because, as a supervisor, he is held to a higher standard. The contract forbids the

arbitrator from modifying the level of discipline if cause is found unless the level of discipline constitutes an abuse of discretion.

Union's position: (1) From May through July, the grievant had reason to feel confident the child was not in imminent danger.

(2) While it was the grievant's responsibility to ensure that certain actions were taken by the social worker, the child's mother would not answer the door or return phone calls.

(3) Caseload levels prevented the social worker from focusing more time on this case or taking the action as the grievant directed.

(4) If discipline is warranted, the grievant should receive a 20-day suspension, like the social worker. The argument that supervisors are held to a higher standard fails since the grievant's supervisor was not disciplined.

Arbitrator's holding: Grievance denied.

Arbitrator's reasoning: (1) While it is undisputed that the social worker failed to follow guidelines and impeded decisionmaking in the case, the grievant failed to perform several of his own responsibilities.

(2) The grievant had access to the service delivery log, but failed to urge the social worker to attempt to make frequent contact with the child. The grievant failed to direct the social worker to conduct a body check of the child.

(3) Staffing conditions do not explain all of the grievant's performance failures. In July, when the case was 90-days old and the social worker left for vacation, the grievant did not assign the

case to another social worker or take any action himself even though there were reports the child was thin and weak.

(4) The county had just cause to discipline the grievant for failure to direct the social worker to make more frequent attempts to meet with the family, for failure to ensure that a body check of the child was performed, and for failure to use other resources to determine if the child was medically neglected. The 30-day suspension was not an abuse of discretion.

(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

Employer's refusal to bargain over effects of security booth, surveillance cameras was not unfair practice: Dept. of Developmental Services and Office of Protective Services.

(SEIU Loc. 1000 v. State of California [Dept. of Developmental Services and Office of Protective Services]. No. 2062-S, 9-14-09; 2 pp. + 8 pp. B.A. dec. By Member Neuwald, with Members McKeag and Wesley.)

Holding: The employer's refusal to bargain was not an unfair practice because the union failed to identify in its demand to bargain the negotiable effects on security guards of a new security booth and surveillance cameras.

Case summary: The Porterville Developmental Center has a perimeter fence that had five security towers staffed by guards represented by the union. In the summer of 2007, the chief steward learned of plans to remove one of the towers due to a change in the fence line. In a meeting that fall with a labor relations specialist, there was mention of surveillance cameras, but the specialist had little information on the plans. Sometime later, the steward demanded that DDS desist from removing the tower.

In December 2007, a union representative sent a letter to the department. She alleged the department was making

changes that affected unit members and requested to meet and confer. The letter was not in evidence at the hearing. After more than a month, the labor relations specialist responded, stating he would review the circumstances.

In February 2008, job stewards heard that the department was planning to install surveillance cameras in the towers and became concerned that unit members could lose their jobs. In mid-February, the labor relations specialist and the union representative set a tentative meeting for February 26. A few days later, the union filed a charge alleging the department had failed to bargain over its decisions to demolish the security tower and install surveillance cameras in the other towers. A week later, the union representative cancelled the February 26 meeting, complaining that the labor relations specialist was trying to use an informal meeting to bypass its obligation to engage in a formal meet-and-confer session.

In March 2008, the tower was demolished and replaced temporarily with a kiosk closer to ground level. Security guards testified that they could not see as well and had to walk the fence line to observe the grounds.

The board agent issued a complaint alleging the department had refused to bargain the effects of the decisions to remove the tower and install cameras. As the union did not move to amend the complaint, the ALJ considered only the department's duty to bargain the effects of the decisions and not the duty to bargain over its decisions.

The board affirmed the ALJ's decision that the department had not violated the Dills Act by refusing to bargain. The ALJ found the union had knowledge of the planned changes in time to demand to bargain over the effects. Although the union sent a letter demanding to bargain, there was no evidence that the letter or other union communications identified specific negotiable effects of the decisions to demolish the tower or install surveillance equipment. Although there was testimony about the effects of the tower removal, the labor relations specialist's un rebutted testimony was that the union did not clearly identify these effects. Since the union did not identify the negotiable effects, the department did not violate the Dills Act when it did not bargain over the effects of the department's decisions.

State did not deny right to representation when questioning continued: Dept. of Social Services.

(*Menaster v. State of California [Dept. of Social Services]*, No. 2072-S, 10-27-09; 6 pp. + 38 pp. ALJ dec. By Acting Chair Dowdin Calvillo, with Members McKeag and Neuwald.)

Holding: The supervisor's continued questioning after the charging party requested union representation did not violate the Dills Act where the supervisor eventually dispensed with the interview. The charging party did not prove the state employer retaliated against him for engaging in protected activity when the employer wrote an "expectations" memorandum, placed him on administrative leave, rejected him on probation, and failed to reinstate him.

Case summary: Soon after his hire in 2005, coworkers complained the charging party was intrusive and loud, gossiped, talked excessively, and made inappropriate and offensive comments. His supervisor warned him several times about his excessive socializing and advised him to focus on his work. The charging party, a doctor, complained to his employee representative about working conditions and about his non-physician manager's authority to question his medical decisions. In late January, union stewards met with the charging party and managers to discuss how to help him pass probation.

On February 1, 2006, the charging party made an agitated phone call to his union steward, screaming and swearing about noisy distractions and work problems. The steward contacted the doctor's supervisor for help calming him down. When upper management became aware of the incident, they directed the supervisor to ask the charging party about it. On February 9, the supervisor related to the charging party the information he had and asked if it was accurate. The charging party declined to provide any information without his union representative. The supervisor asked him three more times whether he wanted to provide information, but eventually ended the conversation.

The supervisor drafted a memo to the charging party based on notes taken during the charging party's employment. Management placed the charging party on admin-

istrative time off while the department prepared to reject him on probation. Foreseeing that he would be terminated, the charging party resigned. Six months later, he requested reinstatement. He was told there were no vacancies, even though the department continued to post openings.

The board adopted the ALJ's conclusion that the supervisor's continued requests for information on February 9 did not violate the charging party's *Weingarten* rights. The charging party reasonably believed the conversation might result in disciplinary action and requested representation, but the supervisor only asked for information and did not attempt to obtain admissions of wrongdoing. Because he dispensed with the interview when the charging party would not answer the questions, the repeated questioning without providing representation did not violate the act.

The supervisor never delivered to the charging party the memo he drafted from his private notes. The board agreed with the ALJ that because the memo was not delivered, it was not an adverse action constituting discrimination against the charging party for exercising his right to call his union representative, and could not have chilled the exercise of this right.

The board agreed with the ALJ that, although the charging party proved his prima facie case that the employer retaliated against him for complaints to the union by placing him on administrative time off, the department proved it did so for a legitimate business reason — to develop the necessary documentation to reject the charging party on probation.

The board found that the charging party adequately placed the employer on notice of his charge that the rejection on probation was discriminatory and that the matter was fully litigated, but it also found that the department had a legitimate reason for the rejection. The board also upheld the determination that the charging party did not prove a prima facie case that the department retaliated when it did not reinstate him.

Economic uncertainty justified deferral of bargaining economic items; no lack of authority: DPA.

(*Stationary Engineers Loc. 39, IUOE, and State of California [Dept. of Personnel Administration]*, No. 2078-S, 11-24-09;

12 pp. dec. By Acting Chair Dowdin Calvillo, with Members Neuwald and Wesley.)

Holding: Economic uncertainty justified DPA's deferral of bargaining over economic items. The state negotiators' lack of authority to bargain economic items was not bad faith bargaining because it did not thwart negotiations. The governor's letter to employees about proposed furloughs did not bypass the union.

Case summary: When negotiations began in spring 2008, DPA negotiators asserted that they had authority to negotiate all issues. Later, they said they did not have authority until the 2008-09 budget passed. Even after the budget passed, they continued to claim they lacked authority to negotiate economic items. After 11 sessions, DPA had not offered an economic proposal or responded to the union's economic proposal. In November 2008, the governor wrote a letter to employees about his proposal to the legislature to furlough employees, eliminate two holidays, increase their ability to work four 10-hour days a week, and eliminate leave from overtime calculation.

The board held that DPA's failure to make or respond to economic proposals was insufficient to establish surface bargaining. In *State of California (DPA)* (1986) Dec. No. 569-S, 69 CPER 51, PERB held that it was permissible to defer bargaining over economic items while the governor and the legislature were negotiating the employee compensation items in the budget. Failure to present or respond to economic proposals after the budget passed also is not an unfair practice because, almost immediately after passage, the state faced a projected \$11 billion revenue shortfall. Deferral when the state's financial condition was so uncertain was justified, and DPA had reached tentative agreement with the union on several non-economic items.

The board also held that DPA negotiators' lack of authority to bargain over economic items was not in itself sufficient to establish bad faith bargaining. Because the financial uncertainty would have been an obstacle to reaching agreement, the negotiators' lack of authority did not delay or thwart negotiations.

DPA negotiators' statements midway through bargaining that they lacked authority to negotiate economic

items did not show bad faith bargaining since the negotiators had stated from the outset that DPA would defer negotiation on economic items and DPA did not attempt to renege on any tentative agreements. A change in authority would not by itself show bad faith bargaining.

The board found the governor's letter to employees did not bypass the exclusive representative. The governor did not seek to bargain with employees over the proposals and did not threaten employees with reprisal or promise a benefit. The letter also did not announce a final decision, but instead stated that the governor was working closely with union leadership. Since the letter acknowledged that negotiations could affect the cost-cutting proposals, it did not undermine the union in the eyes of its members.

Union must put employer on notice that it objects to permissive subjects of bargaining: DPA.

(*California Correctional Peace Officers Assn. v. State of California [Dept. of Personnel Administration]*, No. 2081-S, 11-24-09; 7 pp. dec. + 12 pp. B.A. dec. By Member Neuwald, with Members McKeag and Wesley.)

Holding: The state did not engage in conditional bargaining by insisting to impasse on permissive subjects of bargaining where the charge does not show the union objected to bargaining the non-mandatory subjects.

Case summary: In April 2006, CCPOA and DPA began bargaining for a successor to the contract that expired June 30, 2006. In May 2007, PERB certified that the parties were at impasse. In August, the union withdrew from mediation. DPA presented a package offer containing four items the union believed involved permissive subjects of bargaining because of the potential to conflict with the union's or employees' statutory rights. The union responded that the proposal had sections that would waive state law, and stated, "That is not a legitimate effort towards agreement." Its response contained three questions about the reach and legal effect of the provisions waiving state law. The union found DPA's response to its questions unsatisfactory, but agreed to accept 133 sections of the package offer; it did not reject the remainder of the items. One of the acceptable sections concerned employees' rights when involuntarily transferred,

a provision the union thought could be read to waive statutory notice rights. After the state implemented portions of its final offer, the union filed a charge complaining that the state had engaged in conditional bargaining.

The board agent found that a proposal on discipline for using sick leave was not shown to be a permissive subject because the union presented only its legal conclusion that the provision conflicted with the Labor Code. In addition, the questions the union posed did not communicate an objection to bargaining about the non-mandatory aspects of the provision. The union also did not object to negotiating a provision that waived exemptions to the Fair Labor Standards Act; it generally objected to provisions that waived state, not federal, law.

The proposal on involuntary transfer was silent on notice, not in conflict with state law notice provisions, the B.A. found. It therefore did not involve a non-mandatory subject. In addition, the union indicated it would accept the proposal.

The B.A. found that a provision alleged by the union to involve a waiver of union rights was a proposal to allow DPA only to request a waiver of rights to notice in specified circumstances. Therefore, the provision was not a permissive subject of bargaining.

In its appeal to the board, the union contended the B.A. misapplied the test to determine whether it placed DPA on notice of its objections. The board rejected the argument that *Travis Unified School Dist.* (1992) Dec. No. 917, 92 CPER 45, and *Chula Vista School Dist.* (1990) Dec. No. 834, 86X CPER 13, established a lower burden of proof than the B.A. used. The board found that the union's communication about waiver of state law did not communicate that it was unwilling to negotiate the proposals, and the clarification questions could be construed as a willingness to continue negotiations on the proposals.

Law changing overtime calculation not a unilateral change by legislature, governor: DPA.

(*Stationary Engineers Loc. 39, IUOE, and State of California [Dept. of Personnel Administration]*, No. 2085-S,

12-22-09; 10 pp. dec. By Acting Chair Dowdin Calvillo, with Members Neuwald and Wesley.)

Holding: The legislature did not make a unilateral change by enacting a law altering the method of calculating eligibility for overtime, even though the union's expired contract remained in effect. The governor was not required to provide notice and an opportunity to bargain before submitting the legislation. (See story in State Employment section.)

Duty of Fair Representation Rulings

Delay in processing grievance did not breach duty of fair representation: SEIU Loc. 1000.

(*Diunugala v. SEIU Loc. 1000*, No. 2060-S, 9-8-09; 7 pp. dec. By Acting Chair Dowdin Calvillo, with Members Neuwald and McKeag.)

Holding: Neither the union's neglect of the grievance after the arbitration request nor the ultimate decision not to arbitrate alleged a breach of the duty of fair representation.

Case summary: In October 2004, the charging party's supervisor denied his request for a merit salary adjustment. The union took his grievance through step four and requested arbitration in 2005. The Department of Personnel Administration did not respond to the request.

In March 2007, a DPA attorney sent the union a letter requesting a status update within 30 days. Despite the charging party's inquiry to the union, the union did not respond to DPA's letter until after the charging party filed a charge with the board. After the charge was filed, the union made several attempts to schedule arbitration.

In May 2008, the union informed the charging party that it would not take his case to arbitration. The union's letter noted that the employee's evaluation and his written rebuttal contained allegations the union believed would make it difficult to persuade an arbitrator that a merit salary adjustment had been deserved.

The board agent dismissed the charge, and the charging party appealed.

The charging party alleged that the union acted in bad faith by failing to respond to the March 2007 letter. The board found the union's part in delaying grievance processing was mere negligence, which does not breach the duty of fair representation. Because the union had no obligation to respond to DPA's letter, and the delay did not prejudice the charging party's ability to have his grievance arbitrated, the board found this allegation did not breach the duty of fair representation.

The union's refusal to arbitrate the grievance was not in bad faith. The board found the union's letter set forth a rational basis for the decision: the determination it was unlikely to prevail at arbitration. The union's delay in reaching the decision not to arbitrate did not breach the duty since there was no showing of any arbitrary, discriminatory, or bad faith conduct. The union's negligent delay in making a decision did not in itself extinguish the charging party's right to take the case to arbitration.

EERA Cases

Unfair Practice Rulings

Charge not timely, equitable tolling does not apply: LACCD.

(*Baprawski v. Los Angeles Community College Dist.*, No. 2059, 9-8-09; 4 pp. + 14 pp. R.A. dec. By Member McKeag, with Acting Chair Dowdin Calvillo and Member Neuwald.)

Holding: Equitable tolling does not apply because the parties' grievance process ended in binding arbitration. The charging party has the burden of proving the timeliness of a charge.

Case summary: On September 14, 2004, the charging party's union filed a grievance alleging that the district rescinded her reassignment because she had asked the union to negotiate for her. The district denied the grievance at step one, and the union appealed to step two. On November 1, the district denied the appeal. The union did not file a request for arbitration within 10 days as required by the

collective bargaining agreement, nor did it participate in the alternative mediation process. On November 22, the union informed the charging party that it would not take her grievance to arbitration. She was given written confirmation of the union's refusal on March 11, 2005.

On April 6, the charging party filed an unfair practice charge alleging retaliation for the same conduct. That charge was dismissed and deferred to arbitration but did not proceed to arbitration. On September 9, she filed another charge alleging the same retaliatory conduct and also harassment by the district. PERB issued a complaint on January 5, 2006, based on the alleged retaliation, but not the harassment.

The ALJ dismissed the charge as untimely. She found that the six-month statute of limitations was tolled under EERA Sec. 3541.5(a)(2) from August 31, 2004, the date that her reassignment was rescinded, to November 11, 2004, 10 days after the district dismissed the grievance at step two. At that point, the grievance procedure was exhausted. The ALJ rejected the argument that the statute of limitations should be tolled during the time that the union and the district engaged in informal discussions. Informal discussions cannot be considered part of the grievance process after the union fails to take the grievance to the next step of the contractual grievance process.

The ALJ also concluded that the statute was tolled from April 6, 2005, to May 31, 2005, during the pendency of the first PERB charge, under the principle of equitable tolling resurrected in *Long Beach CCD* (2003) No. 1564, 164 CPER 110. However, the ALJ did not agree with the charging party's argument that the statute should be tolled between the time the first charge was dismissed and September 9, 2005, when she filed the second charge. She believed that PERB's deferral of the first charge to arbitration mandated that the union arbitrate. PERB has no power to force the union to arbitrate, and the charging party's ignorance of the law is no excuse. The total elapsed time, not exclusive of the time that was tolled, was over eight months, in excess of the six-month statute of limitations.

The board adopted the ALJ's proposed decision, subject to a discussion regarding equitable tolling in light

of *Long Beach CCD* (2009) No. 2002, 195 CPER 84, known as *Long Beach II*, a decision issued after the ALJ's decision. The board considered the charging party's argument that the statute of limitations should be equitably tolled from June 3, 2005, through September 1, 2005. She reasoned that it should be tolled because after PERB dismissed her first charge and deferred it to arbitration, she continued to pursue her grievance and did not receive final notice that the union would not take her grievance to arbitration until September 1, 2005.

The board held that equitable tolling, as defined in *Long Beach II*, did not apply because the parties' grievance process ended in binding arbitration. It rejected the charging party's argument that she did not bear the evidentiary burden on the issue of timeliness. *Long Beach II* held that timeliness is an element of the charging party's prima facie case.

None of the parties excepted to the ALJ's finding that the statute was tolled during the time that the first unfair practice charge was being processed by the board. "Therefore, we do not decide in this decision whether the doctrine of equitable tolling applies during the pendency of proceedings before PERB involving the same factual allegations."

No discrimination where employee terminated for job abandonment: Oakland USD.

(*Gregory v. Oakland Unified School Dist.*, No. 2061, 9-10-09; 11 pp. dec. By Member Wesley, with Acting Chair Dowdin Calvillo and Member McKeag.)

Holding: While the evidence established a prima facie case of discrimination, the district would have terminated the charging party for job abandonment regardless of her protected activity.

Case summary: As a paraprofessional in Oakland USD, Gregory had been transferred to several different positions. At one school, she came in contact with someone involved in litigation with her father. Gregory consulted the union and then contacted district human relations analyst Bill Whyte. She informed Whyte that she had met with a union representative who told her to request an immediate transfer.

Gregory was then assigned to work at Brookfield Elementary School with students who had medical needs, for which she had not been trained, including a girl who required catheterization.

When Gregory complained to her supervisor, John Rusk, of her lack of training, and asked to be returned to her original position, Rusk directed her to report to work and perform those duties that did not require specific medical expertise. Gregory stopped reporting to work on October 10, 2006.

On three occasions in October, Rusk met with Gregory to discuss her failure to report to work. Gregory maintained she was not absent because she had never been assigned to Brookfield since the paperwork had not been completed. Rusk told her that he would arrange a meeting with Whyte.

On January 29, 2007, Gregory was informed by Whyte that abandonment of her position was cause for dismissal. Gregory requested a hearing with Whyte, and asserted that she had not abandoned her job.

Gregory did not appear at the hearing set for February 14, 2007. After Whyte tried to reach Gregory by phone, and was told that she had gone to Africa, the district sent Gregory a job abandonment termination notice.

Two weeks later, Gregory contacted the union and maintained that she did not receive written notice of the hearing. The district, however, would not alter the job abandonment termination.

The board found that Gregory engaged in protected activity when she first consulted with a union representative about her desire to be transferred; that Whyte, a district official involved in the decision, knew of her protected activity; and that termination for job abandonment is an adverse action. The board also found that the timing of the termination and the district's departure from its procedures of notifying the employee of the date of the job abandonment hearing were circumstantial evidence proving unlawful motive. It concluded, therefore, that Gregory had established a prima facie case of discrimination in violation of EERA Sec. 3543.5(a).

However, the board determined that the district had established an affirmative defense by proving that it would have terminated Gregory for job abandonment regardless of whether she had consulted with the union.

Retaliation charge untimely, failed to state prima facie case: Los Banos USD.

(*Ulmschneider v. Los Banos Unified School Dist.*, No. 2063, 9-25-09; 6 pp. dec. By Member Neuwald, with Acting Chair Dowdin Calvillo and Member McKeag.)

Holding: The charge was untimely with respect to all allegations of reprisal other than the charging party's dismissal. The charging party failed to state a prima facie case of discrimination because he did not establish that he was dismissed because of his protected activity.

Case summary: The charging party alleged that the district engaged in "intensified forms of reprisals" against him after he filed numerous grievances, PERB charges, and other governmental complaints, and participated in union activities between 2004 and September 11, 2008, when he was dismissed for unsatisfactory performance.

Applying EERA's six-month statute of limitations, the board held that all allegations of unlawful conduct that occurred prior to September 11, 2008, were barred. The allegation that the district unlawfully suspended the charging party without pay effective January 1, 2008, was likewise untimely. However, regarding the allegation that the charging party was terminated in retaliation for having engaged in protected activities, the statute of limitations did not begin to run on that date because, under *Regents of the University of California* (2004) No. 1585-H, 165 CPER 77, the statute of limitations begins to run on the date of actual termination, rather than the date of notification of the intent to terminate.

The charging party failed to establish a prima facie case of discrimination because he did not set forth any facts establishing a causal connection between the grievances and complaints he filed and the district's decision to terminate him.

Dismissal charge alleging breach of contract, unilateral change upheld: LAUSD.

(*Weightman v. Los Angeles Unified School Dist.*, No. 2073, 10-28-09; 6 pp. dec. By Acting Chair Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: The board upheld the dismissal of the charging party's claim that the district interfered with his rights under EERA by failing to follow contractual grievance timelines.

Case summary: The union filed a grievance on behalf of the charging party, a computer teacher, alleging that the district had failed to pay him properly for the past two years after an increase in class size. The district dismissed the grievance as untimely, finding that it did not concern a payroll error but rather a change in class size, and that the contract provides a grievance over class size must be filed within 15 days.

On appeal, the board held that, to the extent the charge alleged a contractual breach, it is without authority to provide a remedy.

Further, the statutory duty to negotiate in good faith runs between the employer and the employee organization, not the individuals it represents. Therefore, the charging party lacked standing to allege the district violated EERA by failing to follow the grievance procedures in the contract.

The charging party did have standing to allege that the district's conduct interfered with the exercise of his EERA rights. But the act does not grant an employee the right to receive a reasonable settlement offer from his or her employer or the right to have a grievance taken to arbitration.

Duty of Fair Representation Rulings

No duty of fair representation where personnel matters not subject to collective bargaining: SEIU Loc. 1021.

(*DeLarge v. SEIU Loc. 1021*, No. 2068, 9-29-09; 2 pp. + 11 pp. R.A. dec. By Member Wesley, with Acting Chair Dowdin Calvillo and Member Neuwald.)

Holding: The union's duty of fair representation does not extend to representing the charging party at a personnel commission hearing, an extra-contractual matter.

Case summary: The charging party, a paraprofessional, was employed by the Hayward Unified School District. As a “merit district,” personnel matters concerning classified employees, including discipline and misconduct, are administered by the human resources department in accordance with personnel commission rules based on the Education Code.

The district conducted a disciplinary hearing in which the charging party was accused of “discourteous, abusive or threatening treatment of the public, employees, or students.” The union did not file a grievance on her behalf and did not represent her at the hearing. A union representative advised her to appeal the disciplinary decision under the provisions of the personnel commission’s rules.

The union did not represent the charging party at the personnel commission appeal hearing on May 5, 2008.

The only conduct that occurred within six months prior to the filing of the charge involved the charging party’s request that the union assist her at the appeal hearing and the union’s refusal to do so. The duty of fair representation attaches to matters that are subject to collective bargaining. The union did not owe a duty to the charging party to represent her on her appeal because the personnel commission operates independently from the collective bargaining relationship between the union and the district.

Administrative Appeals Rulings

No good cause to excuse late-filed appeal: UTLA.

(*Pratt v. United Teachers of Los Angeles*, No. Ad-381, 9-25-09, 5 pp. dec. By Acting Chair Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: The request to excuse the late-filed appeal was denied, and the request for an extension of time to file an appeal did not comply with PERB regulations.

Case summary: The charging party filed a request for an extension of time to appeal the dismissal of her unfair practice charge, and she attached copies of the original charge. The board granted her request, but the charging party did not file an appeal by the date specified. The board’s appeals assistant notified the parties that the case was closed

because the charging party had not filed an appeal. Eight days later, the charging party claimed there was a “misunderstanding” and that she had intended the extension request to constitute her appeal. The board informed the union that it considered the charging party’s letter to be a request to excuse a late filing and gave it 10 days to respond. The union filed its response one day after the 10-day period expired, and the board denied the untimely response.

According to PERB Reg. 32136, the board may excuse a late filing for good cause. The charging party claimed that her appeal was late because of medical reasons and a personal emergency out of state, but she failed to explain how these circumstances prevented her from filing a timely appeal, said the board. It found that she did not demonstrate good cause to excuse her late-filed appeal.

Nothing in the request for extension of time to file an appeal indicated that the charging party intended for it to serve as her appeal. “Had she intended the letter itself to constitute her appeal, she would not have needed to request an extension of time to file an appeal,” reasoned the board. Nor could it have served as her appeal because it did not comply with PERB Reg. 32635(a), which requires a statement of the specific issues to which the appeal is taken, identification of the page or part of the dismissal to which each appeal is taken, and the grounds for each issue stated.

HEERA Cases

Unfair Practice Rulings

Failure to provide financial report violated the Dills Act: SETC United.

(*Ventura et al. v. State Employees Trades Council United*, Dec. No. 2069-H, 10-5-09; 12 pp. dec. By Acting Chair Dowdin Calvillo, with Members Neuwald and Wesley.)

Holding: The union violated the act by failing to provide a financial report to the charging parties on request. The charging parties did not allege facts showing retaliation, and have no standing to challenge the union’s alleged violation of the MOU as an unfair practice charge.

Case summary: Charging parties Rutherford, Ventura, and Duran are elevator mechanics; Ventura and Duran were apprentices. In February 2008, their union and the California State University agreed in a Joint Apprenticeship and Training Committee meeting to provide Ventura and Duran temporary permits that allowed them to perform journey-level duties and receive comparable pay.

In July, another union engaged in a demonstration at the university. An SETC representative requested that Rutherford attend the demonstration at lunchtime. Rutherford expressed reluctance and ultimately did not attend.

In September, Rutherford discovered that the union was planning to seek to reduce the pay of Ventura and Duran at the next JATC meeting. At the meeting, SETC and university representatives disagreed about the extent to which the union had agreed to allow the charging parties to perform journey-level work. After Ventura and Duran were questioned about their qualifications, the union representatives voted to reduce their pay but allow them to keep their temporary permits.

Rutherford told SETC representative Rosales he wanted to view the union's annual report to see the apprenticeship program costs. Rosales explained that the 2007 report was at the auditor, but that quarterly reports were available. Although Rutherford requested them, he did not receive any reports before he filed the unfair practice charge in October 2008. In November, the secretary-treasurer sent the third-quarter 2008 report, but not the 2007 annual report, even though the union's fiscal year ends December 31.

The board agent dismissed the unfair practice charge. The charging parties appealed the dismissal of allegations that the union voted to reduce the pay of Ventura and Duran for their decision not to participate in the demonstration and that the union violated the MOU. They did not appeal the dismissal of the charge that the union did not provide a financial report, but the board decided to review the issue.

The board upheld the B.A.'s determination that SETC did not retaliate against Ventura and Duran because they did not allege a prima facie case that they engaged in protected

activity. There was no evidence that they declined to participate in the July 18 demonstration or that SETC had actual knowledge whether they participated. Other than suspicious timing, there was also no evidence of a nexus between their failure to participate and the vote to reduce their pay.

The charging parties have no standing to challenge a breach of the MOU or to charge that the union violated the duty to bargain in good faith.

The board disagreed with the B.A.'s reason for dismissing the financial report charge. HEERA requires a union to make available within 60 days of the end of the fiscal year a "written financial report [of financial transactions] in the form of a balance sheet and operating statement." The charge should not have been dismissed for either a failure to demonstrate Rutherford requested a balance sheet and operating statement or to specifically use the term "financial report." It is the union's responsibility to provide the correct documents, and it clearly understood that Rutherford was requesting a financial report. The charge was remanded to the general counsel's office for processing in compliance with the decision.

Search of car by campus police was retaliation for protected activity: Trustees of CSU (San Marcos).

(California State University Employees Union v. Trustees of the California State University [San Marcos], No. 2070-H, 10-15-09; 12 pp. dec. By Acting Chair Dowdin Calvillo, with Members McKeag and Neuwald.)

Holding: The manager's complaint to campus police showed retaliation against an employee for using union assistance and filing a grievance. The charge was insufficient to show the university unilaterally transferred bargaining unit work.

Case summary: The charge alleged a CSU facilities department assistant director, Steve Watters, warned laborer Cesar Aguilar to stay away from custodian and CSUEU member Rafael Lopez, "a troublemaker," before Aguilar became the CSUEU steward for skilled and semi-skilled blue-collar employees in unit 5 in April 2008. Lopez later filed a grievance.

In May, Aguilar complained to Watters about workers in unit 6 operating backhoes, driving forklifts, and using power-washing equipment, all duties listed in job descriptions for unit 5 classifications. Watters told Aguilar that he felt accused and that laborers in unit 5 would not be able to promote because of it.

On May 13, 2008, CSUEU representative Brian Young demanded that Watters cease assigning non-unit members backhoe, forklift, and power-washing duties. The next day, Watters told Aguilar not to “take the wrong path” and that it was “not a good thing to be getting involved in these kind of topics.” The following day, the department director told Aguilar, “We don’t want Young around here.”

On June 19, Aguilar complained to the director that Lopez was being swamped with work. On June 24, Young emailed the CSU human resources director that Aguilar was being harassed after Watters discussed his union activity with him. That afternoon, campus police searched Lopez’ car. The police chief gave Lopez no reason for the search. During the search, the chief spoke with Watters. No charge was filed against Lopez.

The board affirmed the dismissal of the allegation that CSU had unilaterally transferred bargaining unit work because the union did not show that the university ceased assigning unit 5 employees the disputed duties and transferred the tasks to unit 6. Because the unit 6 job descriptions included “related work activities,” the union’s allegations did not show that the labor contract established unit 5 members as the exclusive performers of the work. The charge also did not allege that the change in assignments had a negotiable effect on unit 5 employees.

The charge alleged Lopez had engaged in protected activity when he filed a grievance and when he received union assistance with his complaint about his burdensome assignment. The board found that Watters’ complaint to campus security that Lopez had stolen state property was an adverse action, even though Lopez was not disciplined or charged with criminal conduct.

The date Lopez filed his grievance was not included in the charge and, therefore temporal proximity could not

support the allegation that the search occurred because of Lopez’ grievance. However, a nexus between the search and protected activity was demonstrated because the search occurred five days after Aguilar complained about Lopez’ workload and the same day Young complained that Watters was harassing Aguilar. In addition to the suspicious timing of the search, there were allegations that the police did not give Lopez any reason for searching his car, and multiple comments showed managers harbored animus toward the union’s representation of unit 5 members. The board remanded the case for the general counsel to issue a complaint.

MMBA Cases

Unfair Practice Rulings

Regressive wage freeze proposal not evidence of bad faith bargaining: City and County of San Francisco.

(Stationary Engineers Loc. 39 v. City and County of San Francisco, No. 2064-M, 9-25-09; 4 pp. + 7 pp. B.A. dec. By Member Wesley, with Members McKeag and Neuwald.)

Holding: The city’s presentation to the union of a regressive bargaining proposal and notification of the obligation to select an arbitration panel representative are insufficient to demonstrate bad faith or surface bargaining.

Case summary: On November 19, 2008, the city notified the union that it sought to negotiate a successor MOU, and asked the union to select a neutral member to serve on the arbitration panel created by the city charter to resolve bargaining impasses. The parties were required to name the arbitration panel members by January 20, 2009. The city also presented the union with a written bargaining proposal urging that there be no new economic benefits for 18 months, which amounted to an 18-month wage freeze.

The union filed an unfair practice charge asserting that the city engaged in bad faith or surface bargaining. It argued that the city’s 18-month wage freeze was a regressive bargaining proposal because the union already had agreed in June 2008 to a 12-month freeze.

The board affirmed the board agent's conclusion that, even if the proposal were regressive, a single indicator of bad faith is insufficient to establish unlawful conduct. In addition, the board agreed with the B.A. that the charge failed to allege facts showing that the totality of the city's conduct demonstrated an intent to subvert the bargaining process.

The union also alleged that the city pressured it to select the neutral arbitrator for the impasse panel two months before the charter-prescribed deadline. The B.A. found no factual allegations that the city's desire to select an arbitration panel thwarted negotiations or was intended to subvert the negotiation process.

The board agreed with the B.A. that merely informing a union of its obligations under a local city charter is not recognized as a factor indicative of surface bargaining. Notification to the union of the city's selection of its arbitration panel member was not a demand that the parties move to the impasse resolution process. It merely reminded the union of the city charter requirements.

The union's assertion that the city violated provisions of its local rules was dismissed by the B.A. There were no allegations as to how the city's actions violated the charter provisions or that the city's rules are unreasonable.

Without adverse action, charge of retaliation for grievance filing dismissed: County of Riverside.

(*Jackson v. County of Riverside*, No. 2065-M, 9-25-09; 2 pp. + 18 pp. B.A. dec. By Acting Chair Dowdin Calvillo, with Members McKeag and Neuwald.)

Holding: A classification study undertaken to resolve the charging party's out-of-class grievance did not result in adverse action because, while her job title changed, the charging party continued to perform the same duties with no loss of compensation after the study was implemented.

Case summary: The charging party alleged that the county retaliated against her by downgrading her position after she filed an out-of-class grievance. Prior to arbitration, the county and the charging party's exclusive representative entered into a settlement agreement that obligated the county to conduct a classification study.

As a result of the study, the charging party was reclassified and downgraded to the position of public guardian investigator, with the same salary as that of social service worker II, her previous classification.

The county human resources director informed the charging party that the new investigator position was created because the social service worker II classification did not appropriately describe the work she performed.

A board agent concluded that the charging party did not suffer an adverse action because, while her job title changed, she earned the same salary and performed the same duties before and after the reclassification.

The B.A. also found insufficient evidence that the county took action in retaliation for the charging party's grievance filing. No disparate treatment was demonstrated by the fact that two other employees performing the same duties earned more than she earned. Both employees earned higher salaries and were employed in a higher rank within the social service worker classification before the study was released.

PERB lacks the authority to determine whether the charging party was working out-of-class, said the B.A. That is a contractual issue between the union and the county.

The charging party lacked standing to assert that the county had a duty to negotiate with the union over its decision to reclassify her position because the duty to meet and confer is between an employer and the exclusive representative.

On appeal, the board adopted the B.A.'s decision as its own. It declined to consider pay stubs as evidence that the reclassification had resulted in a pay reduction since the charging party possessed these documents before the B.A. dismissed her charge.

Charge failed to show any adverse action linked to protected activity: Metropolitan Water District of Southern California.

(*Jones-Boyce v. Metropolitan Water District of Southern California*, No. 2066-M, 9-29-09; 13 pp. By Acting Chair Dowdin Calvillo, with Members McKeag and Neuwald.)

Holding: The charging party failed to allege sufficient facts in support of her claim that the district placed her on administrative leave and terminated her employment and medical benefits because she engaged in protected activity.

Case summary: The charging party alleged that the district placed her on administrative leave and later terminated her employment and health benefits in retaliation for exercising protected activities. A board agent dismissed the charge, and an appeal to the board followed.

PERB first found that the charging party did not engage in activity protected by the MMBA when she informed the district of her intent to file a claim for long-term disability benefits, submitted discrimination complaints, or filed a claim for workers' compensation benefits. Nor did she exercise rights conveyed by the act when she complained to the district's governing body regarding the conduct of the law firm representing the district in her civil action; this was not a complaint to her employer about her working conditions.

Nevertheless, the board found that the charging party engaged in protected activity when she utilized a union representative in her dispute with the district over a directive issued by her supervisor concerning absences from work, and when she filed the instant unfair practice charge.

The board found that the charging party's supervisor was aware of her reliance on union representation, but the charge did not show that the supervisor played any role in placing the charging party on administrative leave or terminating her employment and health benefits. The board declined to impute the supervisor's knowledge of the charging party's protected activity to the district because there was no allegation that any district employee other than her supervisor was aware of the union representative's involvement. The board found, however, that the district knew of the unfair practice charge since it filed a response.

While placing an employee on involuntary paid administrative leave is an adverse action, said the board, citing *San Mateo CCD* (2008) No. 1980, 193 CPER 78, in this case, the charging party was on unpaid medical leave at the time she was placed on paid administrative leave. Applying the

objective test announced in *Newark USD* (1991) No. 864, 88 CPER 59, the board found that placement of the charging party on administrative leave was not an adverse action "because she gained pay as a result of the status change."

The board rejected the charging party's argument that placement on administrative leave was an adverse action because it prevented her from obtaining long-term disability benefits. PERB found that the charging party failed to allege facts showing that disability benefits were denied because she was on administrative leave.

The board also concluded that the district did not terminate the charging party's employment, but rather implemented her voluntary resignation under the terms of a settlement agreement.

Even if placement on administrative leave and termination of employment and health benefits constituted adverse actions, the board said, the charge failed to establish a nexus between those actions and the filing of the instant unfair practice charge because the district placed the charging party on administrative leave and terminated her employment before she filed her charge. While the charging party's health benefits were terminated after the charge was filed, the board saw no indication that termination of her benefits was motivated by the unfair practice charge filing. Instead, said the board, medical benefits were terminated as a result of the charging party's resignation.

The board refused to accept an addendum to the appeal filed by the charging party after the 20-day appeal period, finding no good cause was shown for the late filing.

County's personnel rules that do not address relations between employer and employee organization are beyond PERB's jurisdiction: County of San Bernardino.

(Roeleveld v. County of San Bernardino [County Library], No. 2071-M, 10-20-09; 10 pp. By Acting Chair Dowdin Calvillo, with Members Neuwald and Wesley.)

Holding: The county's personnel rules deal with relations between the county and individual employees. They are not local rules under Sec. 3507(a) and are outside PERB's jurisdiction.

Case summary: The charging party filed an unfair practice charge asserting that the county violated its personnel rules when, based on criteria not in the job description, it hired a full-time library assistant who was not eligible for the position, failing to consider the charging party's prior experience and neglecting to give her a written rejection letter.

First, the board concluded that the terms of the negotiated memorandum of understanding between the county and the employee organization representing county employees expressly state that disputes concerning the personnel rules will be settled by the civil service commission.

A violation of a local rule adopted pursuant to Sec. 3507 of the MMBA may be processed as an unfair practice under Sec. 3509. Here, however, the board explained, PERB has no authority to process an alleged violation of the county's personnel rules because they are not local rules adopted under Sec. 3507. Referring to the preamble of the act, the board reasoned that the only type of local rules that may be adopted pursuant to Sec. 3507 are those that regulate relations between the public agency and the employee organization. The board noted that all eight subjects mentioned in Sec. 3507 that may be addressed by local rules pertain to employer-employee relations.

In contrast, the county's personnel rules address relations between the county and individual employees. They set out procedures for classifying positions, selecting individuals to fill positions, evaluating employee work performance, and discipline.

The charging party also alleged that the county retaliated against her in violation of the act. The board found she engaged in protected activity when she asked for union assistance in pursuing claims about the selection process, and that the county had knowledge of her activities.

The charging party argued that the county took adverse action by failing to provide her with a written rejection letter or examination results thereby preventing her from appealing the denied appointment to the civil service commission. County rules require that an appeal must be filed within 30 days "after the date of mailing of examination

results." This language implies that written exam results are a prerequisite to an appeal, but the section does not explicitly say so. Because the charging party failed to establish that the civil service commission would have rejected her appeal, the county's failure to provide her with a written rejection or exam results was not an adverse action.

Even if this is considered an adverse action, the charge does not establish that the action was the result of unlawful motivation. The board reasoned that the failure to send a rejection letter was not new behavior by the county. It was the continuation of a course of conduct that began when she was verbally notified of the selection results, which occurred two days before she sought assistance from the union.

Voicemail message was not 'acceptance' of the city's final offer: City of Clovis.

(Operating Engineers, Loc. 3 v. City of Clovis, No. 2074-M, 10-30-09; 9 pp. dec. By Member Wesley, with Acting Chair Dowdin Calvillo and Member Neuwald.)

Holding: The city did not commit an unfair practice by failing to implement a salary increase because the union did not accept the city's final offer of a 3 percent raise when it left a voicemail message offering to withdraw its unfair practice charge if the city implemented the final wage offer.

Case summary: The parties began wage reopen negotiations in May 2007, but failed to reach agreement. In July 2007, the city proffered its last, best, and final offer of a 3 percent salary increase effective July 1, 2007. The union rejected the offer and declared impasse.

Following unsuccessful mediation sessions, the parties met to resume negotiations. After exchanging proposals, the city again presented its 3 percent salary increase as its final offer.

The union advised the city that its proposal had been voted down by the membership and again declared impasse. The city manager then announced to the bargaining unit employees that the city "has decided to conclude its efforts to reach agreement on this issue." The union filed an unfair practice charge asserting that the city had engaged in bad faith bargaining.

When the city did not implement the 3 percent increase, the union's chief negotiator left a voicemail message for the city's chief negotiator, indicating that it would withdraw the pending unfair practice charge if the city would implement the increase. The city declined the union's "trade off."

An administrative law judge concluded that the union's voicemail message was a valid acceptance of the city's offer, thereby creating a binding agreement between the parties. On appeal, the board reversed the ALJ, finding no direct testimony regarding the actual content of the voicemail message. The city's chief negotiator testified that he understood the voicemail message to be "nothing more than a settlement offer of the unfair practice charge." Testimony of the union's negotiator about his intent is insufficient to sustain a finding that the phone message was a specific and unconditional acceptance of the city's offer.

The board also concluded that, even if the voicemail message was an acceptance of the city's final offer, the agreement was not reduced to writing or ratified by the city and, in accordance with Sec. 3505.1, was not binding on the parties. Citing *Long Beach City Employees Assn. v. City of Long Beach* (1977) 73 Cal.App.3d 273, 35 CPER 20, PERB concluded that the parties' agreement must be presented to the public agency's governing body to be binding.

The ALJ also had concluded that the voicemail message changed bargaining circumstances, thereby breaking the parties' impasse and reviving the city's duty to bargain. While recognizing the board's holding in *Modesto City Schools* (1983) No. 292, 56 CPER 15, which held that concessions have a significant impact on the bargaining equation, PERB concluded that this was not alleged by the union in its complaint and was raised for the first time in the union's post-hearing brief. Therefore, the board ruled, the city did not have an opportunity to fully litigate the issue.

No grounds for reconsideration demonstrated: San Bernardino County.

(*Shelton v. San Bernardino County Public Defender*, No. 2058a-M, 10-30-09; 2 pp. By Member McKeag, with Members Neuwald and Wesley.)

Holding: The charging party failed to present a sufficient basis for reconsideration.

Case summary: The charging party alleged that the county denied her the right to union representation and retaliated against her by placing her on administrative leave.

An administrative law judge found that she failed to satisfy her burden of proof and dismissed the complaint. The board upheld the ALJ's proposed decision.

The charging party sought reconsideration under PERB Reg. 32410, which limits the grounds for reconsideration to prejudicial errors of fact or newly discovered evidence.

Here, the board found the charging party failed to meet this standard and merely argued the same facts that were presented on appeal. Accordingly, it denied the request for reconsideration.

No factual allegations that the city improperly closed grievances: City and County of San Francisco.

(*Lam v. City and County of San Francisco*, No. 2075-M, 11-4-09; 6 pp. dec. By Acting Chair Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: The charging party failed to allege sufficient facts to show that the city colluded with his exclusive representative to close grievances he had filed, that the city did so in retaliation for his protected activity, or that it had a duty to inform him of the closures.

Case summary: The charging party alleged that the city violated the act by intimidating and colluding with his exclusive representative regarding grievance filings, retaliating against him for filing grievances and an unfair practice charge, failing to notify him or the union of grievance closure, and violating the city's administrative code.

The charge was dismissed by a board agent, and Lam appealed to the board.

PERB first noted that the charging party's appeal put the board and the respondent on notice of the issues raised on appeal, as required by Reg. 32635(a).

However, the board found no allegations to support the claim that the city conspired with the union to close his

grievances. The record indicates that the city considered the grievances closed because the collective bargaining agreement has an election of remedies provision, and the charging party had elected to pursue a remedy through the city's equal employment opportunity office.

The board also found no merit in the assertion that the city committed an unfair practice by failing to notify the charging party that it had closed his grievances. The charge did not establish that the city had an obligation to directly notify the charging party. And, the city notified the union's worksite organizer. The union representative's alleged failure to pass this information on to local union officials is an internal union matter, PERB held.

Concerning the retaliation charge, the board found no basis for inferring that the city retaliated against the charging party for his protected activity. The charge alleged no facts to show disparate treatment, departure from past practice, or union animus.

Representation Rulings

County, as joint employer of clinics, must process union's request for recognition under local rules: County of Ventura.

(Union of American Physicians and Dentists v. County of Ventura, No. 2067-M, 9-29-09; 9 pp. + 23 ALJ dec. By Member Wesley, with Acting Chair Dowdin Calvillo and Member Neuwald.)

Holding: Because the county retains and exercises control over the manner and method in which work is performed, the county is a joint employer of the physicians who work at its clinics and must process the union's request for recognition in accordance with the MMBA and its local rules. However, it is premature to direct the county to proceed with a representation election or recognize the union as the employees' exclusive representative.

Case summary: The union filed an unfair practice charge asserting that the county violated the act by refusing to process its petition for recognition of physicians who provide patient care at the county's outpatient clinics. The charge also alleged that the county violated local employer-

employee relations' rules by refusing to take the appeal of its determination to deny recognition to the civil service commission.

Applying PERB precedent, an administrative law judge concluded that, along with the individual clinic corporations, the county's ambulatory care department functioned as a joint employer of the clinics because it co-determined matters governing essential terms and conditions of employment. The ALJ found that the department exercised significant control over patient care through the hiring process and through performance requirements affecting the delivery of patient care. The department also jointly prepared the clinics' budget, individual physicians' employment agreements and salaries, use of facilities and equipment, educational opportunities, and dress and grooming standards.

Because the ambulatory care department was a joint employer, the ALJ concluded the county had a duty to process the union's petition for recognition under its local rules. Its refusal to do so violated the MMBA as well as its local rules, and interfered with employees' rights to participate in activities of an employee organization.

The ALJ also concluded that, because the only issue that can be appealed to the county civil service commission is the unit determination itself, not whether the county denied recognition to the union as the physicians' exclusive representative, the county did not violate its own local rules when it refused to process the union's appeal to the commission.

As a remedy, the county was ordered to process the union's request for recognition in accordance with its local rules.

On appeal, the board affirmed the ALJ's conclusion that the county is a joint employer of the clinic physicians, noting that PERB does not use an "actual control" test. Here, the county was a joint employer because it retained the right to control the manner and method in which the physicians performed their work.

The board did not agree with the county that the ALJ should have identified the specific terms and conditions of

employment over which the county is required to bargain, as it would have been a premature determination outside the scope of the union's complaint.

PERB rejected the union's argument that the county should be ordered to conduct a representational election.

Duty of Fair Representation Rulings

No showing that union's alleged negligence extinguished charging party's claims or caused irreparable harm: IFPTE.

(*Maxey v. IFPTE Loc. 21, AFL-CIO*, No. 2077-M, 11-4-09; 2 pp. + 7 pp. R.A. dec. By Member McKeag, with Members Neuwald and Wesley.)

Holding: The allegations were insufficient to demonstrate that the union's grievance handling amounted to a breach of the duty of fair representation.

Case summary: The charging party alleged that the union failed to adequately represent him in connection with a grievance he filed contesting his termination. He asserted that the union did not communicate with him, that his union representative was not prepared for meetings, and that the union allowed the employer to delay in responding to his grievance.

The regional attorney dismissed the charge, finding no factual allegations that the union's shortcomings caused him to lose the right to pursue his claim or caused him to suffer irreparable harm.

The R.A. also concluded that the charging party failed to demonstrate that the union abused its power by acting in an arbitrary, irrational, or dishonest way. The alleged conduct is tantamount to mere negligence, which is insufficient to show a breach of the duty of fair representation.

Union's negligent conduct did not extinguish charging party's right to pursue claims: SEIU Loc. 1021.

(*Lam v. SEIU Loc. 1021*, No. 2076-M, 11-4 -09; 6 pp. dec. By Acting Chair Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: The charging party failed to allege sufficient facts to show that, by its involvement in the closure of two grievances, the union breached its duty of fair representation.

Case summary: The charging party alleged that the union breached its duty of fair representation by colluding with his employer when it closed two grievances, failing to notify him the grievances had been closed, and failed to return his telephone calls.

The charge was dismissed, and an appeal to the board followed.

In agreement with the board agent, PERB found that the allegation regarding telephone calls was untimely.

PERB found no allegations in the charge establishing that the union acted arbitrarily, discriminatorily, or in bad faith. The union's failure to consult with the charging party prior to closure of the grievances did not constitute a breach of the duty of fair representation.

The board also found no facts to indicate that the union intentionally withheld information. The allegations in the charge establish negligence on the part of the union. However, PERB has held that a union's negligent conduct breaches the duty of fair representation only when it completely extinguishes the employee's right to pursue his or her claim. Here, the board found no factual allegations that the failure to notify the charging party had any affect on his ability to further pursue his grievances.

The contention that the union breached its duty of fair representation by failing to notify local union officers that the grievances had been closed is an internal union matter, which did not have a substantial impact on the charging party's relationship with his employer.

Factual allegations insufficient to support DFR charge: SEIU Loc. 1021.

(*Schmidt v. SEIU Loc. 1021*, No. 2080-M, 11-24-09; 5 pp. + 18 pp. R.A. dec. By Member McKeag, with Acting Chair Dowdin Calvillo and Member Wesley.)

Holding: The allegations raised by the charging party failed to establish that the union's conduct breached the duty of fair representation.

Case summary: The charging party alleged that the manner in which the union handled her workers' compensation claim breached the duty of fair representation. The regional attorney noted that the union has no duty to represent an employee in an extra-contractual matter, such as a workers' compensation claim or violations of anti-discrimination laws.

The R.A. also found that the charge failed to allege sufficient facts to assess when conduct occurred or who acted on the part of the union. At a minimum, the R.A. said, the charging party must allege sufficient facts from which it becomes apparent in what manner the exclusive representative's conduct was without a rational basis or devoid of honest judgment.

Facts provided in the amended charge indicate that the union did respond to the charging party's request for assistance; it wrote several letters and initiated at least two grievances on her behalf. The R.A. concluded that, based on the facts alleged, the union did not ignore the charging party or fail to address her concerns.

On appeal, the board affirmed the R.A.'s decision and dismissed the charging party's assertion that PERB's ruling in *SEIU Loc. 221 (Meredith)* (2008) No. 1982, 193 CPER 79, warranted a different result. In that case, the board announced that it would look to the cumulative activities of the exclusive representative to determine if the facts alleged are sufficient to show arbitrary conduct. A prima facie case can be established based on an overall pattern of conduct, even if any one action, standing alone, would not constitute a breach of the duty of fair representation.

Here, said the board, unlike in *Meredith*, the union made an effort to represent the charging party by writing letters on her behalf, initiating one grievance, and accompanying her to meetings, and was responsive to her complaints.

Prima facie DFR breach alleged, complaint to issue: IBEW Loc. 1245.

(*Flowers v. IBEW Loc. 1245*, No. 2079-M, 11-24-09; 5 pp. dec. By Member McKeag, with Acting Chair Dowdin Calvillo and Member Neuwald.)

Holding: The allegations raised by the charging party were sufficient to state a prima facie case that the manner in which the union pursued his grievance breached the duty of fair representation.

Case summary: Following the charging party's termination, the union filed a grievance. However, thereafter, the charging party received no further communication from the union, was not interviewed or consulted by the union, nor advised of the status of his grievance.

The union informed the charging party that it elected not to arbitrate the grievance, but did not offer an explanation as to why.

The charging party filed an unfair practice charge asserting that the union's conduct was irrational and devoid of honest judgment. The board agent dismissed the charge, reasoning that the allegation that the union never investigated the charge was conclusory and speculative.

On appeal, the board found that the charging party asserted sufficient facts to demonstrate that the union did not intend to resolve his grievance. Its failure to question the terminated employee supports the assertion that the union did not conduct an adequate investigation and states a prima facie case.

While simple case-handling errors and simple negligence do not constitute a violation of the duty of fair representation, here, PERB concluded, the union's failure to explain to the charging party why it chose not to process his grievance states a prima facie case.

The board remanded the case to the general counsel for issuance of a complaint.

Activity Reports

ALJ Proposed Decisions

Sacramento Regional Office — Final Decisions

Perkins v. State of California (Dept. of Water Resources), Case SA-CE-1772-S. ALJ Shawn P. Cloughesy. (Issued 12-30-09; final 1-26-10, HO-U-977-S.) The charging party contended that the Department of Water Resources retaliated by issuing her a corrective memo for asking questions on behalf of employees at a monthly staff meeting. While Perkins was forceful, direct, and repeatedly pressed for an answer, her questions/comments lasted only one minute in an 85-minute meeting. Once told the matter would be discussed at another time, she did not attempt to pursue it further. Perkins did not use profanity, foul language, or derogatory remarks. She attempted to get an answer to a question that was of concern to water resource technicians. Such action was not so opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice as to cause substantial disruption or material interference with operations. The charging party's comments were found to be concerted as a logical continuation of group activity. A violation of the Dills Act was found.

SEIU Loc. 1000 v. State of California (Dept. of Motor Vehicles), Case SA-CE-1645-S. ALJ Christine A. Bologna. (Issued 10-14-09; final 11-10-09, HO-U-971-S.) On June 15, 2007, SEIU Staff Representative Gashaw was scheduled to conduct a union meeting. Shortly beforehand, employee Behjat Jounami asked her supervisor, Nathaniel Williams, if she could attend. Williams, a new supervisor, consulted another supervisor and granted permission. Then, Jounami informed Williams that she had decided not to go. When Gashaw learned that Jounami would not be at the meeting, he asked a job steward to escort him to the work unit so he could resolve the miscommunication with Jounami. Williams' supervisor, Jackie Perkins, also new, observed an unknown man in the unit and asked Williams to find out why he was there. Williams confronted Gashaw. Perkins heard loud voices and immediately moved the discussion to the hall.

The unfair practice complaint alleged two separate acts of employer interference: denial of Jounami's right to meet with a union representative and physical restraint of Gashaw as he attempted to meet with Jounami. No violation was found. Williams granted Jounami's request to go to the meeting, but Jounami, for her own reasons, declined to attend. Thus, DMV did not deny Jounami the right to meet with a union representative. Because

Williams and Gashaw were equally culpable for overreacting, the facts alleged as the basis for interference were not established.

Oakland Regional — Office Final Decisions

Schwartz v. Regents of the University of California, Case SF-CE-814-H. ALJ Donn Ginoza. (Issued 11-10-09, final 12-29-09, HO-U-974-H.) The university did not meet HEERA's public notice requirement by announcing its intention to restart employer and employee contributions to the defined benefit plan after a "contributions holiday." Even if the public could have become sufficiently informed of the "issue" at regents' meetings, the resolution was adopted before a reasonable opportunity for public comment. The university's public notice process, in which meetings are held by the director of labor relations after a notice to the media of the intention to announce bargaining proposals, did not meet the requirement because it was invoked after bargaining commenced. Statements made by the associate vice president at the regents' meetings prior to bargaining were not sufficient because they occurred without official adoption of the proposal and because delegation of the adoption step to a university employee is not supported by the statute or applicable precedent.

Chase v. City of Oakland (Oakland Museum of California), Case SF-CE-500-M and SF-CE-545-M. ALJ Shawn P. Cloughesy. (Issued 12-10-09, final 1-20-10, HO-U-976-M.) The charging party, a job steward with SEIU, contended that the city retaliated against her by denying her the opportunity to work holidays and issuing her a notice of intent to suspend her for five days for being insubordinate to her supervisor, rude and abusive to another manager, and abandoning her security post. The charging party was unable to establish a nexus between her protected activities and the adverse actions taken against her. The complaint was dismissed.

Los Angeles Regional Office — Final Decisions

Meredith v. SEIU Loc. 221, Case LA-CO-1322-E. ALJ Bernard McMonigle. (Issued 11-10-09; final 12-08-09, HO-U-973-E.) The charging party alleged the union breached its duty of fair representation at a meeting with the school principal and failed to pursue grievances regarding his alleged rejection from probation. However, evidence demonstrated that the charging party resigned through his actions and was not rejected from

probation. The principal did not request the meeting, which occurred only minutes after the charging party received an unsatisfactory evaluation that did not reject him from probation. The union had no duty to pursue a probation grievance that it determined to be unmeritorious or an untimely grievance over a late evaluation. No violation was found; the unfair practice charge and complaint were dismissed.

Kern County Probation Officers Assn. v. County of Kern, Case LA-CE-343-M. ALJ Thomas J. Allen. (Issued 11-03-09; final 12-02-09, HO-U-972-M.) There was no failure to bargain in good faith to impasse, mediation, and unilateral implementation. The weight of the evidence showed the county provided the requested information. Bargaining delays were caused by extraordinary circumstances, not bad faith. The unilateral implementation conformed to the MMBA.

Morgan v. Inglewood USD, Case LA-CE-5263-E. ALJ Ann L. Weinman. (Issued 12-07-09; final 01-20-10, HO-U-975-E.) A music teacher was first removed from the extra assignment of after-school band leader following complaints about the band program from several sources, then put on administrative leave pending investigation of her serious charges against other teachers and parents and counter charges against her, then non-re-elected to her teaching position. The complaint alleges this was all in retaliation for seeking union representation at a meeting and for filing the original charge. No nexus was found for any of the district's actions. The charge and complaint were dismissed.

Sacramento Regional Office — Decisions Not Final

California Department of Forestry Firefighters v. State of California (Dept. of Forestry and Fire Protection), Case SA-CE-1735-S. ALJ Bernard McMonigle. (Issued 12-28-09, exceptions filed 1-26-10.) A long-standing MOU provision required the state's collection of fair share fees from non-member employees upon request of the union. The union had never enforced that provision with regard to retired annuitants employed on a temporary basis. In September 2008, the state refused the union's request to collect fair share fees from retired annuitants, asserting that they were never part of the bargaining unit. The ALJ found that the retired annuitants had been part of the original bargaining unit since 1979. He also found that the union had not waived its right under the MOU to collect fair share fees from them. A violation was found, and the state was ordered to collect fair

share fees from retired annuitants and make the union whole from the date of request in September 2008.

SEIU Loc. 1021 v. City of Redding, Case SA-CE-553-M. ALJ Christine A. Bologna. (Issued 11-18-09; exceptions filed 12-14-09.) A Redding Electric Utility customer service representative, represented by SEIU, filed a harassment complaint under the city's policy. As a result of an investigation, the personnel director and the REU director authorized a second investigation into general customer service representative workplace issues. On July 22, the personnel director and REU director sent a letter to SEIU chapter representatives that the investigation into customer service issues was completed and results were summarized in a confidential report. On July 28 and August 11, SEIU requested the investigative reports. On August 6 and August 20, after meeting with SEIU representatives, the city responded that the reports could not be provided because city policy and the California Public Records Act required confidentiality. The unfair practice complaint alleged that the city failed to respond to SEIU's request for information. A violation was found. PERB has ordered production of the investigative reports; required production of information relevant and necessary to effectively administer the contract even absent a specific grievance; rejected CPRA defenses, standing alone, and approved redaction of confidential information before providing relevant information to exclusive representatives to eliminate privacy problems. As a remedy, the city was ordered to provide SEIU with copies of both reports, with witness statements accompanying each report, redacted of employee identifying information.

SEIU 1000 v. State of California (Dept. of Corrections and Rehabilitation)/Kern Valley State Prison, Case SA-CE-1694-S. ALJ Christine A. Bologna. (Issued 11-10-09; exceptions filed 11-30-09.) After receiving written reports from nursing staff that their supervisor was pressuring them to turn over purchased meal tickets to her, KVSP Manager Zamora requested an investigation. On June 26, Supervising Registered Nurse Moore was removed from her assignment. On June 30, Zamora issued a cease and desist order to Moore after hearing that she was contacting nurses about the investigation. SEIU representative Sanchez asked KVSP nurse and SEIU job steward Martinez to get documentation from the nurses. At a union meeting to discuss another issue, four nurses raised the meal tickets dispute. Another union representative asked Martinez to talk to cafeteria

staff. Martinez questioned the cafeteria manager. After learning that Martinez was asking questions, ISU Correctional Sergeant Williams consulted with Zamora, who directed her to order Martinez to cease and desist from conducting her own investigation into meal tickets. The unfair practice complaint alleged two separate acts of employer interference: the order to cease and desist any investigation into meal tickets and a statement that Martinez could be “walked off” the job, i.e., fired. No violation was found. The second allegation was not established by the evidence based on credibility determinations. The cease and desist order did not apply to discussions with KVSP employees/union members, and was limited to contract cafeteria staff as potential witnesses. No KVSP representative knew that Martinez was investigating a potential grievance when the decision to give the cease and desist order was made. No harm to employee rights resulted from the cease and desist order. Grievances were filed by SEIU over the meal tickets within days of the July 2 union meeting and the July 3 cease and desist order. Martinez remains an SEIU job steward and bargaining unit representative. Since CDCR/KVSP was concerned about the integrity of the official investigation after receiving two reports of potential witness questioning outside of ISU within four days, operational necessity and legitimate business justification were established.

CSEA & its Chap. 354 v. Red Bluff Union HSD, Case SA-CE-2480-E. ALJ Bernard McMonigle. (Issued 10-15-09; exceptions filed 11-19-09.) In November 2007, the parties reached a tentative agreement that included a 2.4 percent salary increase. The union membership ratified it in December. On January 9, the governor announced significant mid-year cuts for education and the budget plan for 2008-09. Although on the agenda, the trustees did not vote on the tentative agreement at their January 16 meeting. The assistant superintendent informed union negotiators that the district could not pay a salary increase at that time. By March, the district determined it could not certify to the county office of education that it could afford to pay the salary increase. In June 2008, the superintendent recommended that the tentative salary agreement be rejected, and trustees did so. The ALJ found the facts similar to those in *Temple City USD* (2008) Dec. No. 1972. There, PERB determined that the employer was not required to ratify the tentative agreement and “was excused by the proposed unprecedented and severe mid-year cuts in education funding” in 2002-03. Here, the district

management actions appear to have been reasonable and taken in good faith. The complaint was dismissed.

Oakland Regional Office — Decisions Not Final

Berkeley Council of Classified Employees v. Berkeley USD, Case SF-CE-2732-E. ALJ Donn Ginoza. (Issued 12-10-09; exceptions filed 12-30-09.) A provision authorizing a public school employer to make deductions from employee paychecks in order to recoup erroneous overpayments is not a mandatory subject of bargaining under *CSEA v. State of California* (1988) 198 Cal. App.3d 374, which found that such a provision conflicts with Labor Code Secs. 221, 222, and 224, Code of Civil Procedure’s wage garnishment and attachment law, and constitutionally mandated procedural due process. Therefore, the employer’s insistence to impasse on such a proposal in this case resulted in a per se violation of the duty to bargain in good faith.

Mendocino County Public Attorneys Assn. v. County of Mendocino, Case SF-CE-432-M. ALJ Donn Ginoza. (Issued 10-07-09; exceptions filed 10-27-09.) Neither the rule of neutrality following certification of a new exclusive representative nor the duty to refrain from unilateral changes during bargaining requires an employer to implement salary increases scheduled to take effect after negotiations for new MOU have commenced, where the employer has voluntarily recognized the new exclusive representative and immediately begins bargaining for a new MOU. The wage increase here attached to the MOUs of the unit from which the employees had migrated, there was no evidence of employer interference with free choice or refusal to bargain, and commencing bargaining for a new MOU prior to expiration of those MOUs would impose an unfair opportunity cost on the employer if it were required to have granted the increase.

Los Angeles Regional Office — Decisions Not Final

Riverside Sheriffs Assn. v. County of Riverside, Case LA-CE-353-M and LA-CE-438-M. ALJ Ann L. Weinman. (Issued 12-30-09, exceptions filed 01-22-10.) RSA filed two unit modification petitions with the county, seeking to add classifications from two other unions to certain of its own already-established units. Petitions showed support from employees who would be added and from RSA’s recipient units. Relying on the local rule requiring “proof that its represented members comprise 15 percent of the employees in the unit,” the county denied the

petitions because they did not show support from the remaining donor units. The county's interpretation of the rule was found to be unreasonable and its denial of petitions was unlawful.

Heron v. Santa Ana USD, Case LA-CE-5286-E. ALJ Ann L. Weinman. (Issued 12-15-09; exceptions filed 1-04-10.) A substitute teacher was given a notice of unsatisfactory performance for altering his time card in protest of not receiving extra-period pay. The notice stated any further misconduct could lead to discharge. There was no further misconduct, but he was discharged after submitting a strongly worded response to the notice. The notice was not found unlawful, but the discharge was.

Union of American Physicians & Dentists v. County of Orange, Case LA-CE-518-M. ALJ Shawn P. Cloughesy. (Issued 12-14-09, exceptions filed 12-24-09.) The union contended that the county violated the MMBA as it did not have a local rule that governed severance proceedings. It also argued that the county applied an unreasonable rule when it required a majority proof of support for the entire unit in order to have it severed. However, the local rule had a "unit modification" rule that covered severance and did not require majority proof of support for the entire unit, but only for the proposed unit. The complaint was dismissed.

Council of Classified Employees/AFT Loc. 4522 v. Palomar CCD, Case LA-CE-5226-E. ALJ Ann L. Weinman. (Issued 11-03-09; exceptions filed 11-23-09.) The charge alleges a unilateral change in discipline policy, by issuing a written reprimand to an employee under the terms of the side letter. The issue was whether the side letter expired with the most recent modification of the collective bargaining agreement. The side letter was held to still be in effect.

SEIU Loc. 721 v. County of Riverside, Case LA-CE-456-M. ALJ Ann L. Weinman. (Issued 10-15-09; exceptions filed 11-25-09.) The union charged the county with a unilateral change by ceasing the long-standing practice of paying overtime to employees exempt from FLSA overtime provisions. However, the county announced its decision more than six months prior to filing of the charge. Further, the parties' new labor contract contained new provisions in conformity with the FLSA, and a side letter provided premium pay for certain exempt classifications to avoid recruitment/retention problems. The charge was found to be untimely; the county satisfied its bargaining obligations.

SEIU Loc. 721 v. County of Riverside, Case LA-CE-497-M. ALJ Ann L. Weinman. (Issued 10-13-09; exceptions filed 11-23-

09.) The county unlawfully denied the union's petition to accrete per diem employees into three represented units, on the basis that the union did not provide a showing of majority support. The county also unlawfully denied the modified petition on majority support grounds, as well as unreasonable interpretation of the local rule regarding modified petitions.

Report of the Office of the General Counsel

Injunctive Relief Cases

Two requests for injunctive relief were filed during period of October 1, 2009, through December 31, 2009. Of these, one request was denied by the board and the other was withdrawn.

Requests denied

Coalition of University Employees v. University of California (IR No. 578, Case SF-CE-905-H). On November 3, 2009, the union filed a request for injunctive relief primarily to prohibit the university's imposition of furloughs, layoffs, and campus closures. On November 10, 2009, the board denied the request.

Requests withdrawn

Communication Workers of America v. County of Butte (IR No. 579, Case SA-CE-645-M). On December 22, 2009, the union filed a request for injunctive relief primarily to prohibit the county from proceeding with a petition, filed by the Butte County Employees Association, to decertify the union as the exclusive representative of the county's social services workers unit. On December 30, the union withdrew its request.

Litigation Activity

One new case opened during the period of October 1, 2009 through December 31, 2009.

Baprawski v. PERB, Los Angeles County Superior Court Case No. BS123046. (PERB Case No. LA-CE-4883-E.) In October 2009, Baprawski filed a petition for writ of administrative mandamus with the superior court, seeking to set aside PERB Dec. No. 2059 [upholding ALJ's determination that the unfair practice charge was untimely and dismissing the charge and complaint against LACCD] and require PERB to hold a hearing on the merits.

Precedential Decisions of the

Fair Employment and Housing Commission

California Code of Regulations Title 2, Sec. 7435, authorizes the Fair Employment and Housing Commission, an administrative agency charged with enforcing California's Fair Employment and Housing Act, to designate as precedential, any decision, or part of any decision, that contains a significant legal or policy determination of general application that is likely to recur. Once the commission has done so, the agency may rely on it as precedent and the parties may cite to it in their arguments to the commission and the courts.

One of the commission's decisions designated as precedential is summarized below. Full text of decisions may be viewed online at <http://www.fehc.ca.gov/act/decision.asp>.

The manager's conduct was sufficiently severe to constitute a hostile work environment under the FEHA. These working conditions were so intolerable as to constitute constructive discharge.

The manager and the company are liable for sexual harassment and creation of a hostile work environment. The complainant was awarded back pay from the date she was constructively discharged until the date the company ceased doing business. The company alleged that the complainant failed to mitigate her damages. However, the severe emotional after-effects she suffered rendered her unable to work. The commission also ordered \$50,000 in actual damages for emotional distress and an administrative fine of \$25,000.

Manager's unwanted sexual conduct created hostile work environment.

(Department of Fair Employment and Housing v. Artifer Corp., No. 09-05-P, 9-30-09; 23 pp. H.O. dec.)

Holding: The manager's behavior toward a female employee constituted sexual harassment because his conduct was so severe as to create a hostile work environment; the conditions were so intolerable as to constitute constructive discharge. The manager's conduct amounted to sex discrimination.

Case summary: The complainant's manager subjected her to continued, unsolicited sexual conduct, including crude and sexually graphic remarks about her appearance and about her coworker. The manager told the complainant to "look as good as possible and flirt with the bank tellers," invited her to socialize with him after work, and told her to set up a webcam directed at her chest, which the manager used to eavesdrop on her private conversations. The manager's sexual conduct escalated to include grabbing, hugging, explicit sexual comments, and calls to her home.

All of the conduct directed at the complainant was unwanted and persisted after she repeatedly told him to stop.