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LETTER FROM THE EDITOR

Dear *CPER* Readers,

This is issue No. 200 of the *California Public Employee Relations* journal. *CPER* first debuted in 1969, when the Meyers-Milias-Brown Act had just been passed. The act allowed local government agencies to come up with their own rules to implement the basic principles set out in the statute. Representation elections and recognition of exclusive bargaining representatives; procedures for the resolution of disputes involving wages, hours, and other terms and conditions of employment — forty years ago, many public entities didn't have a clue. It would be more than five years before the Public Employment Relations Board became part of the picture.

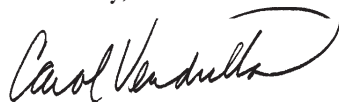
At that point, *CPER* came to the rescue. It provided much needed — and appreciated — information to both labor and management.

In some ways, *CPER* has come to define the public sector community. As the legislature passed other collective bargaining statutes during the seventies, the *CPER* program expanded its coverage as well, to schools, state government, and higher education. With passage of the two trial court laws, our mission continues to grow.

As the public sector matured, more and more jurisdictions came to understand things like appropriate bargaining units, the duty to bargain, and scope of representation. Some principles were borrowed from the private sector. Others, though, needed sorting out with a public sector sensibility: class size and teacher credentialing in the public schools, the state budget component under the Dills Act, and an academic senate's role after HEERA. What proved most difficult was addressing public sector strikes, which occurred outside the NRLA's business model. In fact, we're still working on that one.

Two hundred issues of *CPER* documenting the history of California's public sector employee relations experience. Quite an accomplishment, don't you think?

Sincerely,

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

Carol Vendrillo
Editor

Implementing a Non-Negotiable Decision Before Completing Bargaining on Negotiable Effects

M. Carol Stevens



Carol Stevens has practiced employment and labor relations law for public agencies in California since 1978. Stevens was a founding partner of Kay & Stevens, and is currently a partner at Burke, Williams & Sorensen. She also serves as the executive director of California Public Employers Labor Relations Association ("CALPELRA").

BEGINNING AS early as fiscal year 2008-09, public entities in California experienced precipitous declines in revenue as a result of this "Great Recession." Public agency revenue shortfall continues today and has shown little indication of hitting bottom. Most forecasters suggest that increases in public revenues will lag improvement in the general economy by at least two years.

Because of this decrease in public sector revenue, most agencies can expect difficult choices and contentious bargaining at least through the 2013-14 fiscal year. This anticipated five-year period of economic crisis has spawned, and will continue to generate, unconventional scenarios in labor relations. It already has created many "new realities" in public sector labor relations.¹ These realities not only will generate Public Employment Relations Board decisions of first-impression, but also will reexamine and emphasize older decisions previously considered insignificant.

The Fiscal Crisis, Duty to Bargain, and Management Deadlines

Lawful unilateral adoption before completing the bargaining process will continue to be a major point of conflict during the current fiscal crisis. Many issues relating to the elimination, reduction, or modification of services involve critical timelines — whether for layoff notices, expiration of service contracts, meeting statutory deadlines, or the "loss of budgetary savings." The unprecedented drop in revenues requires public agencies to act in a timely fashion in order to adjust to the changing fiscal environment.

Because the good faith standard generally requires completion of the negotiations and impasse process prior to implementation of any change, California public employers have the challenge of meeting their severe fiscal constraints

while at the same time fulfilling their bargaining obligations. In many instances, public agencies have to choose between disastrous fiscal results and untested bargaining strategies.

Currently, public employers have little room to be flexible within these constraints. And, the question continuously arises — what constitutes a legitimate deadline for completion of the bargaining process that also allows the public agency to move ahead to address severe fiscal demands without any unreasonable delay caused by a difficult and protracted negotiating process?

Basic Obligations of Good Faith Bargaining During Economic Crisis

All California labor relations statutes require the duty to negotiate in good faith with the public employer and the recognized employee organization at the request of either party before making changes in any mandatory subject of bargaining.² What is less well-understood is that the duty extends into the impasse procedure itself³ and may be revived any time impasse is broken,⁴ either before or after the exhaustion of any established impasse procedure.⁵ The requirement is a continuous one for both unions and management.⁶ This good faith continuum extends throughout the entire negotiations process, unless extinguished by clear and unmistakable waiver.⁷

The legal tests for good faith during the impasse process are well established. The “totality of circumstances” test will be applied to demonstrate several indicia for “bad faith” bargaining, but the proof of just one such indicator does not itself establish “bad faith.”⁸

Per se violations also apply. The most common involves the unilateral change in a mandatory subject before completing bargaining or exhausting the impasse process.⁹ Another common *per se* impasse violation occurs when a party insists on bargaining to the point of impasse on a non-mandatory subject.¹⁰ An untimely or denied request for relevant and necessary information is another form of *per se* violation.¹¹

Good Faith Duty and Management Deadlines for Completing Bargaining

Generally, negotiating parties must provide adequate notice and the opportunity to negotiate before any change is implemented.¹² The good faith duty, therefore, requires a reasonable amount of time to conduct negotiations and exhaust the impasse procedure. The law does not generally contemplate the imposition of mandatory deadlines before the completion of the full bargaining process, including impasse.

An employer cannot unilaterally adopt a mandatory subject simply because the general budget deadline for fiscal-year adoption contemplates the completion of the bargaining process.¹³ Completing negotiations by established fiscal deadlines are aspirational and hortatory, not mandatory.¹⁴ Nor have employers been excused from negotiations simply because of a perceived or anticipated budgetary shortfall.¹⁵

To provide an exception, any fiscal emergency must evince no real alternative to taking unilateral action, with no time for meaningful negotiations before taking action.¹⁶

Similarly, an employer will not be excused from the duty to bargain and complete the impasse procedure because of ballot measure deadlines or alleged union delays. For example, PERB decided that the County of Santa Clara was not excused from bargaining because of a ballot deadline, union delay, or business necessity.¹⁷ This case involved key decisions on the scope of bargaining and an employer’s ability to unilaterally implement when faced with a deadline.

The issue began when several unions instituted a proposed ballot initiative that would require interest arbitration of negotiations on wages, hours, and terms and conditions of employment. In response to the unions’ initiative, the county placed two proposed charter amendments on the ballot. One measure proposed substantial limitations regarding binding interest arbitration.¹⁸ The second proposed an amendment to the charter’s current calculation of prevailing wages used in the determining pay rates for county employees.

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The county invited the affected unions to meet and confer on any impact the county's alternative initiatives might have on mandatory subjects. The correctional peace officers union requested to meet, and the parties met four times. During the first meeting, county representatives were greeted with profanities and what the county described as "rowdiness." In addition, the county thought the union delayed setting up meetings. But when asked whether he sought counterproposals from the union, the county representative testified that he was "soliciting feedback" and "gathering information" for the county board of supervisors. When faced with the legal deadline for placing the initiatives on the ballot, the county did not declare impasse but went ahead with the items. Both the union and county initiatives failed in the November election.

PERB concluded that the county's initiative, an amendment to the charter's current calculation of prevailing wages used in determining pay rates for county employees, was a mandatory subject of bargaining, distinguishing a prior Court of Appeal ruling involving the City of Fresno's wage rate charter amendment.¹⁹ In the *Fresno* case, the charter wage rate only established a minimum wage, or what would be the employer's initial offer. Because the County of Santa Clara's prevailing wage initiative established the wage rate, rather than the minimum rate, the initiative involved mandatory subjects. Under *Seal Beach*,²⁰ the county was required to negotiate over the terms of any initiative affecting wages, hours, and terms and conditions of employment.

Instead of declaring impasse and completing the impasse process before placing the prevailing wage amendment on the ballot, the county ceased bargaining and placed the proposed charter amendment on the ballot. PERB decided that the county's failure to declare impasse and complete the bargaining process, including any impasse procedures, constituted bad faith.

Of greater importance, PERB decided that the county was not excused from bargaining the initiative because of the ballot deadline, the union's delay tactics, or the county's alleged business necessity.

Nor did the deadline for placing the measure on the ballot excuse the county from completing the bargaining process. Unlike PERB's prior decision that an immutable deadline for layoffs excuses an employer's duty to complete bargaining before implementation,²¹ PERB found that the county did not meet the test of "an imminent need to act" based on the deadline.²²

In addition, PERB did not excuse the county from completing bargaining on the basis of the union's alleged behavior and dilatory tactic. PERB noted that such behavior does not constitute an automatic waiver of a union's right to bargain, and that an employer cannot resort to "self help" but should instead file an unfair practice charge with PERB regarding the union's behavior.

Finally, PERB rejected the county's claim that business necessity compelled the county to act. PERB found the county did not provide facts to support its claim, stating that, "the mere fact that the county thought inclusion of the measure on the November 2004 ballot was desirable does not constitute a compelling operational necessity sufficient to set aside its bargaining obligation."²³

Exceptions to the General Rule That Management Deadlines Will Not Excuse Completion of Negotiations

Deadlines for completing negotiations must have a significant and provable impact on the employer's operation before the deadline will excuse further bargaining. And business necessity must be demonstrated as "a financial emergency which leaves no real alternative to the action taken and allows no time for meaningful negotiations before taking action."²⁴

PERB decided that the county was not excused from bargaining the initiative because of the ballot deadline, the union's delay tactics, or the county's alleged business necessity.

The employer may proceed with unilateral action before completing the negotiations process and/or exhaustion of impasse procedure, however, in these specific circumstances: (1) the union fails to respond to the employer's notice of a potential change;²⁵ (2) the union relies on a "zipper clause" to refuse to bargain on the "effects" of a non-negotiable policy;²⁶ (3) the union fails to properly demand negotiations or specifically identify the "effects";²⁷ (4) an actual fiscal emergency exists leaving no reasonable alternative;²⁸ (5) the employer covered by the Meyers-Milias-Brown Act, Dills Act, or Trial Courts Acts meets all the standards for declaring an emergency defined under those acts;²⁹ or (6) management proposes to change a non-negotiable subject prior to completing the negotiations or the impasse process on the effects by a reasonable deadline established by management.³⁰

Establishing a Deadline for Implementing Non-Negotiable Decisions While Still Bargaining Over the Effects — The Compton Exception

The sixth exception is one public agencies hope PERB will expand. Under *Compton Community College Dist.*, to change a non-negotiable subject prior to completing negotiations on the effects, the employer must show: (1) the implementation date was not arbitrary, but was based on an immutable deadline (e.g., a statutory layoff deadline) or an important managerial interest, such that a delay in implementation beyond the date chosen would effectively undermine the employer's right to make the non-negotiable decision; (2) the employer provided notice of the decision and the implementation date sufficiently in advance to allow for meaningful negotiations; and (3) the employer negotiated in good faith before and after implementation.³¹

Of course, the most difficult questions arise under the first prong of the three-part test. What type of deadline is not arbitrary? And what constitutes a "managerial interest"

that would be undermined by not meeting the deadline?

On one hand, in setting management deadlines the public employer must assume that PERB will require management to demonstrate a bona fide managerial interest and not a mere pretext for driving a hard bargain. On the other hand, public agencies can hope that during these difficult times, PERB's next-generation decisions will allow revenue-challenged agencies to act with fiscal responsibility in dealing with the Great Recession.

As demonstrated in its *California Correctional Peace Officers Assn. v. State of California (Department of Corrections and Department of Personnel Administration)*³² decision, PERB's

next-generation decisions may continue to favorably address the following instances of reasonable "managerial interests" under the *Compton Community College* standards cited above.³³

- Will "lost budgetary savings" due to the delayed implementation of a staff reduction or work rules allow the employer to set a reasonable deadline for the completion of the bargaining process?
- Will the timeline for implementing a layoff, as the employer's alternative to a negotiated wage reduction, constitute a reasonable deadline for the completion of the wage reduction negotiations?
- Will an expiration date for a services contract constitute a reasonable deadline for completion of the negotiations necessitated by the non-renewal of the services contract?
- Will deadlines established for terminating or modifying public services (changes in mass transit routes, closure of libraries) constitute reasonable deadlines for completing bargaining?

Public Policy Reasons for Reasonable Deadlines

During this Great Recession, public employers are forced to eliminate, reduce, or reorganize the delivery of services to match declining revenue. These decisions are

After notice, the union must clearly demand to bargain over the effects, and must identify those effects with some precision.

core management prerogatives generally outside the scope of bargaining, even though the implementation of those decisions may impact wages, hours, and workload of the remaining employees. For this reason, unions rightfully expect to bargain over the effects of an employers' decision to reduce or eliminate public services.

Much of the law has been clarified since the California Supreme Court, in a case involving the City of Claremont, established a three-part test for identifying the effects that must be bargained before a non-negotiable change can be implemented by a public agency.³⁴

PERB and the courts also have determined that after notice the union must clearly demand to bargain over the effects,³⁵ and must identify those effects with some precision.³⁶ Without such demand and clarification the employer is free to implement the decision without completing the negotiations on the effects.

Finally, PERB and the courts have established the general rule that the employer must complete negotiations on the effects before implementing the non-negotiable decision. Few exceptions to that rule have been fully enunciated other than the basic principles set forth in *Compton Community College Dist.*³⁷

History of Compton Decision

Deciding when the public employer may implement a non-negotiable decision involving negotiable effects is critical. The basic rule is that the employer must first complete the negotiations on the effects before implementing the decision. But there are several exceptions. One was found in another *Compton* case.³⁸ There the school district attempted to negotiate the teacher work calendar but was unable to finish negotiations as the school year approached. The district adopted a temporary student attendance calendar (non-negotiable) while continuing to negotiate the teacher work calendar (negotiable). PERB supported the district's

right to implement under these exigent circumstances.

For a long time, public employers have hoped PERB would expand an employer's right to implement a non-negotiable decision before completing bargaining on the negotiable effects of that decision. In *Compton*, PERB determined that a school district could implement the decision adopting the student calendar while continuing negotiations on the effects (teacher work calendar). This distinction had critical implications for employers faced with implementing a non-negotiable decision that has negotiable effects on mandatory subjects of bargaining.

PERB has not expanded the *Compton* decision and, depending on the facts, PERB's decision may not control in all circumstances. In *Poway Unified School Dist.*,³⁹ PERB narrowed the circumstances under which a school district can implement a student calendar before completing negotiations on the placement of teacher workdays and the annual work calendar. Those narrower standards may apply if an agency fails to properly describe implementation of the decision before completing negotiations on the effects.

PERB's *Poway* decision narrowed the employer's flexibility by determining that the school district acted unlawfully when it adopted the student calendar before completing negotiations on the teacher calendar — even though the district specifically continued bargaining on the teacher calendar and the school board acted out of declared business necessity.⁴⁰ PERB viewed the factual circumstances in *Poway* differently than those in *Compton* because of the way the agencies described their actions at the time of implementation. In *Poway*, PERB found the school board intended in fact to also adopt the teacher calendar by citing the board official minutes that read, "[T]he students, parents, and teachers need in some degree to start planning their vacations and...had delayed this decision long enough." PERB also cited a district press release touting the adoption of the "school calendar."

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PERB noted that in *Compton*, the student calendar tentatively adopted was a “proposed calendar,” and “was alterable via the negotiations process.” By contrast, PERB viewed the adoption of the calendar in *Poway* as final, thus precluding meaningful negotiations on the placement of teacher workdays. How the employer describes its actions — whether in budget documents, official minutes, background summaries, or press releases — greatly impacts PERB’s determination.

Expanding the Underlying Management Principle in the Compton Decision

The current exceptions are limited, but the underlining principle in both these exceptions is the same — management’s right to unilaterally implement a non-mandatory decision becomes meaningless and illusory if that right can be thwarted by the union’s delay or refusal to bargain the effects. However, as two relatively recent decisions indicate, PERB may expand on this principle.

In *Trustees of the Californian State University*,⁴¹ CSU unilaterally implemented a computer use policy at its Monterey Bay campus and offered California Faculty Association an opportunity to negotiate about the policy’s impact on unit employees. CFA argued that CSU could not implement the policy until it had negotiated both the decision to create the policy and the effects on unit employees. In addition, CFA argued the zipper clause prohibited CSU from implementing the policy because the clause in its collective bargaining agreement gave CFA the right to refuse to negotiate over the decision and the effects. In other words, CFA argued that even if CSU’s decision was within its management prerogative, the association could prevent the university from implementing the decision by refusing to bargain any effects based on the zipper clause.

As it had in its prior *Trustees* decision,⁴² PERB decided that because there was no duty to bargain the decision to

implement the policy, the zipper clause was inapplicable.⁴³ PERB stated, “...we hold that exclusive representatives cannot properly refuse to bargain effects in reliance on a zipper clause when the decision to implement the policy is itself a managerial prerogative or else risk waiving the right to bargain the effects.”⁴⁴

As PERB stated in *Trustees of the Californian State University*, a “...contrary conclusion would lead to absurd results. For example, a union could delay the implementation of a non-negotiable layoff until after the expiration of the contract simply in reliance upon the zipper clause.”⁴⁵

Similarly, management would be deprived of the effective right to implement a non-negotiable decision with major fiscal implications if the decision cannot be implemented in a timely fashion. Without the ability to set reasonable bargaining deadlines for negotiating the effects, public agencies are deprived of the right to implement non-negotiable fiscal decisions.

In *State of California (Department of Corrections and Department of Personnel Administration)*,⁴⁶ the Department of Personnel Administration (DPA) implemented a non-negotiable decision while continuing to negotiate the effects. After state legislation mandated the closure of two juvenile detention facilities and the layoff of

excess officers and those savings were incorporated into the Governor’s proposed budget, the Department of Personnel Administration (DPA) was responsible for negotiating with the California Correctional Peace Officers Association (CCPOA) regarding the closure and layoffs. The state legislation mandated that the facilities be closed by June 30 of the fiscal year, and that established a management deadline for completing the negotiations.

In March of the fiscal year, the DPA provided the union with notice and opportunity to negotiate over the impact of the prison closures and the resulting layoffs. In April, the union requested to negotiate, and the parties met on six occasions before the layoff implementation on July 31.

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During the impact negotiations, the parties disagreed on the applicable area for the layoff. The State proposed a local “geographic” layoff, and the union insisted upon a statewide application of the layoff.

When the parties remained adamantly fixed in their respective positions, the State declared impasse, closed the facilities by the deadline, began the layoff process, and offered to continue negotiating over the effects of the decisions to close facilities and layoff officers.

In determining whether the DPA could implement the closure and layoff (non-mandatory subjects) while continuing to negotiate about the layoff area (mandatory effects) PERB cited *Compton Community College* and determined that the State DPA did not fail to bargain in good faith by implementing the closure and layoff even though bargaining had not concluded over the identified effects. PERB’s decision stated:

[T]he [union’s] charge fails to allege sufficient facts to establish that the State violated its duty to bargain by implementing the layoff on July 31, 2008, while it continued to bargain until August 20, 2008. As noted above, implementation of the nonnegotiable decision to lay off employees prior to the completion of negotiations over the effect of the layoff is permissible where the decision to implement was not arbitrary, the employer gave sufficient notice of the implementation date to provide for meaningful negotiations, and the employer continues to negotiate in good faith.⁴⁷

PERB’s decision in *State of California (Department of Corrections and Rehabilitation and Department of Personnel Administration)* gives hope to public sector management that an important exception has been firmly established. By continuing to apply the underlying principle of *Compton Community College*, employers can utilize this narrow exception to implement necessary nonnegotiable decisions provided good faith negotiations continue on the effects.

Conclusion

Unfortunately, the Great Recession may leave public agencies grappling with revenue shortfalls at least through the 2013-14 fiscal year. The anticipated five-year period of

economic crisis has spawned, and will continue to generate, unconventional scenarios in labor relations.

Public agencies attempting to meet reasonable fiscal deadlines while completing bargaining on the effects of a management decision are “stuck between a rock and a hard place” during this fiscal crisis. To reduce expenses, agencies need to implement a non-negotiable decision (such as a layoff, reorganization, or reduction in service) as soon as possible, without waiting to complete bargaining on the impact of that decision on mandatory subjects (such as workload and safety).

The next generation of PERB decisions may determine those conditions under which an employer may implement a non-negotiable decision before completing the bargaining about the negotiable effects. Public agency employers are hoping that PERB will be guided by the underlying principle articulated in *Trustees of the California State University* and *State of California (Department of Corrections and Rehabilitation and Department of Personnel Administration)*, and that PERB will create clearly delineated and broader exceptions allowing public employers to deal with exigent needs in this fiscal crisis. *

1 William F. Kay, my partner and co-director of CALPELRA’s Labor Academy, coined the phrase, “New Realities,” and created Academy 6: Bargaining Your Way Through Economic Crisis and Academy 7: Impasse and Unilateral Adoption During Economic Crisis. <http://www.calpelra.org>.

2 *Public Employment Relations Board v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 900, 186 Cal.Rptr. 634.

3 *San Joaquin County Employees Assn. v. City of Stockton* (1984) 161 Cal.App.3d 813, 207 Cal.Rptr. 876; *Rio School Dist.* (2008) PERB Dec. No. 1986, 33 PERC 8.

4 *Public Employment Relations Board v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 186 Cal.Rptr. 634; *Rowland Unified School Dist.* (1994) PERB Dec. No. 1053, 18 PERC par. 25126; *Modesto City Schools* (1983) PERB Dec. No. 291, 7 PERC par. 14090.

- 5 *State of California (Department of Personnel Administration)* (2010) PERB Dec. No. 2102-S, 34 PERC 62; *California Department of Forestry and Fire Protection* (1993) PERB Dec. No. 999-S, 17 PERC par. 24112, pp. 330,332.
- 6 *Fremont Union High School Dist.* (1987) PERB Dec. No. 651, 12 PERC par. 19021.
- 7 Waiver of the duty to bargain must be clear and unmistakable (*Independent Union of Pub. Service Employees v. County of Sacramento* [1983] 147 Cal.App.3d 482, 448, 195 Cal.Rptr. 206), and can be accomplished by a “zipper clause” (*Cupertino Union School Dist.* [1993] PERB Dec. No. 987, 17 PERC par. 24069), by a comprehensive contract provision (*Berkeley Unified School Dist.* [2004] PERB Dec. No. 1729, 29 PERC 45), by an expansive management rights clause (*Placentia Unified School Dist.* [1986] PERB Dec. No. 595, 10 PERC par. 17181), by inaction (*Stockton Police Officers Assn. v. City of Stockton* [1988] 206 Cal.App.3d 62, 66, 253 Cal.Rptr. 183), or by a bona fide impasse (*San Jacinto Unified School Dist.* [1994] PERB Dec. No. 1078, 19 PERC par. 26036).
- 8 *Regents of the University of California* (1985) PERB Dec. No. 520-H, 9 PERC par. 16207.
- 9 *California State Employees Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th 923, 59 Cal.Rptr. 2d 488; *San Mateo Community College Dist.* (1979) PERB Dec. No. 94, 3 PERC par. 10080; *Trustees of the California State University* (2006) PERB Dec. No. 1886-H, 31 PERC 26.
- 10 *Chula Vista City School Dist.* (1990) PERB Dec. No. 834, 14 PERC par. 21162; *Berkeley Unified School Dist.* (2005) PERB Dec. No. 1744, 29 PERC 66; *Lake Elsinore School Dist.* (1986) PERB Dec. No. 603, 11 PERC par. 18022.
- 11 *Stockton Unified School Dist.* (1980) PERB Dec. No. 143, 4 PERC par. 11189.
- 12 *Victor Valley Union High School Dist.* (1986) PERB Dec. No. 565, 10 PERC par. 17079.
- 13 *Dublin Professional Fire Fighters, Loc. 1885 v. Valley Community Services Dist.* (1975) 45 Cal.App.3d 116, 118-119, 119 Cal.Rptr. 182; *Public Employment Relations Board v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 898-899, 186 Cal.Rptr. 634; *Gonzales Union High School Dist.* (1985) PERB Dec. No. 480, 9 PERC par. 16057.
- 14 *Dublin Professional Fire Fighters, supra.*
- 15 *San Mateo Community College Dist.* (1979) PERB Dec. No. 94, 3 PERC par. 10080; *Pleasant Valley School Dist.* (1985) PERB Dec. No. 488, 9 PERC par. 16093; *Regents of the University of California* (1998) PERB Dec. No. 1255-H, 22 PERC par. 29066; *Compton Unified School Dist.* (1989) PERB Dec. No. 784, 14 PERC par. 21029.
- 16 *Calexico Unified School Dist.* (1983) PERB Dec. No. 357, 7 PERC par. 14291.
- 17 *County of Santa Clara* (2010) PERB Dec. No. 2114-M, 34 PERC 97. On July 8, 2010, Santa Clara County appealed PERB’s decision to the California Court of Appeal, Sixth Appellate District.
- 18 PERB found that the county was not required to negotiate over the interest arbitration initiative because that matter was outside the scope of bargaining. PERB based its determination that an interest arbitration initiative was a matter outside the scope of bargaining on the *DiQuisto* Court of Appeal ruling. The *DiQuisto* court stated, “Under state law, although interest arbitration is not a mandatory subject of contract negotiations, it is a permissive subject about which the parties properly may meet and confer. (*Fresno, supra*, 71 Cal. App.4th at pp. 96-97.) Likewise, under federal law, binding interest arbitration “is not a mandatory subject of bargaining, since its effect on terms and conditions of employment during the contract period is at best remote.” (*NLRB v. Columbus Printing Pressmen and Assistants Union No. 252* [5th Cir. 1976] 543 F.2d 1161, 1166.) “It is well settled in the federal courts that interest arbitration is a permissive bargaining subject.” (*International Assn. of Firefighters, Loc. 1264 v. Municipality of Anchorage* [Alaska, 1999] 971 P.2d 156, 157.); *DiQuisto v. County of Santa Clara* (2010) 181 Cal.App.4th 236.
- 19 *City of Fresno v. People ex rel. Fresno Firefighters* (1999) 71 Cal. App.4th 82.
- 20 *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591.
- 21 *Compton Community College Dist.* (1989) PERB Dec. No. 720, 13 PERC par. 20057.
- 22 *County of Santa Clara, supra.* On July 8, 2010, Santa Clara County appealed PERB’s decision to the California Court of Appeal, Sixth Appellate District.
- 23 *Ibid.*
- 24 *Oakland Unified School Dist.* (1994) PERB Dec. No. 1045, 18 PERC par. 25073.
- 25 *Stockton Police Officers Assn. v. City of Stockton* (1988) 206 Cal. App.3d 62, 66, 253 Cal.Rptr. 183.
- 26 *Trustees of the California State University* (2004) PERB Dec. No. 1656-H, 28 PERC 197; *Trustees of the California State University* (2007) PERB Dec. No. 1926-H, 31 PERC 152.
- 27 *City of Richmond* (2004) PERB Dec. No. 1720-M, 29 PERC 31; *Newman-Crows Landing Unified School Dist.* (1982) PERB Dec. No. 223, 6 PERC par. 13162.
- 28 *Calexico Unified School Dist., supra.*
- 29 *Sonoma County Organization etc. Employees v. County of Sonoma* (1991) 1 Cal.App.4th 267, 274,275, 1 Cal.Rptr.2d 850.
- 30 *Compton Community College Dist.* (1989) PERB Dec. No. 720, 13 PERC par. 20057, pp. 176-177; see also *Poway Unified School Dist.* (2001) PERB Dec. No. 1430, 25 PERC par. 32060.
- 31 *Compton Community College Dist., supra.*
- 32 *California Correctional Peace Officers Association v. State of*

California (Department of Corrections and Department of Personnel Administration) (2010) PERB Dec. No. 2115-S, 34 PERC 99.

33 *Compton Community College Dist.*, *supra*.

34 *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 47 Cal.Rptr. 3d 69.

35 *City of Richmond*, *supra*; *Newman-Crows Landing Unified School Dist.*, 6 PERC par. 13162; *Laborers International Union of North America, Loc. 777 v. County of Riverside* (2010) PERB Dec. No. 2097-M, 34 PERC 49.

36 *Ibid*.

37 *Compton Community College Dist.*, *supra*.

38 *Compton Community College Dist.* (1990) PERB Dec. No. 790, 14 PERC 21051.

39 *Poway Unified School Dist.* (2001) PERB Dec. No. 1430, 25 PERC par. 32060.

40 *Ibid*.

41 *Trustees of the California State University* (2007) PERB Dec. No. 1926-H, 31 PERC 152.

42 *Trustees of the California State University* (2004) PERB Dec. No. 1656-H, 28 PERC 197.

43 *Trustees of California State University* (2007) PERB Dec. No. 1926-H, 31 PERC 152.

44 *Ibid*.

45 *Ibid*.

46 *California Correctional Peace Officers Association v. State of California (Department of Corrections and Department of Personnel Administration)* (2010) PERB Dec. No. 2115-S, 34 PERC 99.

47 *Ibid*.

Make Plans to Attend “The Basics of Practicing Before PERB” on October 12.

Would you like to learn more about practicing before PERB? Here's your chance! The Labor & Employment Law Section of the State Bar of California, with the participation of the California Public Employee Relations Program (CPER) and PERB, is sponsoring a seminar on “The Basics of Practicing Before PERB.”

The seminar will be held at the Sheraton Grand in Sacramento. October 12, from 9:00 am. to 12:00 pm. The cost is only \$45 for members of the Labor & Employment Law Section and \$60 for everyone else. In 2006 and 2007, PERB sponsored similar seminars that completely sold out. So if you want to attend, please sign up early!

For the schedule and registration information, go to the State Bar Labor and Employment Law website:

<http://laborlaw.calbar.ca.gov/Education/TheBasicsOfPracticingBeforePERB.aspx>

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The Negotiator: Like a Rolling Stone

Gregory J. Dannis



Greg Dannis is a shareholder of Dannis Woliver Kelley, a law firm with offices in San Francisco, Long Beach, and San Diego. In addition to his employment, labor, and public entity law practice, he negotiates at 20 to 30 tables annually for public school and community college districts. Dannis is also a school board member in his home district. A version of this article was first presented as the keynote speech at the 2010 Association of California School Administrators Symposium for Negotiators.

I HAVE A CONFESSION to make. Becoming a lawyer and labor negotiator for public schools was not my first career choice. I was a musician, and I wanted to be a rock and roll star. I actually made enough money to help pay for college and law school. I think of this time as my personal “Camelot,” my one brief shining moment.

I decided to forego the chance for fame because of the unlikelihood of attaining any fortune. I did not want to be part of a business in which one cannot predict with certainty how much revenue one might receive year to year. I did not seek a career where success or failure depends on the caprice of others and fleeting notions of what is popular and good.

I resolved not to put myself at the mercy of outside forces that could give and take with total unpredictability and without basic fair play. I opted out of a profession where jockeying for power and winning battles is more important than addressing substance and confronting reality.

Yes, I knew that was not the life for me! I wanted to be in an industry rooted in rationality, suffused with stability, and immune from idiocy. So what path did I choose? To be a lawyer and negotiator in that altered state of reality we call California’s public school system!

The Good Book of Rock and Roll

I learned a new language in law school, and over the past 30 years have become trilingual: I speak legalese, educationese, and negotiationese. But I never stopped believing that the language with the greatest insight into the human experience is the language of Rock and Roll.

Look at the state of our public schools. If you talk to a board member these days you are likely to hear:

Well you ask me what I want this year,
And I'll try to make this kind and clear:
Just a chance that maybe we'll find better days.
("Better Days" by Goo Goo Dolls.)

Ask a superintendent how to balance the budget without impacting students after years of cuts, and she may look skyward with hope and say:

I want a reason for the way things have to be.
I need a hand to help build up some kind of hope
inside of me.
And I'm calling all angels
I'm calling all you angels.
("Calling All Angels" by Train.)

Ask the chief financial officer what's on his mind and you might hear:

The best things in life are free.
But you can save 'em for the birds and bees.
Now give me money.
That's what I want.
("Money [That's What I Want]" by Barret Strong.)

Ask any employee, certificated or classified, "If you could ask the district one question, what would it be?" They might respond with one voice and say:

How can I be sure?
In a world that's constantly changin'?
How can I be sure
Where I stand with you?
("How Can I Be Sure?" by the Rascals.)

If you were to ask anyone in a district, county office, or community college to describe what happens every time the legislature passes a budget and adjourns, they might use these words:

Every time you go away,
You take a piece of me with you.
("Every Time You Go Away" by Paul Young.)

But what about us — the negotiators? How does the Good Book of Rock and Roll describe the field in which we

toil today, one so different from years past? Let's dispense with the obvious choices:

You can't always get what you want.
But if you try sometimes, you just might find
You get what you need.
("You Can't Always Get What You Want" by the Rolling Stones.)

Or:

Try to see it my way,
Only time will tell if I am right or I am wrong.
While you see it your way
There's a chance that we may fall apart before too long.
We can work it out.
("We Can Work It Out" by the Beatles.)

Like a Rolling Stone

Among thousands of artists, only one writes rock and roll poetry that cuts to the heart and soul of the times in which we live, on intellectual, emotional, and even spiritual levels.

We should turn to the teachings of Mr. Bob Dylan to explain where we have been, where we are, and where we might be going. After all, Dylan is the foremost authority when "the times they are a' changing."

And so, fellow negotiators, let us begin by asking:

How does it feel?
To be on your own.
With no direction home.
Like a complete unknown.
Like a rolling stone?
("Like A Rolling Stone" by Bob Dylan.)

Together with the districts we represent, we have been left to our own devices. While this causes great hardship, it presents some challenges and opportunities for negotiators.

To Be On Your Own — The Hardship

On the negative side, our legislature constantly reduces our funding and changes our legal obligations only to leave us twisting in the wind. For example, the legislature cut funding for K-3 class size reduction by 20 percent, but eased penalties for exceeding the 20:1 ratio. In many districts, however, we must negotiate to go beyond that ratio.

We may now reduce the instructional year by five days, from 180 to 175. But districts must negotiate a change in the certificated work year and choose between losing instructional days or professional development time.

A new recently proposed option allowed us to deviate from seniority when forced to lay off teachers. But the governor's proposal merely would give us permission to negotiate over this subject.

The federal government has joined the fray with RTTT. For negotiators, this stands for "Race To The Table" since the law preserves all bargaining obligations and negotiated agreements. We must negotiate and reach agreement over multiple subjects just to qualify for what may be insufficient funds.

Each year, we receive less funding as our challenges grow in number and complexity. Last year, the difficulty was negotiating "After the Gold Rush," when there is no money to bargain. Now we are losing the "gold" we used to own as revenues continue to decline. Just when we think they cannot possibly take more, they do. As Dylan said:

Well, they'll stone you and say that it's the end.
Then they'll stone you and then they'll come back
again.

("Rainy Day Women #12 & 35" by Bob Dylan.)

The ongoing budget crisis reveals the weaknesses of the law under which we practice — the Educational Employment Relations Act.

Application of private sector labor law principles to the public education sector proves to be wrong as time goes on. As districts struggle to maintain quality education programs, their efforts are frustrated by having to negotiate the amount and configuration of student instructional time under the guise of negotiable working hours for adults. Efforts to structure the student instructional year to maximize student

achievement are thwarted by the obligation to negotiate employee work years.

The Education Code continues to impose strict timelines for matters like teacher layoffs. In most cases, if a district needs to increase class size, it must negotiate this decision. This can take months if the union is resistant. What can a district do when it must (a) begin staffing for the next year in January; (b) issue layoff notices by March 15; and (c) lay off teachers by May 15 if negotiations are not completed?

If no agreement is reached by the beginning of the new school year, the district is faced with an untenable choice: implement layoffs and achieve the needed budget reductions, or retain the status quo, thereby forfeiting its legal right to lay off employees and foregoing the savings to help balance its budget. If layoffs do not occur, they cannot be implemented later — employees are entitled to another year of employment. If the district unilaterally implements layoffs to avoid this result, it risks having its decision overturned, with dire economic consequences.

The impasse process fails to resolve deadlocks in a time of crisis. It is too slow, primarily because a mediator can prolong the process without any regard for the district's urgent need to act. At this stage, the district wishes Dylan's hopeful words will come true:

I see my light come shining
From the west unto the east.
Any day now, any day now,
I shall be released.
("I Shall Be Released" by Bob Dylan.)

The factfinding process is flawed because many neutrals do not follow state laws as EERA compels. For example, neutrals must assess whether the district can afford a potential settlement in the current year plus the two subsequent years. Often, neutrals take a myopic one-year perspective, usually at the urging of the union. When the factfinder only looks at the current year, urges ongoing compensation increases based on one-time funding, and concludes by saying, "Let's just hope for the best in the next few years," she abdicates her legal responsibilities. This is not a fantasy — it is a reality.

We are not only on our own as negotiators, but as long as EERA ignores the unique needs of public education, we operate "like a complete unknown." The more management

or labor sees negotiations as a hindrance and an obstacle to addressing their needs, the less confidence and respect they will have for the law.

Both parties will opt for self-help — unilateral action — to meet their needs instead of seeking bilateral solutions. The primary purpose of EERA — to improve employer-employee relations — will be defeated. The parties are apt to think:

“There must be some way out of here,”

Said the joker to the thief.

“There’s too much confusion;

I can’t get no relief.”

(“All Along the Watchtower” by Bob Dylan.)

To Be on Your Own — The Challenges and Opportunities

Once we acknowledge we are on our own like a rolling stone, opportunities to reexamine and refine how we negotiate can follow.

In a recent *Newsweek* article about the Obama presidency, the author commented, “Steering the right course between principle and pragmatism is no easy challenge.” This phrase resonates. We strive to remain principled educators and negotiators, while facing the Herculean task of being practical and pragmatic as our resources disappear. Much as we might wish, we cannot sit back and think to ourselves:

It ain’t no use to sit and wonder why, babe

It don’t matter, anyhow.

And it ain’t no use to sit and wonder why, babe

If you don’t know by now.

Don’t think twice, it’s all right

(“Don’t Think Twice, It’s All Right” by Bob Dylan.)

On the contrary, we must revisit how we *prepare* for negotiations, how we *initiate* negotiations; and how we *conduct* negotiations. Renewed attention to these areas will help prevent us from becoming negotiators “with no direction home.”

How We Prepare for Negotiations

Choosing and growing the team. If you consult a thesaurus for a synonym for “team,” one of the first words to

appear is “group.” We know, however, that while a team is a group of people, a group of people is not necessarily a team. It is even more critical to choose bargaining team members with the goal of forming a functioning team. How can we accomplish this?

- Anticipate what you need from team members and select participants accordingly. Choose the principal of the school where the president of the union works if these two have a good relationship. Avoid this selection if the opposite is true.
- If you will be discussing concessions, like increased class sizes or reduced preparation periods, choose team members who understand how employees’ workloads will be affected. This grounds negotiations in reality rather than hyperbole or doomsday scenarios.
- Define the role of the district finance officer. The CFO may be Einstein when it comes to school budgets, but do not have him at the table if he cannot tolerate the snail’s pace of negotiations or put up with people who do not understand budgets. Instead, educate a team member to discuss finances at the table or ask the union to put its questions in writing and allow your team to respond in kind.
- Create a “safe haven” by explaining how the district’s team operates. Tell team members they are expected to express opinions during caucuses.
- Make team members aware that constructive confrontation of their “own side” is welcome, whether that pertains to a proposal, the superintendent, or the school board. Assure individuals that, within our own team, there will be no negative consequences for openness, honesty, and candor.
- The entire team should attend one closed session with the board to observe how it gives the team direction. This allows the board to see the faces of their team, and acquaint the team with the feeling and emotion behind the board’s direction. This builds team cohesion since members may feel shut out if only the chief negotiators meet with the board.

Taking Stock of the 'New Present'

Good negotiators know the substance of negotiations is only the first half of the bargaining equation. Personalities and emotions fill the second half and sometimes spill over to displace the first. District administrators think they know their employees, their unions, and the strength or weakness of relationships. There is usually enough history so that everyone knows how to persuade or piss off the other side. The budget crisis, however, has created higher levels of stress, strain, and anxiety in our workplace. This changes how we react to one another and, as a result, is transforming relationships.

Board members are weary of being trustees over a shrinking financial base instead of proactive policymakers in pursuit of student achievement. Administrators tire of cuts in human resources at the same time expectations are increasing. Unions tread carefully to remain aligned with constituent demands that are growing harder to meet. Employees are just plain afraid of losing their jobs.

Under these conditions, management and labor feel their counterparts do not understand the difficulties they face. When this happens, people and organizations stop listening to each other and feel an urge to distance themselves from the other side instead of coming together when it is needed most. Dylan described this mindset as follows:

I wish that for just one time
You could stand inside my shoes.
And just for that one moment
I could be you.

Yes, I wish that for just one time
You could stand inside my shoes.
You'd know what a drag it is
To see you.

("Positively 4th Street" by Bob Dylan.)

We cannot assume relationships remain unchanged. We must take stock of our "new present" and confront the "environmental reality" even before we frame our proposals. Board members, administrators, and district bargaining team members should address the following questions:

- What is it really like out there? What is the "mood" or environment in the district?
- What are the major concerns, fears, or interests of each bargaining unit and their union right now? What about management employees?

Following discussion of these inquiries, the district should be able to begin to confront the "negotiations reality," asking: "How does this inform *what* we might propose and *how* we should approach negotiations?"

How We Initiate Negotiations

Once the team is chosen and the various "realities" have been confronted, it is time to initiate the negotiations process, the first step of which is crafting the initial proposal.

Evolution of the Initial Proposal

The initial proposal is the most important document produced in negotiations but it receives little forethought or attention. It is the district's "anchor" that should shape the entire course of negotiations. It is the district's statement of philosophy, core values, and beliefs. In these chaotic times, our key messages must be communicated early and clearly to manage expectations of the district community.

To develop an effective initial proposal:

Define 'policy level' direction. Articulate the governing board's vision and philosophy. Integrate the superintendent's tangible goals with the board's vision.

Determine site and district needs. Survey all stakeholders, particularly those who might be affected by implementation of policy directives. The input of site-level administrators is critical since they bear the burden of making the vision real.

Align goals and needs. This is easier said than done, but vital to success in negotiations. If district leadership is not on the same page at the outset of negotiations, they will not get there during the process.

Distill. Assess the potential for movement on the district's proposals. Distinguish between what you "want" and what you "need." (At this stage, the Rolling Stones' guidance is germane!) Quantify the "Pandora's Box" impact of each

proposal: If you change longstanding language that was the product of a delicate compromise, will you end up worse off than the status quo?

Draft. After you have reduced objectives to the essentials, draft the initial proposal. It should contain your key messages, core values, and beliefs as well as the substantive areas you wish to negotiate.

Administration buy-in. Review the proposal with the leadership team, modify it based on their input, and obtain their support. Do the same with the superintendent, making sure his or her goals are embedded in the proposal.

Board ownership. Present the proposal to the governing board for review and official adoption. The board is the ultimate owner of the final product and must be satisfied that its vision, philosophy, and key messages are accurately expressed.

How We Conduct Negotiations

Traditionally, at the first bargaining session, the parties walk through their initial proposals. The union may not have an initial proposal if its interest is to protect the status quo.

This is accomplished quickly since the union has had prior access to the proposals. Following this presentation, the district will try to start the proposal-counterproposal process.

The union, no stranger to tradition itself, will calmly tell the district team to slow down, and explain that it needs information and data before any proposals can be exchanged. It will suggest that 10 or 12 bargaining sessions be scheduled in order for negotiations to get off to a good start.

The union spokesperson will explain she is in the precarious position of trying to satisfy scared and angry unit members while simultaneously processing and responding to district demands for concessions. She may even quote Dylan by saying:

I got mixed up confusion
Man, it's a-killin' me.
Well, there's too many people
And they're all too hard to please.

Well, my head's full of questions
My temp'rature's risin' fast.

Well, I'm lookin' for some answers
But I don't know who to ask.
("Mixed Up Confusion" by Bob Dylan.)

This caricature of the union could apply equally to management when there is money and the union is seeking gains. Now, however, the district is proposing concessions that, in the union's view, erode wages, benefits, and working conditions it fought and paid for over decades. This means we cannot conduct negotiations the same old way. The old way will not solve the new problems we face. Labor and management risk losing sight of our separate and collective priorities because of the perceived or real speed with which the sky is falling. Henry Kissinger advised as follows in this situation:

One of the problems...is to separate the urgent from the important and make sure you are dealing with the important and don't let the urgent drive out the important.

Negotiations must be conducted in a way that accommodates our urgency without losing sight of what is important. Conducting negotiations in pursuit of both goals can be guided as follows:

Challenges and goals. Instead of starting off negotiations the same old way, make a presentation at the first session that contains the following three "Challenges and Goals":

- (1) To arrive at a common vision and understanding of the district's financial concerns and needs.
- (2) To explore options for addressing these needs through contractual changes.
- (3) To negotiate in a collaborative manner that produces an agreement both parties can live with now and in the immediate future.

Goal #1. We do not expect the union to accept all of the district's numbers and projections. Rather, we are asking, "Do you agree we have a problem somewhere in the range we have described?"

If we cannot reach consensus on this, the district should inform the union that negotiations may be fruitless and the district may be forced to plot a unilateral strategy — actions the district can take *legally* without union agreement, such as layoffs and raising class sizes. The district should emphasize

that the union will be excluded from the problem-solving process and the resulting decisions likely will be more onerous than bilateral solutions.

Goal #2. We are not prescribing where or to what degree the contract must be changed to address our fiscal problems (as if one party can ever dictate what the other party must agree to!). Rather, we ask the union to acknowledge that expenditure reductions will affect *people* and are largely contained in the negotiated agreement.

If the union agrees the district is in financial trouble but takes a “NIMBY” stance to oppose any contractual concessions, the district may be forced to adopt a unilateral plan.

Goal #3. We are not asking the union to “roll over,” abdicate its duty to its members, or agree to only permanent impairments to the contract. We are asking the union to abandon the traditional negotiating model and instead work together openly and quickly to attack the issues. This message addresses Kissinger’s “urgency component.” Tell the union the district will pursue changes that union leadership can recommend and its unit members can ratify, not proposals that are dead on arrival. Tell the union that the fiscal crisis may be temporary and so too might be concessions. These messages address Kissinger’s “importance component.”

If the union insists on the regular snail’s pace of negotiations and the exchange of formal written proposals, the district may be compelled to consider the unilateral strategy in the interests of time.

Financial data. The second part of the presentation is data that depicts the district’s financial condition. This might include the latest budget report and multi-year projections, reductions already made, and the impact of the proposed state budget on the district’s future fortunes. This data should serve as the basis for an open and honest discussion that leads to a common vision of district fiscal concerns and needs.

Options. The third section of the presentation includes *every* possible contractual change that will generate expenditure reductions and cost savings. The district should stress that this expansive list is *not* its proposal; it is intended to quantify the cost of potential concessions and to provoke further brainstorming.

This process generates candid discussions and leads to a collaborative approach for attacking issues. It helps the

district answer three difficult questions it must confront in this “new present” of negotiations: (1) Are we prepared to agree to language concessions in exchange for economic concessions from the union; (2) What exactly are we asking from the union among all the options we have generated; and (3) Is what we are asking from this union a “fair share” of the burden for it to bear?

It is one thing to shower the union with data and options; it is harder to articulate what you are asking the union to do and why. This is where your interests, core values, and key messages operate to ensure your proposals are properly in alignment

You Are the Negotiator

During this budget crisis, the job of a chief negotiator and team member is growing in complexity and importance. As rolling stones who are on our own, the challenge is to be more deliberate, empathetic, and trusting of our talents and abilities. On that note, I will close with a final reading by Mr. Dylan from the Good Book of Rock and Roll:

Trust yourself,
Trust yourself to do the things that only you know
best.
Trust yourself,
Trust yourself to do what’s right and not be second-
guessed.
Don’t trust me to show you beauty,
When beauty may only turn to rust.
If you need somebody you can trust, trust
yourself.

Trust yourself,
Trust yourself to know the way that will prove true
in the end.
Trust yourself,
Trust yourself to find the path where there is no
if and when.
Don’t trust me to show you the truth,
When the truth may only be ashes and dust.
If you want somebody you can trust, trust
yourself.

(“Trust Yourself” by Bob Dylan.) *

Recent Developments

Public Schools

State Sued for Failing to Financially Support Public Schools

TWO LAWSUITS have been filed against the State of California alleging that it has failed to meet its constitutional obligations to fund K-12 public education. In *Robles-Wong et al. v. State of California*, eight school districts, 60 individuals, and a coalition of education groups including the California Parent Teachers Association, the California School Boards Association Education Legal Alliance, and the Association of California School Administrators, contend that the current system of state financing is based on outdated formulas that are disconnected from required academic goals and the learning needs of students. In *Campaign for Quality Education v. State of California and Gov. Arnold Schwarzenegger*, four groups representing low-income parents and students — Alliance for Californians for Community Empowerment, Californians for Justice, San Francisco Organizing Project, and Campaign for Quality Education — along with 21 individuals, make similar allegations but also contend that low-income students need additional resources, including state-funded quality pre-school. “It is incumbent upon the State to ensure that low-income students — as early as possible in their

educational experience — are able to overcome the impediments to learning that come with the effects of poverty,” they argue.

Both cases were filed in Alameda Superior Court, and it is anticipated that they will be combined. Both contend that, under the California Constitution and court cases, education is a fundamental right and each child is entitled to an equal education. Both cite the state’s low rankings in funding, resources, and test scores. Both claim that school funding is insufficient to provide essential educational programs and services. And, both allege that the funding ignores the educational goals the state requires districts to meet. Funding is based on historical data and formulas that have little if any relationship to the actual cost of providing and delivering required educational programs and services to all students, according to the complaints. Instead, “Proposition 98 ties funding to growth

in personal income and growth in state general fund revenues in a given year,” alleges the complaint in *Robles-Wong*.

California ranks 47th nationally in the amount of per-pupil funding. It has cut \$17 billion from public schools over the last two years and will probably cut more this year. Districts have been forced to increase class sizes, cut programs, and lay off teachers and other staff. State Superintendent Jack O’Connell released a list of 175 school districts that may not be able to maintain the state-mandated 3 percent reserve in their operating budgets. Categorical funding ties administrators’ hands and gives districts little leeway where to spend the funds they receive. Fewer than 70 percent of California students graduate from high school.

Governor Schwarzenegger has stated that he will oppose the lawsuits, but that he has instructed his lawyers to work with the plaintiffs and the court to “really make sure we are going in the right direction.” While he claims to be interested in increased funding and correcting the funding mechanism, he is opposed to “increasing funding and just throwing more money at that broken system.” *

Pending Bill Would Allow Override of Teacher Seniority Rules, Settle Lawsuit

LEGISLATION introduced by Senate President Pro Tem Darrell Steinberg (D-Sacramento) would, if passed,

explicitly give superintendents and school boards the authority to disregard seniority rules in order to avoid

a disproportionate number of teacher layoffs at any school. S.B. 1285 addresses the issues raised in a class action lawsuit brought against the Los Angeles Unified School District earlier this year. The legal action charged that budget cuts and teacher layoffs are violating students' constitutional right to a fair and equal education at three of the district's lowest performing schools. Judge William Highburger issued a preliminary injunction in May, preventing any teacher layoffs for budgetary reasons from any of the three schools. (For a complete discussion of the lawsuit, see *CPER* No. 199, pp. 36-37.)

The bill would have a major impact on low-performing schools serving disadvantaged and minority chil-

dren, where teachers tend to have less seniority and layoffs occur in greater numbers. It directs each county superintendent of schools to determine the percentage of teachers at each school who are in their first or second year of teaching, and then assess whether this number exceeds or falls below the percentage of first- or second-year teachers in the *district*. It requires superintendents to assign teachers in such a manner that the percentage of these teachers in a school does not exceed the districtwide percentage by more than 10 percent. And, the bill requires that when certificated teachers are subject to layoffs, the proportion of certificated teachers at the lowest performing schools be no greater

than the proportion of certificated teachers terminated in the district as a whole. The legislation specifies that this requirement is an exception to the mandate that layoffs occur in order of seniority.

The lead attorneys for the plaintiffs in the lawsuit appeared with Steinberg when he announced the bill. S.B. 1285 "would catapult the state out of the bad-old days of separate and unequal educational opportunity" into an era in which all students are valued, said coauthor Catherine Lhamon of the Public Counsel Law Center. *

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

-- Robert Frost, poet

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

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

Pocket Guide to the Educational Employment Relations Act

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

Bargaining Updates

Los Angeles USD

THE *Los Angeles Times* gave the Los Angeles Unified School District a powerful bargaining chip in its ongoing effort to pressure United Teachers of Los Angeles to agree to include student test scores as one measure of evaluating teachers. The *Times*, in mid-August, published a database showing how individual teachers may have affected their students' standardized test scores. With the help of the Rand Corporation, the newspaper analyzed seven years of math and English scores of third- through fifth-grade students, correlating the results to 6,000 elementary school teachers. It used a "value added" analysis that rates teachers on their students' progress from year to year. The teachers were not named in the first article but would be identified in an article to appear at the end of August, the newspaper announced.

Teachers unions reacted with outrage. California Teachers Association President David Sanchez labeled the publication of the database "irresponsible," and United Teachers of Los Angeles President A.J. Duffy called for a "massive boycott" of the *Times*. "You're leading people in a dangerous direction, making it seem like you can judge the quality of a teacher by a test," he said. Duffy, who has consistently refused to consider the use of test scores in teacher evaluations, said that while he thought test scores could be useful

feedback for teachers, they should not be used for evaluation.

However, between the publication dates of the two articles, with the threat of the release of the teachers' identities looming, UTLA's stance shifted. Shortly after the first article appeared, Duffy announced that he was "ready, willing, and able" to agree to a new teacher evaluation system that is "good for kids and fair for teachers," and he seemed to indicate that such a system could include test scores. The *Times* reported that UTLA had accepted Deputy Superintendent John Deasy's offer to restart talks on performance reviews of teachers. The district was seeking to have the test score ratings count for 30 percent of the evaluation.

Randi Weingarten, president of the American Federation of Teachers, met with both the district and UTLA. Weingarten supports the use of test scores as one component of a teacher's evaluation. She believes that parents should have access to the results but opposes the public release of the information. Another factor that could have brought the union to the table was some indication that, in the opinion of the district's attorneys, inclusion of test scores into teachers' performance reviews could provide a legal basis for refusing to release the information to the public or to the *Times*.

But, the window between the two

articles closed without any agreement having been reached. As promised, the *Times* published the test score database identifying the 6,000 teachers by name on August 29. On its website, UTLA is calling for a demonstration at the *Los Angeles Times* building in addition to a boycott of the paper. "UTLA is protesting in the strongest possible terms the *L.A. Times*' reckless and destructive posting of a 'value-added' database naming 6,000 teachers and purporting to rate their effectiveness," reads the web message. It states that "scholars and researchers" agree that the methodology is too "unreliable and unstable" to judge a teacher's effectiveness. "The data base will cause chaos at school sites, as parents scramble to get their children into classes taught by teachers labeled as 'effective' by a newspaper — not by education professionals or the parents, teachers, and principals who have worked with these teachers." "It could also have a long-lasting impact on the careers of teachers who the *Times* has labeled as 'ineffective' based on just one measure. Even the *L.A. Times* admits that teacher effectiveness must be based on multiple measures."

It does not appear that the district and the union will be reaching agreement any time soon.

Sacramento City USD

After months of contentious negotiations, the Sacramento City Teachers Association and the Sacramento City Unified School District finally reached

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

-- Pete Seeger, folksinger

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

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Pocket Guide to K-12 Certificated Employee Classification and Dismissal

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

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an agreement. As reported in the last issue of *CPER*, the association was feeling the pressure from the district to agree to a number of demands. (See story at *CPER* No. 199, p. 39.) That pressure increased after a Sacramento County grand jury released a report entitled, "Last Chance to Put Children First," urging the union to agree to concessions in order to save the district from bankruptcy.

The agreement includes pay cuts over two years, changes in health benefit payments, an increase in the number of years employees must work before becoming vested, and more district flexibility in managing the calendar. SCTA members will have their pay cut by \$950 a year for the next two years while working the same number of days. Association president Linda Tuttle said the union felt it was "incredibly important" for students

not to lose instructional time. The district estimated that this concession would save \$2.1 million this year and is the equivalent of three furlough days.

Changes in health benefits include reducing Health Net's coverage of out-of-area retirees over age 65 and replacing it with a lower-cost program. Union members will fund retiree benefits by contributing \$15 a month for 10 months in 2010-11, and \$20 a month for 10 months in 2011-12.

The vesting period for retirement benefits was changed from 10 to 15 years.

In addition, the agreement allows the district to change the school calendar to make Monday and Tuesday of Thanksgiving week holidays. The other four bargaining units in the district agreed to designate those as two of their three furlough days.

Out of approximately 3,000 members, the vote for ratification was 1,009 in favor, with 598 opposed.

Long Beach USD

The Teachers Association of Long Beach and the Long Beach Unified School District reached agreement on a three-year contract that provides for five unpaid furlough days during this school year. The tentative agreement was ratified by 93 percent of the union's 2,150 members and approved by the school board.

The contract requires the district to verify the restoration of 200 bargaining unit jobs that it claims were saved by the furlough days and some changes in health benefits. The jobs were to be restored no later than 30 days after final school board approval.

The parties agreed to reopen negotiations regarding compensation

for 2011-12. The district dropped its demand for reopener negotiations for 2010-11. By mutual agreement the district and union may reopen on compensation and evaluation as it relates to the district's Race to the Top grant application for 2010-11.

Elk Grove USD

By a margin of 89 percent, members of the Elk Grove Education Association voted in favor of ratification of a two-year contract with the Elk Grove Unified School District that includes a 1 to 2 percent cut in pay, nine furlough days, a doubling of the medical copay, and the suspension of an annual bonus from lottery funds. In return, the district will cap class sizes in K through 3rd grade at 24, and save 210 teacher and librarian jobs. The Elk Grove USD, with 61,000 students, is the largest in Northern California.

Oceanside USD

The Oceanside Teachers Association and the Oceanside Unified School District entered into an agreement that calls for teachers to accept six unpaid furlough days this school year and five in 2011-12. One of the six days this year is a professional development day, meaning that the school year will be shortened by five days each year. The school year will be restored to 185 days beginning in 2012-13.

The 1,200 union members were not happy about the decrease in pay but felt they had no choice, given a projected \$19 million budget shortfall for the 2010-11 school year. "For

teachers, this agreement is a compromise that hurts teachers that already subsidize our schools by buying books, pencils, paper and Kleenex," said union president Terry Hart.

The district originally had proposed a 5 percent pay cut, five furlough days, and larger contributions for healthcare. Administrators voluntarily agreed to work five fewer days and take a 5 percent pay cut last January.

Superintendent Larry Perondi has recommended a number of other cost-saving measures, including laying off teachers and other employees, shortening the school year by one week, cutting back on training, increasing bus fees, eliminating summer school, and cutting out classes to help students pass the high school exit exam.

Paradise USD

The Paradise Unified School District and the Teachers Association of

Paradise reached a tentative agreement that, if finalized, would shorten the current school year by four furlough days, saving the district an estimated \$480,000 in teachers' salaries. The savings would be used to reopen school libraries and rehire several counselors who were laid off last year.

Negotiations had stalled over the summer. TAP reportedly had proposed \$700,000 in cuts for one year. The teachers agreed to give up four days of pay and to take on supervision duties and raise class sizes. The district wanted \$900,000 in cuts over three years.

Union members were preparing to vote on the agreement as CPER went to press. If ratified, the school board will hold a special session to vote for approval. *

Teacher Per Se Unfit to Teach Only if Convicted of Specified Crimes

A TEACHER convicted of three drunken driving offenses is not "per se," or automatically, unfit to teach, held the Third District Court of Appeal in *Broney v. California Commission on Teacher Credentialing*. The trial court instead should have applied the California Supreme Court's seven-part test set out in *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, to evaluate whether the teacher is fit to

teach. However, the court concluded that application of the correct test would have led to the same result.

Shirley Broney, an elementary school teacher, was convicted of three drunk driving offenses within a five-year period. None of the convictions involved children or occurred near or on school property. After an investigation, the state Commission on Teacher Credentialing found cause to recom-

mend a 60-day suspension of Broney's credential. Broney requested a hearing, after which an administrative law judge determined that the commission had failed to prove unprofessional conduct and recommended the accusation be dismissed. The commission rejected the ALJ's proposed decisions. It determined that Broney had committed unprofessional conduct, and that her conduct indicated she was unfit to

The appellate court agreed with Broney that the trial court erred when it adopted a per se rule of unfitness to teach.

teach. The commission suspended her teaching credential for 60 days and stayed the suspension subject to her successful completion of a three-year probationary period.

Broney petitioned for extraordinary relief from the commission's decision. The trial court found that the third conviction rendered her unfit to teach by law, or per se, under *Watson v. State Bd. of Education* (1971) 22 Cal. App.3d 559. Broney appealed.

The appellate court agreed with Broney that the trial court erred when it adopted a per se rule of unfitness to teach. "A teacher whose credential is being investigated for possible adverse action is per se unfit to teach only

when the teacher has been convicted of a crime which the Legislature has declared requires the imposition of automatic sanctions on that teacher's credentials," instructed the court. "Driving under the influence is not an offense specified by the Legislature as sufficient per se to justify suspension or revocation of teaching credentials," it continued. The lower court should have applied *Morrison*, not *Watson*, the court said, but Broney would have fared no better had the trial court applied the *Morrison* factors to determine whether she was unfit to teach because of her unprofessional conduct. "We know this because the trial court, in addition to applying a per se rule, weighed the evidence under the *Morrison* factors," it said. Even though the trial court did so in the context of determining the reasonableness of the penalty meted out by the commission, it weighed all of the evidence and performed the same analysis it would have performed had it applied the factors to the issue of Broney's fitness to teach. "Because the trial court applied the *Morrison* factors to the evidence and found the suspension was justified, it is not likely it would have reached a different conclusion had it applied the *Morrison* factors on the issue of fitness to teach," concluded the appellate court.

Applying the first factor, the likelihood that Broney's conduct may have adversely affected students or teachers, the appellate court noted that she was required to wear an ankle bracelet at

school to fulfill her sentence. Doing so, the court concluded, may have adversely affected others, "especially" as it concerned her ability to earn the respect of her students.

Regarding the proximity or remoteness in time of the conduct, the court found that the evidence supported the trial court's finding that it was not remote in time. Even though her last conviction was six years prior

Broney would have fared no better had the trial court applied the Morrison factors.

to the hearing, the court cited "her record of repeated convictions occurring at intervals of ten and five years."

The third factor considered was the nature of Broney's teaching credential, which authorized her to teach elementary school children. She was teaching fifth graders at the time of her last conviction. The appellate court agreed with the trial court's finding that "given the impressionable nature of children at that age, which is not disputed here, plaintiff's multiple alcohol-related convictions are of serious concern."

The appellate court also upheld the finding of extenuating or aggravating circumstances surrounding the conduct. Pointing to the fact that Broney admitted having a blood-

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alcohol level of more than three times the legal limit when she was arrested prior to her last conviction, and was willing to endanger the public safety by driving while severely intoxicated, both courts found “such irresponsible conduct” to be “incompatible with a teacher’s status and duties.”

The fifth factor considered was “the praiseworthiness or blameworthiness of the motives resulting in the conduct.” The appellate court found nothing praiseworthy about Broney’s conduct.

The last *Morrison* factor is the likelihood that the conduct will recur. Broney’s history of three convictions and the fact that she continues to drink regularly supports the trial court’s legitimate concern about whether she will reoffend, said the court.

The court was not persuaded by Broney’s argument that the commission and the trial court should have given deference to the ALJ’s factual findings based on the witnesses’ credibility in accord with Government Code Sec. 11425.50. The court determined that the code section “is not as binding on us as plaintiff suggests,” noting that the Law Revision Commission comments to Sec. 11425.50 state that nothing in the section “precludes the agency head or court from overturning a credibility determination of the presiding officer, after giving the observational elements of the credibility determination great weight, whether on the basis of non-observational elements of credibility or otherwise.”

Here, the court said, the witnesses’ testimony either did not address all of the *Morrison* factors “or it undercut itself.” And it found that Broney’s experts fared worse. “Her experts claim the likelihood of her reoffending is small, even though they admit she has a probability of acting out, which they state means a possibility of drinking and driving again.”

The court concluded that the trial court’s incorrect application of a per se test did not result in a prejudicial error and affirmed the trial court’s judgment. (*Broney v. California Commission on Teacher Credentialing* [2010] 184 Cal. App.4th 462.) *

Teacher’s Complaints About Lack of Services Not Protected Whistleblowing

A TEACHER’S complaints about special education services are not protected disclosures under the Reporting by School Employees of Improper Governmental Activities Act, concluded the Third District Court of Appeal in *Conn v. Western Placer Unified School Dist.* Section 44113 of the act makes school officials liable for interfering with the right of a school teacher to disclose evidence of improper governmental activities to an administrator or school board. Here, said the court, the complaints were raised in the context of internal administrative or personnel actions, rather than in the context of legal violations, and so were not protected.

Christina Conn, a second-year probationary teacher, claimed that she was not reelected for a third year, and thus denied permanent employment, because she disclosed to her superiors that certain students were not being provided with appropriate

special education services. She filed a lawsuit against the district and various individuals, alleging that she was denied tenure in violation of Sec. 44113. The trial court rejected Conn’s claims, ruling that the individual defendants were management employees exempt from liability, and that a district could not be held liable under the code section. It also found that the individual defendants were entitled to immunity for discretionary acts under Government Code Sec. 820.2

The appellate court agreed that those individual defendants who had not acted as supervisory employees in relation to Conn were not liable under Sec. 44113, and that the district could not be held liable under that code section because it applies only to “employees.” However, the court disagreed with the trial court as to those other individuals who exercised supervisory authority over personnel actions regarding Conn. Those

individuals, who had the authority to discharge her or to recommend that she not be reelected, could be held liable if they used that authority to interfere with her rights protected by the act, instructed the court.

And, supervisory employees are not immune under Gov. Code Sec. 820.2 because that statute is superseded by Sec. 44113. Relying on *Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 93 CPER 43, which also involved a whistleblower statute in the context of public employment, the court concluded that recognition of Sec. 820.2 immunity for cases falling within Sec. 44113 “would largely emasculate the latter section and thereby frustrate the legislative purpose behind its enactment.”

However, the actions of the supervisory employees in this case did not violate the act, held the court. “The intent of the Act is to encourage school employees and other persons to disclose improper governmental activities,” it said. The act defines an “improper governmental activity” as one that “violates a state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform a duty.” Also included are activities that are “economically wasteful” or involve “gross misconduct, incompetency, or inefficiency.”

Here, said the court, no improper governmental activities were disclosed. “Conn’s complaints about unruly first graders, the failure to perform an assessment before deciding to terminate her son’s services, how a particular screening was performed, an error in her son’s IEP, and the behavior of members of the special education team were done in the context of internal administrative or personnel actions, rather than in the context of legal violations.” Conn was trying to get special education services for her children and certain students in her class, “not blow the whistle.” “Such complaints do not rise to the level of protected disclosures under the Act,” it concluded. (*Conn v. Western Placer Unified School Dist.* [2010] 186 Cal. App.4th 1163.) *

Local Government

PERB's Exclusive Jurisdiction Extends to Strikes That Threaten Public Welfare

IN A LONG-AWAITED decision, the California Supreme Court answered the following question: "If a public entity is of the view that a threatened strike by its employees will be unlawful because a strike by some or all of the employees creates a substantial and imminent threat to public health and safety, must the public entity first file an unfair labor practice complaint with PERB and await PERB's adjudication of the complaint before asking a court for an injunction prohibiting the strike?"

At long last, the court responded: "Our answer is 'yes.' This is why: The Legislature has expressly vested in PERB initial jurisdiction over claims of unfair labor practices arising under the Meyers-Milias-Brown Act. Because a public entity's claim that a threatened public employee strike is illegal generally constitutes an unfair practice claim, the claim comes within PERB's initial jurisdiction."

In a unanimous opinion authored by Justice Kennard, the Supreme Court announced that PERB has initial jurisdiction over a claim by a public agency that a strike by some or all of its employees is illegal. "A public entity must exhaust its administrative remedies before PERB before seeking

judicial relief unless one of the recognized exceptions to the exhaustion of administrative remedies requirement is established."

The court reviewed a long line of cases arising under the Educational Employment Relations Act, beginning with *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 41 CPER 2, that recognize the board's exclusive initial jurisdiction over unfair practice charges enumerated in the statute. In *El Rancho USD v. National Education Assn.* (1983) 33 Cal.3d 946, 58 CPER 15, the Supreme Court held that PERB's exclusive jurisdiction over unfair practice charges divested the superior courts of jurisdiction over a school district's complaint for damages arising from a teachers strike.

The question of whether public employees have a legal right to strike was not decided in these cases. But, in *County Sanitation Dist. No. 2 v. Los Angeles County Employees Assn.* (1985) 38 Cal.3d 564, 65X CPER 1, the high court announced that "strikes by public employees are not unlawful at common law unless or until it is clearly demonstrated that such a strike creates a substantial and imminent threat to the health or safety of the public." The Supreme Court went on to iden-

tify exceptions to this pronouncement "in certain essential areas of public employment." In those instances, it falls on the courts to determine "on a case-by-case basis whether the public interest overrides the basic right to strike." As of 1985, therefore, the courts were vested with jurisdiction to decide whether to allow or prohibit a particular public employee strike.

The landscape changed in 2000, when the legislature extended PERB's jurisdiction to matters arising under

*A public entity
must exhaust its
administrative
remedies before PERB
before seeking
judicial relief.*

the MMBA. The statutory language that begot this shift stated that PERB was to determine whether an unfair practice charge is justified, and if so, the appropriate remedy is a matter "within the exclusive jurisdiction of PERB." This language, the court concluded, is "virtually identical" to the language in EERA and vests the board with exclusive initial jurisdiction over public employee strikes that may involve unfair practice claims under the MMBA.

The court dismissed the city's argument that PERB precedent is

inapplicable because the MMBA does not “arguably protect or prohibit” threatened strikes by public employees whose services are essential to the public health and safety. The court noted that EERA also does not explicitly protect or prohibit strikes. The holdings in *San Diego Teachers* and *El Rancho* “would have been precluded if, as the City here contends, express statutory protection or prohibition of public employee strikes is a requirement of PERB’s jurisdiction over those strikes.”

Also unpersuasive was the city’s argument that an action seeking injunctive relief against a public employee strike involving employees who provide essential services is outside

the board’s purview under the “local control” doctrine. That doctrine, said the court, applies when the subject of the action is peripheral to the labor dispute or when a judicial decision does not interfere with the decisions of a labor board. Here, said the court, the issue is the legality of the public employee strike — “an issue that goes to the essence of labor law.”

The court next considered whether a public entity can bypass the administrative forum and go to court if it can establish an exception to the doctrine of administrative remedies. The union contended that the doctrine of exhaustion *always* applies to public employee strikes that give rise to claims of unfair practices under the MMBA.

The city contended that the exhaustion doctrine *never* applies to public employee strikes because any remedy by PERB cannot be effective when the threatened strike involves employees who perform services essential to the public welfare. “Neither party is right,” said the court. “Whether a public entity must await PERB’s adjudication of an unfair labor practice complaint before seeking judicial relief depends upon the facts of each case.”

The court set aside the union’s contention that PERB’s initial jurisdiction over unfair practices nullifies the jurisdiction of the courts. In fact, case law holds that in the case of jurisdictional conflict, the court could stay the judicial proceeding. It also rejected

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

-- Will Roger, humorist

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

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Pocket Guide to the Meyers-Milias-Brown Act

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

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the assertion that the PERB-provided remedy is always adequate because the board serves the same public interest as a court.

The court also looked askance at the city's position that the PERB-provided remedy can never be effective when essential public services are at risk. The court eyed the board's detailed regulations that establish precise procedures for responding to a party's injunctive relief request. These regulations do not prevent the board from acting with sufficient speed to prevent a threatened strike that will cause irreparable harm to the public welfare.

The Supreme Court summed up: "Whenever possible, labor disputes asserting unfair labor practices under the MMBA should be submitted first to PERB rather than a court. If an exception to the doctrine of exhaustion of administrative remedies is claimed,

the trial court should afford due deference to PERB and issue injunctive relief only when it is clearly shown that PERB's remedy would be inadequate." (*City of San Jose v. Operating Engineers Local Union No. 3* [2010] 49 Cal.4th 597.)

Despite the boldness of the court's language, the ruling seems to perpetuate controversies over the jurisdictional boundaries between PERB and the courts. As articulated by the court in a footnote, the question before it was whether a court is without jurisdiction or authority to act when PERB has not yet issued a final order or decision but there is a potential substantial and imminent threat of harm to the public welfare. The urgent need for injunctive relief — rather than the adequacy of the board's remedy — may be how lawyers will frame future legal controversies. *

members give up their right to strike in favor of binding interest arbitration, the employer must forebear from unilateral implementation of new contract terms pending arbitration.

Bargaining Breakdown

ATU is the exclusive representative of the operating, maintenance, and office employees of the Alameda-Contra Costa Transit District. They have been parties to a series of col-

Despite the ruling, the changes reflected in the district's offer were implemented.

lective bargaining agreements dating back to 1960. The parties began negotiations for a successor agreement in February 2010. On June 22, days prior to the expiration of their contract, ATU demanded that the parties engage in interest arbitration. The transit district rejected that request.

The union then filed a petition to compel arbitration under Code of Civil Procedure Secs. 1281 et seq. and sought injunctive relief to require AC Transit to maintain the status quo while arbitration was pending. On June 30, two days later, the transit district declared a bargaining impasse and issued a resolution declaring that it would implement its last, best, and final offer on July 18.

Court Bars AC Transit's Imposition of Last, Best Offer Pending Completion of Interest Arbitration

ON AUGUST 2, Alameda County Superior Court Judge Judith D. Ford granted a preliminary injunction that bars AC Transit from enforcing the terms of its last, best, and final offer. The judge's order also enjoins the transit district from imposing any other changes to the terms of the collective bargaining agreement negotiated with the Amalgamated Transit Union, Local 192. AC Transit was directed to maintain the status quo pending issu-

ance of the final award rendered at the completion of interest arbitration.

In a case of first impression in California, attorneys Margot Rosenberg and Beth Ross of Leonard Carder convinced Judge Ford that the status quo must be maintained through conclusion of the parties' impasse resolution procedures, and that this obligation persists in both good and bad economic times. And, as the court acknowledged, when the union and its

At the urging of ATU, Judge Ford granted the union's petition to compel arbitration and ordered the parties to engage in that dispute resolution process. Despite that ruling, on July 18, the changes reflected in the district's last, best, and final offer were implemented.

At that point, ATU returned to court and asserted that it would be irreparably harmed if AC Transit did not maintain the status quo while the parties take part in interest arbitration or other post-impasse resolution procedures.

The court's authority to issue a preliminary injunction under Sec. 1281.8 permits a party to an arbitration agreement to seek an injunction on the ground that the arbitration award "may be rendered ineffectual without provisional relief." This is a threshold or minimum requirement for obtaining an injunction under that section.

Need for Provisional Relief

Here, Judge Ford found that ATU established the eventual result of the interest arbitration process might be ineffectual if the court did not order AC Transit to maintain the status quo during arbitration. The judge found the union demonstrated that the new terms and conditions of employment implemented by the district affect more than employees' compensation; they affect the working lives of employees "in ways that cannot be remedied by the eventual settling of the terms of a new collective bargaining agreement." "In the interim,"

Judge Ford wrote, "before the decision is rendered, employees will labor under terms and conditions imposed outside of the bargaining process affecting their day-to-day lives and the lives of their family members." As examples, the court noted that changed

ATU asserted that it would be irreparably harmed if AC Transit did not maintain the status quo.

work schedules would require ATU's members to be "behind the wheel for longer times, to be at work for lengthy hours, and to drive unfamiliar routes without training on those routes." These factors, said the court, "not only disrupt the employees' lives and expectations, but also have the potential to result in conditions that are not safe for the drivers or for the riding public." None of these harms can be remedied adequately by any eventual determination of new contract terms brought about by interest arbitration, the court reasoned.

Likelihood of Success on the Merits

Judge Ford found that ATU demonstrated it is likely to succeed on its claim that the transit district has a duty to bargain in good faith and that this includes a duty to maintain the status quo during the pendency of the par-

ties' agreed-on post-impasse interest arbitration procedure. First, the court found that Public Utilities Code Sec. 25051 imposes on AC Transit a good faith bargaining duty. And, the judge added, that duty "has generally been interpreted to include a duty on the part of the employer to maintain the status quo and to refrain from imposing any unilateral changes in the terms and conditions under negotiation during the course of bargaining, through and including any required post-impasse procedures."

Section 13(c) of the Urban Mass Transit Act requires that, as a condition for receipt of federal transit funds, the employer must enter into an agreement that provides for "the preservation of rights, privileges, and benefits...under existing collective bargaining agreements [and] the continuation of collective bargaining rights." That section also precludes unilateral control by an employer over mandatory subjects of bargaining, the judge said.

Here, the court found that interest arbitration "is an extension of the bargaining process, required once the parties reach impasse and the union agrees to give up its right to strike in favor of interest arbitration." Both Sec. 25051 and Sec. 13(c) preclude an employer from imposing new terms during the pendency of interest arbitration, Judge Ford announced.

Balance of Harms Favors Injunction

"The balance of harms as between ATU and AC Transit favors injunctive



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

-- Vernon Sanders Law, baseball player

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

By Cecil Marr and Diane Marchant (Updated by Dieter Dammeier) • 12th edition (2007) • \$16
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relief to maintain the status quo," said the court. The status quo is the state of affairs before July 18, when the transit district imposed its last, best, and final offer. The court was not persuaded by AC Transit's argument that the status quo was the state of affairs as they existed at the time the union made its injunctive relief request. When the transit district implemented the terms of its last, best, and final offer, "it acted in apparent derogation of its duties and in disregard of whether it might be prohibited from continuing its course of action. Those actions AC Transit took to put the new terms in place do not preclude the Court from issuing an injunction to stop their enforcement," the judge explained.

Relying on declarations of ATU members, the court concluded that the employees would be harmed in ways that cannot be remedied. Judge Ford cited different run schedules and long

"spreads" and split shifts that result in excessive hours. She also observed that the imposed unilateral changes were made in disregard of seniority, the need to accommodate employees' limitations, and applicable safety rules. "The harm to the employees here is not something that can be remedied by the arbitrator's award, since the interim time spent working under these changed conditions cannot be recouped nor can any resulting non-pecuniary harms be readily compensated."

In comparison, the court pointed out, the harms claimed by the transit district are speculative in nature and can be remedied. Whether AC Transit will be able to permanently implement cost-savings measures "awaits the conclusion of the interest arbitration," the court said. The transit district has not demonstrated that the effect of implementing terms in the interim,

before interest arbitration concludes, would make a demonstrable difference to its financial stability in the coming budget year. And, Judge Ford added, "While it is clear that AC Transit is in financial straits, it is not apparent from the evidence that making immediate changes to the employees' run schedules, and the other changes AC Transit has undertaken, are necessary to avoid service cuts, schedule changes, or layoffs."

The parties selected John Kagel to serve as the arbitrator. As CPER went to press, one meeting had occurred; over 10 additional days are scheduled between mid-September and December 10. Although there are a large number of open issues, it is understood that time is of the essence and Kagel's decision is expected soon after the hearings are completed. *

No Local Membership Vote Required Prior to Merger of Locals

IN AUGUST, THE Second District Court of Appeal weighed in on a question that has been simmering in the public sector labor community: Were members of a Los Angeles SEIU local entitled to vote on whether it and six other Southern California locals should be merged or consolidated into one SEIU Local 721 — or, as it is pronounced, Local “seven-two-one.”

The controversy surfaced in 2006, when the international arm of SEIU sent notices to its locals in California announcing plans to hold hearings to consider restructuring and consolidating. Hearings were held throughout the state by two hearing officers appointed by the SEIU executive committee. During the hearings in Los Angeles, affected local union members were given the opportunity to be heard. Some members of Local 347, which represented approximately 9,000 city employees, opposed the merger, but the local itself took no position on the matter.

The hearing officers submitted a report recommending that Local 347 be combined with Locals 535, 620, 660, 998, and 1997 to form a new regional local union, Local 721, which would represent local government workers in several Southern California counties.

SEIU’s executive board adopted the hearing officers’ recommendation

and enacted an official policy that required all local unions to comply with the decision of the executive board. The policy prohibited the use of local union funds or staff to oppose the board’s decision on the merger.

In advance of a vote on the merger, a series of informational meetings were held in Los Angeles, where SEIU officials made a presentation and answered questions. There was an opportunity for discussion and debate.

Statewide balloting was conducted by mail over a four-week period. The reorganization was approved by over 31,000 voters; approximately 4,250 voted against the plan. In January 2007, SEIU President Andrew Stern issued a charter to Local 721, appointed interim officers, and provided a temporary constitution. He instructed all affected local unions to take steps to transition into the newly created Local 721. The next month, Local 721 filed a petition for an amended certification with the Employee Relations Board for the City of Los Angeles, in this case seeking a name change from SEIU Local 347 to Local 721.

Dan Mariscal, a city worker and member of Local 347, opposed the petition. He argued that members of Local 347 were entitled to vote separately on whether they should merge with the other local unions into Local 721.

After an evidentiary hearing, the hearing officer recommended that the board approve the petition for an amended certification. She found that local members were accorded ample notice and opportunity to be heard prior to the merger, that the prohibition on the use of Local 347 staff and funds to campaign against the merger did not deny members their due process rights, and that the merger

The merger was effected in accordance with the SEIU constitution and its governing documents.

did not create a question concerning representation. The board adopted the hearing officer’s recommendation and approved the petition to recognize SEIU Local 721 as the authorized employee organization for the consolidated locals, including Local 347.

Mariscal attempted to reverse the board’s decision and, when that effort failed, he filed an appeal. The court first cast aside the argument that merger of the locals into Local 721 was governed by two sections of the Corporations Code which require that mergers of non-profit corporations be approved by the members of each constituent corporation. Repeating the ruling of the trial court, the appellate

court said that “a labor union is not a corporation, and a labor union is not governed by the Corporations Code.” The merger was effected in accordance with the SEIU constitution and its governing documents, which do not require a separately tallied vote of local union members to effect the merger, the court concluded.

*Is SEIU Local 721
a continuation of the
old union, or is it a
substantially different
organization?*

Section 3507(a) of the Meyers-Milias-Brown Act allows public agencies to adopt local rules and regulations to implement the statute and, under that authority, the City of Los Angeles adopted an Employee Relations Ordinance. The ERO expressly grants the board the power to determine issues affecting the recognition status of employee organizations and encompasses issues like mergers and transfers of jurisdiction between two employee organizations. Therefore, the court reasoned, the Los Angeles ordinance “allows a union that has been certified the exclusive bargaining representative for a given bargaining unit to merge or affiliate with another qualified employee organization.”

The court turned to federal labor law to determine whether the succes-

sor organization that resulted from the merger — SEIU Local 721 — is a continuation of the old union under a new name or a substantially different organization that requires a vote of affected unit members. A certified union must be recognized as the exclusive bargaining agent, and that recognition cannot be discontinued unless affiliation or merger with another union raises a question concerning representation. If a question concerning representation is raised by the affiliation or merger, an election must be held to decide whether the certified union still is the choice of the majority of the bargaining unit. Under federal precedent, the court explained, a question of representation arises only if the new affiliation substantially changes a certified union’s relationship with the employees it represents and the change makes it unclear whether a majority of the employees continue to support the reorganized union.

In this case, the board found that affected local union members were given a fair opportunity with appropriate due process safeguards to approve the proposed consolidation and merger and the merger did not cause organizational changes so great as to present a question concerning representation.

The court took note that local members, including members of Local 347, had ample opportunity to consider, discuss, and approve the proposed reorganization. At the statewide hearings, local union members were

invited to comment on the proposed merger. Following the hearings, SEIU conducted a statewide vote by confidential mail ballot, and 88 percent of those who voted approved of the proposed merger.

Although the merger created certain organizational changes, the court found there was continuity of representation for the members of Local 347. After the merger, each local retained an advisory committee

*Union members were
given a fair oppor-
tunity to approve the
proposed consolidation.*

through which it made suggestions to the Local 721 executive board. The former general manager of Local 347 became the director of the region encompassing Los Angeles, and her duties remained the same. Labor relations policies and practices did not change; grievance handling procedures remained the same, and existing joint labor management committees continued to function. Members of Local 347 retained the ability to suggest contract proposals, serve on the bargaining team, and ratify tentative agreements reached with the city. “Substantial evidence supports ERB’s finding that the merger did not result in a substantial change in the nature of Local 347 to present a ‘question of representation,’” the Court of Appeal concluded.

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

Now, firefighters have a new resource.

Pocket Guide to the Firefighters Bill of Rights Act

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

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Finally, the court rejected Mariscal's contention that a question concerning representation was demonstrated by the fact that 399 members of Local 347 signed a document opposing the merger and consolidation. As the hearing officer noted, those members opposed to the merger constituted fewer than 5 percent of the 9,000 city employees who had been represented

by Local 347. That is insufficient to raise a question concerning representation and falls short of the 30 percent showing needed under the city's employee relations ordinance to initiate a decertification election targeting Local 721. (*Mariscal v. Los Angeles City Employee Relations Board*; *SEIU Local 721*, *RPI* [2010] 187 Cal.App.4th 164.) *

Court Employees Gain Whistleblower Protection

EFFECTIVE January 1, court employees will join the ranks of other public employees covered by the Whistleblower Protection Act. Assembly Bill 1749, was drafted by Assembly Member Bonnie Lowenthal (D-Long Beach) and Audra Strickland (R-Thousand Oaks). It was introduced last February after legislative hearings brought to light questionable spending practices by the Administrative Office of the Courts and accusations of retaliation against court employees who brought claims of improper government practices to light. The legislation extends the Whistleblower Protection Act to court employees who were not covered by existing laws.

The bill covers employees of the Supreme Court, the courts of appeal, the superior courts, and those of the Administrative Office of the Courts.

The act prohibits retaliation against employees who make a protected disclosure, defined as a communication of information that may

evidence an improper governmental activity. A.B. 1749 authorizes an employee who files a written complaint alleging retaliation for having made a protected disclosure to forward a copy of the complaint to the State Personnel Board. The statute requires the SPB to investigate any claim filed and to make a recommendation as to the alleged retaliation to the employing entity.

The Whistleblower Protection Act currently covers about 330,000 employees of the State of California, the University of California, and the California State University. This bill adds 22,000 court employees to that group.

An earlier version of the bill called on the SPB to take action in cases of retaliation. That provision was dropped at the urging of the Judicial Council. The bill that passed only allows the SPB to make findings of fact and recommendations. *

State Employment

New MOUs Roll Back Pensions, Protect Against Furloughs, Minimum Wage

AFTER TWO YEARS of intermittent bargaining, the Department of Personnel Administration and six unions reached agreements that trade compensation stability and a 2011-12 boost in maximum salaries for higher employee pension contributions and rollbacks in retirement benefit eligibility. Five of the six units have ratified the agreements despite the concessions. "The best that can be said is that we have removed the unknown," Pam Manwiller, AFSCME Local 2620's director of state programs, said about the pacts. The governor touted the contracts as "the first steps toward pension reform."

Negotiations in Limbo

Of the 21 bargaining units of state employees, only the unit represented by the California Association of Highway Patrolmen had an unexpired contract in June. The rest have been in off-and-on negotiations for at least two years. Last year's tentative deal with SEIU Local 1000, which represents nine units, was never approved by the legislature.

The situation has posed a delicate balancing act for Democrats in the legislature. Some of their strongest supporters are unions, and they would prefer to leave compensation of state

employees to collective bargaining. But, they have a budget deadline to meet and no money to play with. On June 3, Senate President Pro Tem Darrell Steinberg wrote the governor:

I have talked with the leaders of all these bargaining units and stressed the importance of getting to the table as soon as possible.... They get it — they have been and remain ready to bargain in good faith.

But there's a serious problem. I have been told by more than one unit, that ...issues unrelated to the terms and conditions of employment have been introduced at the 11th hour by the Department of Personnel Administration, thus halting any momentum the parties may have had to that point.

Steinberg gave one example. DPA had insisted that a union agree as part of its contract not to oppose legislation requiring the California Public Employees Retirement System to use "supportable assumptions and data." The president pro tem criticized the proposal as an unnecessary roadblock. He continued:

Existing law authorizes the Governor, not the Legislature, to negotiate employment contracts with state employees. If the administration intends to move forward in good faith now

with the bargaining units, we can recognize any agreed upon terms in the budget.... The administration should not expect that the Legislature will circumvent the collective bargaining process and do what is clearly your administration's statutory responsibility and obligation.

In his response, Governor Schwarzenegger did not deny interjecting the CalPERS transparency legislation into negotiations. He advised Steinberg that he would not sign a budget without pension reform and would require legislation "separate and apart" from any MOUs. He demanded the legislature roll back the expansion of benefits adopted in Senate Bill 400 in 1999, increase employee contri-

The governor demanded the legislature roll back the expansion of benefits adopted in Senate Bill 400 in 1999.

butions toward retirement benefits by 5 percent, return to calculating retirement benefits on the average of an employee's highest three years of salary rather than the single highest year, and require CalPERS to submit a report on various investment return assumptions, currently 7.75 percent

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

Written and revised by experts in the field, this Pocket Guide focuses on the Act's impact in the public sector workplace and explains complicated provisions of the law that have vexed public sector practitioners, like the "salary basis" test and deductions from pay and leave for partial-day absences. The second edition includes the Department of Labor's significant changes to overtime exemption regulations, addresses common issues regarding hours worked by public employees, and discusses recent legal developments in compensatory time off.

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

Pocket Guide to the Fair Labor Standards Act

By Cathleen Williams and Edmund K. Brehl (updated by Brian Walter) • 2nd edition (2009) • \$16
<http://cper.berkeley.edu>

annually, that will be evaluated by a third party.

The governor's letter foreshadowed key elements of the final agreements. Within weeks, he and six unions announced tentative pacts that significantly change the compensation landscape for 35,000 employees. The California Association of Highway Patrolmen and the CDF Firefighters agreed to three-year contracts. The International Union of Operating Engineers, the Union of American Physicians and Dentists, the California Association of Psychiatric Technicians, and AFSCME Local 2620 negotiated two-year agreements.

Take-Home Pay Reduced in 2010-11

The governor's budget had called for 5 percent pay cuts and an increase in employee pension contributions that would amount to nearly 5 percent of pay. In May, he added another 5 percent cut in the form of a personal leave day every month. Four of the six new MOUs include the personal leave plan, but not the pay cut. All include an increase in employee pension contributions. The administration anticipates savings of \$74 million from the six units in 2010-11.

Except for highway patrol officers and firefighters, employees with new

contracts would receive a personal leave day each month for 12 months in exchange for a 4.6 percent pay reduction. The PLP days would have no cash value and would expire if unused by July 2014. The reduced compensation would not affect "final compensation" for purposes of pension benefit calculations even though pension contributions would be reduced.

An increase in employee pension contributions would trim the amount the state must pay to CalPERS. In 2009-10, the state paid approximately 19 percent of payroll on behalf of most state employees, more than 20 percent for safety members, nearly 29 percent

of payroll for firefighters, and 32 percent of payroll for highway patrol officers. The contributions by miscellaneous employees would increase from 5 to 10 percent of pay. Those of safety members would increase from 6 percent to 11 percent of payroll. Firefighters would put in 4 percent more, for a total of 10 percent of pay. CHP officers, who now contribute 8 percent of pay, would put in 10 percent by July 2013. In the meantime, contributions patrol officers now make to retiree health benefits would be redirected to CalPERS. (See story on CHP retiree health benefit payments in *CPER* No. 197, pp. 42-44.)

These compensation reductions would be offset slightly for employees in some units. The state would pay more for health benefit premiums of craft and maintenance employees represented by IUOE and psychiatric technicians represented by CAPT. The last time the state boosted its contributions for these units was January 2008. The new rate is approximately 80 percent of average premium costs.

In addition, IUOE, CAPT, and AFSCME — which represents health and social service professionals — negotiated an increase in pay for working on holidays. Many of the expired contracts had required the state to pay an employee one-and-a-half times the regular rate of pay, but legislation in February 2009 restricted compensation to straight pay and eight hours leave credit, unless higher compensation was negotiated after the legislation

passed. IUOE, AFSCME, and CAPT regained time-and-a-half pay for six of the state's 12 holidays.

The governor has taken an inconsistent approach to using paid leave when calculating eligibility for overtime pay. At one time, most state employees who took a sick day and worked the other four days in a week would earn overtime on the fifth day. In some units, the state has successfully negotiated elimination of paid leave as "hours worked" for purposes of overtime. In February 2009, the legislature reinforced this effort by eliminating paid leave from calculations of overtime eligibility for all employees, unless their representatives were able to renegotiate it. The provision was never applied to CHP officers, who had a contract in effect. And, it also was not applied to firefighters, even though CalFIRE's budget was reduced to take into account overtime savings. Now CAPT has regained inclusion of paid leave, other than sick leave, as hours worked if a psychiatric technician is assigned mandatory overtime work.

Raise in 2011-12

Each union won a pay increase at the top step of pay ranges effective January 2012. These are the first raises that the employees other than CHP officers have received since 2007.

CDF Firefighters negotiated a 4 percent increase to the maximum of the pay range for employees eligible for a firefighter/peace officer pension. Miscellaneous members of the retire-

ment system who are at the top of their pay scale will receive a 5 percent raise. The top level of pay ranges in the other four units will rise 5 percent.

Highway patrol officers did receive a pay increase in 2008, and their 2012 boost to the top step will be only 2 percent. This raise will be in addition to any increases officers receive as a result of the annual salary survey the parties are legally required to conduct to maintain pay parity with police officers in five large local California agencies. Beginning in 2013, the survey will take into account whether and how much officers in other agencies are prefunding retiree health benefits.

In its analysis of the MOUs for the legislature, the Legislative Analysts Office says that most state employees are or will be at the top step in 2012, adding \$32 million to state costs in 2011-12. The higher base salaries will result in larger overtime payments and pension contributions. With the end of the personal leave plan in September 2011, the higher salaries and benefits, and holiday and overtime eligibility changes, the state will save little in compensation costs in 2011-12.

Retirement Benefit Changes

The governor achieved his primary goal of reducing future pension liability. CHP officers and firefighters have been eligible to retire at 50 with a benefit formula based on 3 percent of their highest annual salary multiplied by their years of service. Future hires will not be eligible for the 3 percent

formula until age 55, and benefits will be based on the average of the highest three years of salary. The change to a three-year average will protect against the effects of “spiking,” where an employee takes a higher paying job for only one year and then retires with a much higher pension than has been prefunded.

The deal does not return formulas to the way they existed in 2000, prior to the passage of S.B. 400 (Ortiz, D-

If the legislature fails to pass a timely budget, employees will be protected from minimum wage orders.

Sacramento). Correctional officers and firefighters had been eligible for a 2 percent retirement formula at age 55. Benefits for state highway patrol officers and local police officers who retired at 50 were calculated using a 2 percent formula.

The pension formula for state safety employees will change to 2 percent of final compensation at age 55, but will be 2.5 percent if the employee waits to retire at 60. Future miscellaneous employees will be eligible for a 2 percent formula at 60 and a 2.418 percent formula at age 63, which is slightly below the current maximum benefit. The legislature already enacted the three-year average highest compensa-

tion provision for new employees in units represented by CAPT, UAPD, AFSCME, and IUOE in 2006.

An important new component of several MOU deals is prefunding of retiree health benefits. State employees have been eligible for employer contributions of half their retiree health premiums if they worked for 10 years, and to incrementally higher contributions for more years of service until they earned 100 percent contributions after 20 years of service. Before, only CHP officers were contributing a portion of their pay to a fund for the benefits. The agreement will redirect that payment toward pension benefits. But, employees represented by UAPD and IUOE will begin contributing .5 percent of pay to prefund retiree health benefits.

The vesting schedule for retiree health benefits for new operating engineers will change. Fifteen years of service will be needed for any employer contribution, and the 100 percent contribution will not occur until an employee has 25 years of service.

Despite the misgivings of Senator Steinberg, all six unions agreed not to oppose transparency legislation that would require CalPERS to use sup-

portable assumptions in its analyses and have its estimates evaluated by a third party.

Compensation Protections

The new labor deals remove the threat of furloughs for the duration of the contracts. True to his word, the governor exempted CHP and CalFire among other agencies, and all employees represented by IUOE, AFSCME, UAPD, and CAPT when he ordered the resumption of furloughs three days a week pending passage of a budget.

The MOU bills also contain a provision establishing a continuous appropriation for the pay of employees in the six units through the terms of the various agreements. If the legislature fails to pass a timely budget, employees will be protected from minimum wage orders. The legislature drafted a narrow continuing appropriation that would preserve pay rates during budget impasses without committing itself to appropriation of all compensation for the duration of the contracts, in case it needs to scale back compensation in an annual budget act. The governor signed the two MOU bills in August. CDF Firefighters is conducting its ratification vote in September. *

Controller's Duty to Audit Claims Does Not Authorize Disregard of DPA's Pay Letter

THE DEPARTMENT of Personnel Administration has the authority to direct the controller to reduce salaries to the federal minimum wage during a

budget impasse that continues past July 1, an appellate court held in July. Although the controller has the duty to audit claims, he must seek a judicial

resolution if he disagrees with DPA's order, the court decided. It rejected the contention that the Fair Labor Standards Act requires that California employers pay the higher state minimum wage. It did not rule on the controller's defense that it was not technologically feasible to carry out DPA's directive. State Controller John Chiang has opposed the governor's 2010 minimum wage order on several grounds. (See story on pp. 48-49.)

Power Struggle Over Pay

In 2003, the California Supreme Court decided *White v. Davis*, 30 Cal.4th 528, 160 CPER 14, which grappled with the effect of a California constitutional provision that prevents the controller from paying state employee salaries before the legislature

enacts an appropriation for them. When the legislature fails to pass a budget appropriating funds for employee salaries before the beginning of the fiscal year in July, employees may not be paid until the budget is enacted, at which time they are entitled to receive the deferred pay in full, the court held. The only exception to this rule is for employees covered by federal wage and hour laws, the court instructed. Under the FLSA, the controller must timely pay the minimum wage to non-exempt employees, and full salary plus overtime compensation to non-exempt employees who work overtime.

In 2008, the legislature did not pass the 2008-09 budget until September. On July 31, 2008, the governor issued an executive order directing DPA and the finance department to

work with the controller to implement a compensation plan that would comply with *White v. Davis*. DPA issued a "pay letter" instructing the controller to reduce paychecks of state employees to zero for exempt employees and pay the minimum allowed under the FLSA for others. The controller, however, responded that he needed more time to resolve tax withholding issues and develop or modify computer programs. DPA went to court.

DPA asked the court to order the controller to comply with the pay letter and to declare that the controller is legally required to refrain from paying state employee salaries without an appropriation unless required by the FLSA. After the budget was enacted in September, DPA asked the court to order the controller to "make any and

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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>

all adjustments to the payroll system so the controller will be prepared to comply with the law during the next budget impasse.”

Chiang, however, argued the case was moot, since the 2008-09 budget and compensation appropriations had been enacted. He also contended that DPA lacked authority over him, that it was not feasible to implement the pay letter, and that the pay letter violated employee rights to the higher state minimum wage. Several employee unions intervened in support of the controller.

*Chiang contended
that DPA lacked
authority over him.*

The trial court issued a declaratory judgment against Chiang. Although it recognized the controller could invoke the defense of impossibility by a showing that implementation of the pay letter would be extremely difficult or expensive, the court found that there was not enough evidence of impossibility and no showing the controller could not fix the problems before the next budget impasse. The controller and several unions appealed.

Moot But Not Over

The court rejected Chiang’s claim that the trial court should have dismissed DPA’s petition as moot after the budget passed. Because the issue was resolved in September, the trial

court did not order Chiang to comply with the 2008 pay letter, but it did grant declaratory relief. Once a conflict has arisen, California law allows a court to issue a declaratory judgment to prevent a legal violation or breach from occurring. Since there was an actual controversy, the subject of the declarations was not moot, the appellate court decided. To the extent the subjects were moot, the court found that they involved issues of public interest that were likely to recur. The court explained that “legislative gridlock makes it reasonable to expect that budget impasses will continue in the future, and the controller has made it clear he intends to disregard any similar pay letter in the event of a future budget impasse.”

DPA’s Authority

The question of DPA’s authority over pay was addressed previously in *Tirapelle v. Davis* (1993) 20 Cal. App.4th 1317, 103 CPER 31. In that case, the court held that the controller was required to implement DPA’s decision reducing the salaries of unrepresented employees. Chiang argued that *Tirapelle* should not be applied to the present case because DPA has express authority to set salaries of unrepresented employees but lacks authority to delay paying full salaries. The court noted, however, that the *Tirapelle* court found the legislature gave DPA jurisdiction over the administration of all employee compensation. In addition, the court pointed out, the controller

must comply with *White v. Davis*, even without a directive from DPA.

The controller’s duties include reviewing the legality of claims against the state treasury. Therefore, he argued, he had the authority to ignore DPA’s letter if he thought it violated the FLSA. But the court followed the reasoning of *Tirapelle*, which found that the controller’s duties are largely ministerial rather than discretion-

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ary. The *Tirapelle* court observed the legislature has not delegated to the controller “any supervisory or review powers over the decisions of the DPA.” Although the controller has the power to audit salary claims, it said, “this is far from being authorized to fix compensation.” If the controller thinks that DPA has committed an error on an issue within DPA’s jurisdiction, it must challenge DPA judicially, the *Tirapelle* court instructed.

Chiang asked the court to read *Tirapelle* narrowly and not apply it to the controller’s opinion that a DPA directive violates federal law. The court found no legal support for this assertion, however. Even though the controller previously had been sued for

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violating the FLSA, the court decided Chiang did not have the discretion to refuse to pay employees the amounts set by DPA. Although the controller does have authority to examine the factual circumstances to determine whether a claim is valid, the court observed, the current case did not involve a factual dispute. There is no question that the employee claims for pay were valid, the court observed.

Chiang argued on several grounds that DPA has limited powers to administer salaries. He contended that DPA's own regulations limited its powers to the determination of pay periods and the application of established salary rates. The court, however, found the regulations placed no limitation on DPA's statutory authority to administer salaries. It noted that the Government Code requires DPA to enforce the laws pertaining to personnel, which would include *White v. Davis*.

SEIU Local 1000 and the controller contended that the pay letter was unauthorized because DPA has no jurisdiction to set salaries for employees represented by unions under the Dills Act. They relied on *Department of Personnel Administration v. Superior Court (Greene)* (1992) 5 Cal.App.4th 155, 94 CPER 8. The court interpreted *Greene* as merely holding that DPA's power was limited "when the legislature had expressly reserved to itself authority over certain salary decisions." The court, however, viewed the pay letter as merely delaying payment, not setting

salaries. For that reason, the directive did not conflict with any legislative reservation of power over salaries.

SEIU argued that a Government Code provision authorizing DPA to provide overtime pay showed that DPA did not have broad authority over compensation. The court rejected the contention that the law would not have been necessary if DPA had broad authority, and pointed out that the purpose of the provision concerned the relationship of the FLSA to an MOU.

State Minimum Wage

Chiang contended that state non-exempt workers are entitled to the state minimum wage, which is higher than the federal minimum wage. The court reiterated that the controller did not have the power to determine that DPA's pay letter violated state minimum wage laws. And, the court ruled, nothing in the FLSA makes the state minimum wage payable as a matter of federal law. The FLSA stipulates that it does not preempt state laws setting higher minimum pay, but that does not mean that the act incorporates state law.

Federal regulations provide that where a statute entitles an employee to a higher regular rate than that set by the FLSA, the "regular rate" for purposes of calculating overtime pay is the higher wage. The court found, however, that the provision did not have the force of law because it was

entitled, "Statements of General Policy or Interpretation Not Directly Related to Regulations." Even if it was legally binding, the policy does not affect the minimum pay for those who did not work overtime, the court explained. It refused to read a phrase in *White v. Davis* that required the state to pay "at least the minimum wage" as a mandate to pay the state minimum wage, a question the *White* court did not address.

Feasibility Undecided

Because the dispute over the 2008 pay letter had ended, the court declined to decide whether Chiang had proven that it would be technologically impossible to comply with *White v. Davis*. Any future DPA pay letter might contain different instructions, the court pointed out, and the capabilities of the controller's computer system during a future budget impasse could not be determined. Although there was evidence that a pending upgrade to the system would not remove all the obstacles to implementation of a minimum wage order, the court advised that other changes could solve the problem.

The court upheld the declaratory judgment. That same day, the controller informed the governor that he viewed the DPA's 2010 minimum wage pay letter as a "mistake" and announced that he would take his impossibility defense to court. (*Gilb v. Chiang* [2010] 186 Cal.App.4th 444.) *

Minimum Wage Threat Delayed Again

NO SOONER did the Court of Appeal decide one minimum wage case than another legal skirmish began over the governor's July 2010 directive. Although the court in *Gilb v. Chiang* held that the controller had no authority to refuse to implement the Department of Personnel Administration's pay letter reducing state employee pay to the federal minimum wage, the court left open the possibility that State Controller John Chiang could prove that it would not be feasible to pay employees minimum wage temporarily and then timely restore salaries when a budget is passed. (See story on pp. 43-47.) When DPA sued to compel Chiang to reduce employee pay, the controller filed a cross-complaint charging that the order is illegal and nearly impossible to implement. Meanwhile, the California Attorneys, Administrative Law Judges and Hearing Officers in State Employment has filed both an unfair practice charge and a lawsuit over DPA's pay letter. The letter temporarily eliminates most of its unit members' pay because they are not protected by the federal Fair Labor Standards Act.

Not Feasible

When he received DPA's pay letter dated July 1, Controller Chiang announced he would not be able to implement its directives using the controller's aging computer system. DPA

Director Debbie Endsley attempted unsuccessfully to obtain a provisional order compelling the controller to reduce or cease pay to state workers in mid-July. But the court refused to issue an order, ensuring that employees would receive full pay through September.

Endsley filed a motion to dismiss the controller's cross-complaint. In late August, the trial court ruled that many of the controller's claims had already been decided against him in *Gilb v. Chiang*, which the controller has asked the Supreme Court to review. However, the trial court allowed several of the controller's claims to go forward.

Chiang contends that DPA's pay letter does not exempt employees who are paid with funds which are continuously appropriated, despite a July 27 letter from DPA Director Endsley that states, "The pay letter does not instruct you to withhold any pay for state employees who are currently paid from continuous appropriations." Chiang also claims that employees in the California Department of Corrections and Rehabilitation under the authority of the federal receiver should be exempted from the minimum wage order. He asserts that DPA did not instruct how to account for legally required deductions from paychecks if the paychecks are smaller than the amounts that are to be deducted. The state employer also has not provided

a way for the controller to determine which workers are eligible for overtime pay in each month.

In addition, Chiang backed up his claims of infeasibility with declarations of his payroll system administrators and a report from an outside consultant, Crowe Horwath, which conducted a three-month study of the system. The consultant found that the system cannot now perform the operations which would be necessary to comply with the governor's order

Solutions to some problems would make others logically impossible to solve.

and then restore normal payroll after a budget is signed. Even if there were significant modifications to the system, no one solution could solve all the obstacles to compliance. In fact, solutions to some problems would make others logically impossible to solve, creating "logical mutual exclusivity," the consultant concluded. The court likely will not issue a decision on these cases until November, by which time a budget may be enacted.

'Coercive and Discriminatory'

Several unions moved to intervene in the lawsuit between the governor and the controller, but the court denied their motions. CASE, however, took its own legal actions.

The union's unfair practice charge claims that DPA engaged in coercive tactics to force concessions by a combination of announcements and actions. First, the governor had said he would not sign a budget unless it contained significant pension changes that affect employee compensation. In late June, DPA Director Endsley raised the prospect of a minimum wage order if a budget did not pass, noting that employees represented by the unions that had recently reached tentative agreements with DPA would be exempted from the order. On the same day, DPA suddenly announced a deadline for CASE to accept a state bargaining proposal that had been on the table for four months. Several days later, DPA issued the minimum wage pay letter exempting bargaining units with tentative agreements, even though no continuing appropriation had yet been enacted since the legislature had not approved the MOUs. CASE asserts, "The pay letter thus represents an example of the administration attempting to punish CASE members for failing to agree to the Governor's demands." The letter discriminates against the union in violation of the Dills Act, the union claims.

CASE also contends that implementation of the pay letter would "starve" Unit 2 into submission" by preventing the payroll deductions for membership dues, a form of "union-busting." In addition, the charge asserts that the minimum wage pay letter was issued without notice and will result in

a unilateral change in working conditions, since there will be no pay from which employees can make required contributions for health, retirement, and other benefits.

CASE's court petition to prevent Chiang from implementing the pay letter points out that cutting the pay of attorneys at the State Compensation Insurance Fund and 22 other programs would be illegal since there is a continuous appropriation for their funding. It also contends that the pay letter violates the constitutional equal protection clause because it illegally exempts employees based on tentative agreements with DPA. When the union filed the petition in July, the legislature had not yet passed the bill containing a continuing appropriation for compensation of employees in those units.

CASE raises a new legal argument that all state employees' salaries are continuously appropriated under Government Code Sec. 19824, which states, "Unless otherwise provided by law, the salaries of state officers shall be paid monthly out of the General Fund." CASE cited a 1934 Supreme Court decision that found the provision sufficient to pay a division chief in the Department of Finance even though the legislature specifically prohibited using any Department of Finance funds for his salary. CASE argues that the provision applies to any state employee, not just state officers. The term "officer" is defined in many ways in the Government Code, and in at least one place refers explicitly to deputy attorneys general, who are among CASE's unit members. No date is set for the hearing on the petition. *

Court Upholds Back Pay for Wrongfully Furloughed SCIF Employees

WORKERS AT the State Compensation Insurance Fund scored another victory against the governor's furloughs when the First District Court of Appeal rejected claims that a back pay award was defective. In unpublished sections of the opinion, the court also held that the San Francisco Superior Court had jurisdiction over the case even though a Sacramento court already had decided a similar case, and that the Insurance Code prohibited the governor from ordering furloughs of

SCIF employees. On both the latter issues, the court reiterated the opinion of the Third District Court of Appeal in *California Attorneys, Administrative Law Judges and Hearing Officers in State Employment v. Schwarzenegger* (2010) 182 Cal.App.4th 1424, 199 CPER 54. That case is now pending before the California Supreme Court.

In December 2008, the governor issued an executive order directing the Department of Personnel Administration to adopt a plan to implement

furloughs of most state employees for two days a month, “regardless of funding source.” Service Employees International Union, Local 1000, which represents SCIF employees in nine bargaining units, filed a lawsuit on the ground that the Insurance Code prohibits the governor from imposing staff cutbacks at the agency. SCIF is a constitutional agency governed by a board of directors, which has authority to administer the fund under the Insurance Code.

*It would be
‘preposterous’ for the
court to hear from
5,800 employees
before granting
monetary relief.*

After a hearing on September 10, 2009, the trial court issued an order in the union’s favor, but did not sign a formal judgment. On September 24, the court entered a judgment issuing a writ of mandate and a permanent injunction against mandatory furloughs of SCIF employees. The judgment also ordered the state controller to pay all SCIF employees their full salaries without any reductions and to provide back pay with interest for the unlawful reduction in salaries caused by the furloughs.

The governor and the director of the Department of Personnel Ad-

ministration appealed. In addition to the arguments they made and lost in the prior case, they contended that the judge improperly issued the back pay award on September 24 after she issued her order on September 10. The Court of Appeal found no merit in this contention, since the September 10 order clearly was not final. It also reminded the governor of prior case law that allows an award of back pay in a writ of mandate where there is a finding the public employer violated a ministerial duty.

The court was even less impressed with the governor’s claim that there was no evidence to support a back pay award. The union verified its complaint that the furloughs caused salary reductions, and the governor did not deny that furloughs had been in effect since February 6, 2009. It would be “preposterous” for the court to hear from 5,800 employees before granting monetary relief, the court exclaimed, especially since the controller had told

the trial court that he could implement a back pay order for all the individual employees with a few keystrokes on a computer. The controller already had authorized back pay to the attorneys involved in the first SCIF case, the court observed.

The final challenge to the back pay award was based on lack of parity among civil service employees. The award would thwart the collective bargaining process established in the Dills Act, the governor and DPA director contended. The court, however, viewed the back pay order as merely restoring the state of affairs that existed between State Fund employees and their employer prior to the furlough decision. The court could not see how that impinged on parity or undermined the collective bargaining process. It affirmed the trial court’s judgment. (*Service Employees International Union, Loc. 1000 v. Schwarzenegger* [2010] 186 Cal.App.4th 747.) *

State Personnel Board Amends ‘Incomplete, Confusing’ Regulations

NEW STATE Personnel Board regulations on appeals and hearings provide a much better road map for participants in disciplinary cases and other appeals to the board. The SPB changed timelines for various actions, so the new regulations should be consulted by anyone involved in appeals of merit, whistleblower, discrimination, and

other issues, as well as advocates in disciplinary hearings.

State agencies now must file personnel actions using the online filing system. Employees and unions still may file paper documents. The goal is to have most filings online within the next few years so that files are accessible by more than one person at a

time. Before, the file could be inaccessible for days because the administrative law judge had it at a hearing out of the office.

The three types of processes conducted by the SPB — investigations, informal hearings, and evidentiary hearings — and when they are used are now explained in the regulations.

The discovery regulations have been amended to allow a party to take depositions on order of an ALJ. Sanctions for failure to provide discovery or other abuse of the process are now authorized. New sections explain the procedures for filing motions and obtaining continuances.

The regulations codify the pre-hearing/settlement process that became mandatory in January 2009. With 2,600 appeals filed every year, the board is hoping that cases will settle earlier, so that hearing dates are not wasted on cases that settle on the “courthouse steps.” The regulations require specific content in pre-hearing statements.

Parties can no longer stipulate to extend the time to bring a case to hearing past the three-year deadline. A new provision allows a dismissed employee to ask for priority in scheduling a hearing.

The regulations allow electronic participation in hearings, by videoconferencing, for example. This provision will allow hearings to go forward even when, as now, there is no travel budget for ALJs to go to a workplace to conduct hearings. *

Court Grants Conditional Certification of Collective Action in CCPOA’s FLSA Lawsuit Against Furloughs

THE CALIFORNIA Correctional Peace Officers Association advanced another step in its quest to invalidate furloughs of state correctional officers. The union asserts that the state violated the Fair Labor Standards Act by deducting pay for furlough time each month even though employees are required to work on those days. In June, a federal district court decided that the three plaintiffs who filed the lawsuit last December can represent a group of employees represented by CCPOA who worked for the California Department of Corrections and Rehabilitation or the Department of Mental Health at any time since February 1, 2009, when furloughs began.

For eighteen months in 2009 and 2010, most state employees were required to take furloughs on two or three Fridays each month and suffered pay reductions of 4.6 percent for each furlough day. Employees in some 24-hour operations, however, had been told they could not take Furlough Fridays because it was necessary to have employees at work every day. Those employees had been instructed to take “self-directed” furlough days when they could arrange time off without detrimentally affecting operations. They were informed that they must use the furlough time by July 2012, when it would become worthless.

The administration’s policy is to charge an employee’s time off to furlough days before deducting it from accrued vacation or other leave. But CCPOA claims that officers are not being allowed to take time off every month, and it will be impossible for every officer to use all furlough time before July 2012. The Department of Personnel Administration admits that

*Employees represented
by CCPOA had
accrued over 2.3
million furlough hours.*

in October 2009, CDCR employees represented by CCPOA were entitled to reimbursement for over 2.3 million furlough hours, and that DMH employees had accrued over 19,000 hours.

In December, CCPOA filed a lawsuit seeking to end the practice of reducing pay for furloughs in months when officers were not allowed to take time off. The union asserted that not paying for all days worked within the month and not keeping accurate furlough records violates the FLSA. It also charged that the state is not counting the hours worked on furlough

days as hours worked for purposes of calculating eligibility for overtime pay. The administration denies that the departments fail to count furlough hours toward overtime eligibility, and asserts that written policy encourages employees to take their furlough days monthly.

In June, the district court found that a single policy affected all proposed “class” members. It allowed CCPOA to notify employees how they could opt in to the lawsuit.

CCPOA asked the court only to rule whether the state employer violated the FLSA, and did not ask for back pay or damages because the state has sovereign immunity. The eventual ruling on the union’s claims will affect how the state administers future furlough orders, but will not award any compensation. Significant sums of back pay may result from a case that CCPOA won in a California trial court in December, however. In that case, the court held the state violated state minimum wage law when it failed to pay employees who could not take any days off for three days of work each month. (See story in *CPER* No. 198, pp. 35-38.) That ruling is on appeal. It is not one of the seven furlough cases that the California Supreme Court is reviewing. Meanwhile, SEIU Local 1000 has filed a lawsuit for employees it represents who are subject to “self-directed” furloughs.

In the most recent furlough directive, DPA removed the June 30, 2012, deadline by which employees must use

furlough time to avoid it becoming worthless. The memorandum states that departments must “continue to monitor and ensure that all accrued furlough hours are exhausted prior to termination, separation from State service (such as retirement) or instances such as rejection on probation or dismissal. On rare occasions, when an employee separates from State service and has accumulated unused furlough hours which cannot be used prior to the separation (e.g., death or AWOL), furlough hours must be paid at the time of the employee’s separation.”

CCPOA Executive Vice President Chuck Alexander told *CPER* that removal of the expiration date does not solve the problem entirely. Many employees would have to take six to eight weeks off to use all their accrued furlough credits. If an employee is fired or plans to retire in the next two years, using all furlough credits before being separated from service still will be nearly impossible. *

Higher Education

U.C. Postdoctoral Researchers Reach Historic First Contract

IT TOOK MORE than 60 days of meetings over eighteen months, but the University of California and Postdoctoral Researchers Organize/UAW finally signed a five-year contract covering nearly 6,500 postdoctoral researchers and scholars. "Postdocs" are employees with doctoral degrees who conduct research with professors. They generally are employed for five or fewer years as a first step in a career in academia. PRO/UAW was certified as their exclusive bargaining agent in November 2008. (See story in *CPER* No. 192, pp. 62-64.)

Slow and Bumpy

The union hoped that contract talks would be concluded within three months, and was surprised by the slow pace. After barely a month, PRO/UAW conducted a strike vote. It claimed that the university was engaging in regressive bargaining, backing off an initial proposal that postdocs be disciplined only for just cause. U.C. wanted to make a distinction between the standards used for ordinary workplace misconduct and discipline for poor academic performance or academic misconduct. A strike was authorized but never held.

The union also complained about the university's failure to provide information. It asserted that U.C. had not provided safety and health information that is legally required to be given within 24 hours of a request by any employee. An Occupational Safety and Health Administration complaint was lodged in May 2009.

Still, progress was slow, and information requests relating to salary issues were not satisfied. In August 2009, 3,700 unit members wrote a letter to U.C. President Mark Yudof demanding that bargaining be completed by the end of the month. Despite meeting 10 days in August, no agreement was reached.

In addition to compensation issues, the parties were hung up on family-friendly leave policies. Female postdocs are often in their prime child-bearing years, and studies have shown that the underrepresentation of women in academia is due to policies that discourage them from taking breaks to start families.

In the fall, PRO/UAW joined with the United Professional and Technical Employees/CWA, which represents researchers and technical employees at U.C., to protest the university's insistence that it could not raise any

salaries due to the state budget crisis. Postdocs' and UPTE members' salaries and benefits are largely funded by grants from federal agencies such as the National Institutes for Health and the National Science Foundation, rather than state funds, they pointed out. The grants generally provide funding for increases in compensation.

U.C. did agree to increase the minimum salary for postdocs to \$37,400 a year in October 2009, but proposed increasing copays and employee contributions toward health premiums. The university was not

Postdocs' salaries are largely funded by grants from federal agencies rather than state funds.

interested in experience-based salary scales that national funding agencies recommend. When UPTE won 2.5 percent increases in February 2010, for its researchers, who often have lesser educational qualifications, the university balked at providing the same raises to postdocs.

Legislative Scrutiny

The fact that most postdoc compensation is paid with federal funding enabled the union to interest members of Congress in the contractual dispute. On April 30, 2010, three Bay

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Area Democrats from the House of Representatives Education and Labor Committee, George Miller (Martinez), Barbara Lee (Oakland), and Lynn Woolsey (Petaluma), heard testimony from union representatives and university administrators. They urged U.C. to end the negotiations quickly.

Afterward, Congressman Miller informed U.C. President Yudof in a May 11 letter that he was “thoroughly disappointed” with the progress of negotiations. It was “doubly disturbing” to find out that the university had not provided the union with information about how federal grant money is spent and what conditions are placed on it. U.C. stated at the hearing that it was still costing out union wage proposals, which it had claimed it was doing in July 2009, Miller noted. U.C. used the excuse that it did not have information relating to a small number of postdoctoral researchers who are paid directly by funding organizations, even after it had told the Public Employment Relations Board in 2008, that it had reviewed the grant documents for 16 funding organizations who pay postdocs directly, he pointed out.

Disputes over the failure to provide information also led the union to file an 18-page unfair practice charge with PERB in June. In addition to claims of surface bargaining and other bad faith negotiating conduct, the charge contained allegations of unilateral changes in childcare benefits, direct dealing, and playing favorites with advocates of union decertification.

Salary Increases

At the end of July, the parties announced a tentative agreement, which postdoctoral employees ratified on August 11, 2010. The contract consists of 35 articles ranging in subject matter from a no-strike clause to a sentence guaranteeing access of unit members to workspace and materials. It includes a fair share provision and provides for payroll deductions.

For postdocs making less than \$47,000 a year, the university will raise salaries 3 percent.

The university agreed to phase in over four years the NIH recommended pay scale. New postdocs will make \$37,740 annually beginning in September. For existing postdocs making less than \$47,000 a year, the university will raise salaries 3 percent. For those making more, salaries will rise 1.5 percent. Beginning June 1, 2011, all new postdocs will be placed on steps equal to the NIH pay scale, which includes step increases based on experience and annual increases to the scale. Employees whose salaries are below scale will receive 3 percent increases in each of the next two years and 3.5 percent in 2013 until their pay reaches the appropriate experience-based step. Even postdocs who are paid above the scale

will receive annual salary boosts of at least 2 percent.

Health benefits and premium costs will not change in 2010 and 2011. Those in health maintenance organizations pay no premiums. Beginning in 2012, those in preferred provider programs will see increases in premium contributions and may pay 7 percent of costs by 2014.

Postdocs will receive 12 days of sick leave, 13 holidays, and 24 days of personal time off each year. Those not eligible for leave under the Family and Medical Leave Act or California Family Rights Act may request an unpaid leave for up to a year for pregnancy, birth, and illnesses. A unit member who has a disability is eligible for a short-term disability benefit of 70 percent of pay for up to six months.

The university may discipline a unit member only for just cause. Disciplinary and other grievances can be taken to final and binding arbitration, but the arbitrator may not substitute his or her judgment for any academic judgment that contributed to the decision.

Postdocs are now entitled to appointments of at least one year, although there are exceptions. Progress and performance must be reviewed at least annually. PRO/UAW negotiated a layoff article that permits the university to lay off a unit member for loss of funding.

The contract is historic. Only three other postdoctoral groups in the United States are party to a collective bargaining agreement. Be-

cause of U.C.'s size and high volume of research activity, the PRO/UAW contract covers 10 percent of all post-

doctoral researchers and scholars in the country. *

U.C. Nurses Can't Strike, Begin Bargaining

THE CALIFORNIA Nurses Association – National Nurse Organizing Committee has taken some hard knocks recently, but its members still command salary increases. CNA represents 12,000 nurses at five University of California medical centers and 10 student health centers. In June, the Public Employment Relations Board took U.C.'s side and asked a judge to prohibit a strike over staffing that PERB found would have been an unfair bargaining tactic. U.C. will implement a 2 percent raise for all nurses in September, despite its refusal to agree to the raise last year when recommended by a factfinding panel. As the parties begin bargaining for a successor agreement to the contract that expires September 30, 2010, nurses are wary of a Post-Employee Benefits Task Force report that recommends reducing pension benefits for future employees, boosting employee contributions beyond historical highs, and hiking pension benefits for senior managers.

Staffing Dispute

Last December, the university implemented the terms of its last, best, and final offer presented to CNA during 2009-10 reopener negotiations. (See story in *CPER* No. 198, pp. 49-

50.) No general salary increases were granted, despite the recommendation of a factfinding panel that the parties agree to a 2 percent raise in March for some nurses and 2 percent increases for all nurses effective September 2010. Employee contributions to health plans and pensions increased. CNA got nowhere on its demand that U.C. hospitals schedule enough nurses to meet safe staffing regulations while nurses are taking meal and rest breaks. U.C. maintains that it complies with the state regulations, which require at least one nurse for every five patients and one nurse for two patients in critical care units.

In February, PERB held that safe staffing ratios were within the scope of bargaining. But it found that U.C. had not bargained in bad faith when it refused to incorporate state regulations into the contract in 2005. PERB also ruled that unfair practice strikes are legal under the Higher Education Employer-Employee Relations Act. However, no unfair practices justified CNA's threatened strike in 2005. PERB held that it had authority to order the union to pay for damages the university incurred when preparing for the threatened strike. CNA

has filed a petition for judicial review of the decision.

Despite PERB's view of its past threats to strike, CNA called another unfair practice strike over U.C. staffing. CNA claims nurses must take part in job actions to point out what it believes are conditions that adversely affect patient care. The union asserted that reports show U.C. is not maintaining required ratios, even before nurse breaks are figured into the staffing. It claims that 30 percent of the

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to nurses.*

shifts at U.C. Davis Medical Center have been understaffed. In addition, the union claimed that the university had cancelled a June arbitration over staffing issues.

The strike was timed just after U.C. had decided to offer a 2 percent raise to nurses effective in September and during the public notice period for successor contract negotiations. Hearing no complaint from CNA, U.C. decided on May 27 that it would go ahead with the September salary boost. The next day the university received the strike notice.

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Facts do not cease to exist because they are ignored.

-- Aldous Huxley, writer

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Strike Enjoined

When U.C. asked PERB to obtain an injunction against the strike, the board found that the job action was designed to improve the union's position at the bargaining table rather than protest an unfair practice. And, the strike would occur while the parties had a no-strike clause in effect. CNA argued that the no-strike clause was suspended during reopener negotiations after the factfinding panel issued its report, but PERB did not agree. As U.C. had already implemented terms in the 2009 reopener negotiations and the parties had not started successor contract negotiations, there was no bargaining impasse.

On June 8, the superior court issued a temporary restraining order

against the June 10 strike. U.C. had already scheduled thousands of replacement nurses in preparation. Instead of striking, nurses held rallies and conducted an informational picket. Later that month, the judge issued a permanent injunction against strikes until the contract expires or bargaining reaches impasse, whichever is later, unless the strike is based on unfair practices committed after June 18 or PERB dismisses U.C.'s unfair practice complaint against the strike.

The staffing dispute continues. CNA filed a complaint about understaffing at U.C. Davis in November 2009, which the Department of Public Health is now investigating. In August, the parties began bargaining for a new contract. Staffing was discussed

during the first session, along with wages, educational leave, and union business leave.

Pension Fight Looms

Discussions during the second bargaining session centered on changes the U.C. regents may make to retirement benefits. A task force has recommended increasing employee pension contributions to 5 percent of pay, lengthening service requirements for retirement health benefit eligibility, and reducing the university's contribution to retiree health plan contributions to 70 percent of cost. A new tier of benefits with increased retirement ages and reduced retirement benefits would be established for employees hired after 2013, and current employees would need to pay higher pension

contributions — at least 7 percent of pay — to stay in the existing plan.

At the same time, the task force recommends increasing retirement benefits to employees whose salaries exceed \$245,000. The university already pays out \$5 million a year to about 200 employees whose annual pensions are capped at \$195,000 — an average of \$25,000 per employee. The payment is from an excess benefit plan established because of an Internal Revenue Service rule that limits the pensions payable by tax-qualified pension plans. This plan, which has liabilities

of about \$90 million, will continue. The IRS also has a rule that compensation above \$245,000 cannot be used to figure retirement benefits in a tax-qualified plan. For those hired prior to 1994, however, that upper limit was \$360,000. The task force recommends raising the cap on covered compensation to \$360,000 for all employees, but gives no indication how that would be accomplished or funded.

Given the parties' negotiating history on pension issues, a long, contentious bargaining saga is beginning. *

CFA and CSU Try to Tie Up Unraveled Contract While Negotiating a New One

ISSUES FROM reopener negotiations in 2008-09 and 2009-10, as well as a new contract, were on the table when the California Faculty Association and the California State University met this summer. CFA represents 23,000 faculty members, counselors, librarians, and coaches on 23 campuses. A fact-finding panel recommended limited equity increases, which the university refused to implement. The parties are at impasse in 2009-10 negotiations, but have begun negotiations for a successor to the contract that expired on June 30.

Budget Cuts Tear Up Pact

Back in April 2007, the parties celebrated a 2007-10 agreement that pledged general salary increases of

nearly 16.7 percent over three years, as long as the legislature increased CSU funding as promised in CSU's compact with the state. (See story in *CPER* No. 184, pp. 73-77.) One year into the contract, the legislature cut CSU's funding, automatically reopening the contract on 2008-09 salaries.

The 2007-10 agreement called for a 3 percent raise on July 1, 2008, and a 2 percent boost on June 30, 2008. Eligible employees would receive service salary increases on their employment anniversaries. The contract also required CSU to set aside \$7 million each year for equity increases to resolve salary compaction and inversion problems in the professor ranks.

The equity increase program was part of a two-year plan to rectify the fact that new professors are being hired

at salaries greater than those of existing professors with more experience. The same problem exists for librarians and counselors represented by CFA. In 2007-08, the university set aside the \$7 million to boost the salaries of assistant professors and equivalent ranks with several years experience so that they would be earning more than those with less experience. The parties distributed \$6 million to assistant professors and already had determined how they were going to allocate the remaining million and a second installment of \$7 million to associate and full professors in 2008-09. But the 2008-09 program was contingent on an increase in CSU funding, which did not happen.

New professors are being hired at salaries greater than those of existing professors with more experience.

Equity Increases Recommended

After months of negotiations on the aborted salary increases, CSU would agree only to distribution of the \$1 million in leftover 2007-08 equity increase funds but not the funds for 2008-09. The parties reached impasse and proceeded to mediation and fact-finding. In April 2010, the factfinding panel recommended that no general salary increases be paid for 2008-09. But, it had a lot more to say about the equity increases.

The panel noted that after implementation of only half of the equity increase plan, some untenured assistant professors were being paid more than associate professors, who have tenure. CSU stated it had other priorities for spending the \$7 million, but did not explain to the panel how it had evaluated whether it should discontinue the equity increase plan. Key to the panel was the fact that the parties, including the CSU vice chancellor for human resources, already had decided unanimously how to distribute equity payments in the second year. This showed that the salary inversion and compaction problem was “mutually viewed as both serious and of major importance,” the panel wrote. Half-

implemented, the plan exacerbated the problem rather than alleviating it.

The factfinders recommended that, due to changes over time, the equity oversight committee restudy who should be eligible for increases. After ascertaining where compaction and inversion of salaries remained, equity increases should be paid prospectively. Service salary increases should be paid when necessary to avoid compaction. The panel noted that its recommendation might result in less than \$7 million being spent.

Negotiations continued after the factfinding report was issued, but CSU would not agree to pay any equity increases from 2008-09 funds. In June, reopener negotiations began for the 2009-10 year. Again, the legislature

had cut CSU's funding, and promises of two salary increases totaling 6 percent were scrapped. CSU offered no across-the-board raises and no service salary increases.

Never-Ending Bargaining

These reopener issues spilled into the first few negotiation sessions for a new contract. Because CSU would agree only to distribute \$1 million rather than the \$7 million the oversight committee envisioned, CFA proposed paying one-seventh of the previously determined equity increases to the associate and full professors who the committee found were affected by inversion and compaction. Eventually, CSU agreed to pay almost 16 percent of the equity increase, but capped in-

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

-- Bob Edwards, NPR radio host

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

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

Pocket Guide to Workplace Rights of Public Employees

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

<http://cper.berkeley.edu>

dividual increases at \$1,116 annually, about \$93 a month. CFA vows to raise the equity issues again in successor contract bargaining.

No headway was made in 2009-10 reopener negotiations. CFA proposed that a portion of the promised raise be paid based on the proportion of CSU's 2010-11 request for state funding that is actually received. Although both the legislature and the governor have pledged to increase CSU's budget this year, the university declined to negotiate on this basis. After three meetings, the parties reached impasse and are now in mediation.

In a sign of the times, the first issue CFA wanted to discuss in successor bargaining was layoffs. Tenured librarians and a faculty member working under an early retirement plan have been laid off this year. Several full-time lecturers with at least six years of employment — who have guaranteed three-year appointments — were laid off and then rehired at a lower time base.

CSU's first proposal was a plan to obtain more money from the union. The contract provides paid released time for faculty representatives for which CFA is not required to reimburse CSU, and other released time that CFA reimburses the university for at the minimum rate of pay for an associate professor. The university proposes reducing the amount of unreimbursed released time and increasing the rate of reimbursement. The university has stated it will not make any proposals on compensation until a state budget is passed. *

CUE Affiliates With Teamsters, Enters Factfinding

THE LAST TIME *CPER* checked in with the Coalition of University Employees, it was fighting decertification attempts by AFSCME Local 3299 and the Communication Workers of America. (See story in *CPER* No. 199, pp. 50-51.) As soon as CUE's leaders got wind of AFSCME's decertification campaign, they decided to affiliate with the International Brotherhood of Teamsters. The Teamsters and AFSCME have a no-raid agreement that prevents AFSCME from organizing Teamsters-represented workers. The leadership's affiliation decision had to be ratified by the membership.

The ratification vote was a struggle. CUE's constitution required that 50 percent of members vote and two-thirds of those voting must decide in favor of affiliation. CUE extended the voting deadline twice to bring in enough votes. Three weeks after the initial deadline, the votes were counted. The Teamsters affiliation was ratified by 81 percent of voters.

CUE-Teamsters rivals challenged the voting extension both in the courts and before the Public Employment Relations Board, but lost. PERB issued an amended certification listing CUE-Teamsters as the exclusive bargaining agent for the 14,000 clerical employees. When AFSCME continued to collect signatures for a decertification petition, CUE-Teamsters invoked an arbitration provision in their no-raid

agreement. The arbitrator validated the CUE-Teamsters affiliation, causing AFSCME to drop its organizing efforts. Soon after, CWA decided not to pursue decertification.

Having survived the decertification effort, CUE-Teamsters is concentrating on bargaining. The contract between the University of California and CUE expired in September 2008, and the parties have been negotiating for more than two years. The university is offering no raises for clerical workers even though other units have won pay increases. Although researchers and technical employees received no retroactive raises, they won step increases and a 2.5 percent raise on October 1, 2010. In May 2009, AFSCME negotiated a 3 percent increase effective October 1, 2008, a 1 percent boost in July 2009, and another 3 percent raise on October 1, 2010. CUE will be appearing at the U.C. regents meeting in September and charging U.C. with discriminating against the largely female and minority employees in the unit it represents, CUE spokesperson Amatullah Alaji-Sabri told *CPER*. It, like other U.C. unions, also will be voicing opposition to the university's proposed retirement changes. CUE is the only union that has not agreed to employee contributions to the pension plan.

The parties reached impasse months ago, and mediation was unsuccessful.

cessful. Alaji-Sabri asserts, however, that the parties will not proceed to factfinding until a court rules on the union's dispute with the Public Employment Relations Board. The union has asked the court to overturn a decision by PERB to compensate PERB-appointed factfinders only \$100 a day for three days for any factfinding. During a previous impasse, U.C. refused to agree with CUE to hire a factfinder at the factfinder's full rate, Alaji-Sabri says, preferring to use a free PERB-appointed neutral. Few neutrals on PERB's factfinder list are willing to work for \$100 a day, and for nothing if a case takes longer than three days. CUE argues that the reduced factfinder stipend hampers its ability to explain its position in a complex bargaining stalemate. A court decision is expected in November. *

Discrimination

California Supreme Court Rejects ‘Stray Remarks Doctrine’

THE CALIFORNIA Supreme Court refused to apply to state cases the “stray remarks doctrine” fashioned by federal courts in dealing with employment discrimination cases. Under federal law, statements made by non-decisionmakers or by decisionmakers outside of the decisional process are “stray” and irrelevant when considering the legal theory of a discrimination lawsuit. In *Reid v. Google, Inc.*, the high court, in a unanimous opinion, agreed with the Court of Appeal that application of the “stray remarks doctrine” is unnecessary and might lead to unfair results. The court also concluded that where a trial court fails to rule on objections to evidence, those objections are not waived and can be raised on appeal.

Brian Reid was 52 when he was hired by Google. He was removed from his position after one year, even though his only written job performance review was satisfactory. Two much-younger employees took over his job duties. Reid was appointed to develop and implement an in-house graduate degree program but was terminated months later. Google claimed that he was fired because of poor job performance and because his position had been eliminated. Reid claimed the only reason he was given

for his dismissal was that he was not a “cultural fit.” He also asserted that he had been told the graduate program was continuing.

Reid filed a lawsuit against Google alleging age discrimination in violation of California’s Fair Employment and Housing Act. He claimed that Google’s reasons for firing him were pretextual and pointed to a number of remarks made by employees in support of that accusation. He alleged that one of his supervisors repeatedly told him that his opinions and ideas were “obsolete” and “too old to matter,” that he was “slow,” “fuzzy,” “lethargic,” and “sluggish,” and that he did not “display a sense of urgency” and “lacked energy.” Other coworkers called him “an old man,” “an old guy,” and “an old fuddy-duddy.” They said his knowledge was “ancient” and that the CD case which he used as an office placard should be an LP.

The trial court dismissed the case, but the Court of Appeal reversed, finding the evidence submitted by Reid was sufficient to raise a triable issue of fact as to pretext. Google appealed.

Supreme Court Decision

The court first addressed whether Google’s objections to Reid’s evidence

were waived because the trial court failed to rule on them. It concluded that, because Google had submitted all of its objections in proper form, they were preserved on appeal.

The court then turned to the central issue — whether the appellate court should have disregarded the remarks made by Reid’s supervisors and coworkers in reviewing Google’s summary judgment motion. The company urged the court to adopt the judicially created federal “stray remarks doctrine” and permit California courts to “disregard discriminatory comments by coworkers and non-decisionmakers, or comments unrelated to the employment decision” “to ensure that unmeritorious cases principally supported by such remarks are disposed of before trial.”

Reid argued that courts should not view the remarks in isolation, but rather consider them along with all the other evidence. The court agreed, finding that the strict application of the doctrine urged by Google would categorically exclude relevant evidence. “An age-based remark not made directly in the context of an employment decision or uttered by a non-decisionmaker may be relevant, circumstantial evidence of discrimination.”

Supreme Court Justice Sandra Day O’Connor first coined the term “stray remarks” in *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 81 CPER 72. There, noted the court, Justice O’Connor clarified that while stray

remarks do not constitute “direct evidence” of discrimination, they can be probative. And, in *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 143 CPER 50, authored by Justice O’Connor, the high court held that if the plaintiff establishes a prima facie case and demonstrates pretext through circumstantial evidence, including evidence of discriminatory comments by a decisionmaker unrelated to the employment decision, a reasonable trier of fact may infer intentional discrimination.

The court rejected Google’s contention that it is the role of the trial court to assess the relative strength and nature of the evidence presented on summary judgment, and that the kinds of remarks at issue should be weighed and assessed in isolation. “Determining the weight of discriminatory or ambiguous remarks is a role reserved for the jury,” it instructed. Adoption of the stray remarks doctrine would allow the trial court “to remove this role from the jury.”

Further, said the court, application of the doctrine would be contrary to Code of Civil Procedure Sec. 473c, which directs courts at the summary judgment stage to “consider all of the evidence set forth in the papers...and all inferences reasonably deducible from the evidence.”

After reviewing a number of federal cases, the California court concluded that “federal courts have widely divergent views regarding who constitutes a decisionmaker and how much separation must exist between

the remark and an adverse employment decision for the remark to be considered stray.” It agreed with Reid “that the only consistency to the federal stray remarks cases is that the probative value of the challenged remark

turns on the facts of each case.” “That was the approach taken by the Court of Appeal here,” the Supreme Court concluded. (*Reid v. Google, Inc.* [2010] 50 Cal.4th 512.) *

Employee Cannot Sue to Increase EEOC Remedy Without Relitigating Liability

WHERE THE Equal Employment Opportunity Commission made a finding of age discrimination and ordered certain remedies, the complainant cannot sue to expand those remedies without relitigating the issue of liability, according to the Ninth Circuit Court of Appeals in *Carver v. Holder*.

John Carver was an assistant United States attorney who took an early buy-out from federal service. He later sought to be rehired for a vacant position, but a younger person with less experience was selected. Carver filed a complaint of age discrimination with the EEOC. The agency found in his favor and ordered the Department of Justice to offer him another AUSA position, pay him back wages and benefits, and issue a final report of compliance.

Carver contested the DOJ’s calculation of his back pay award. He argued that his leave benefits had a monetary value which should have been added to the award. The department argued that the value of leave benefits earned during his interim state and county employment should offset his federal

leave benefits. The EEOC accepted the DOJ calculation and closed the case. Carver filed a lawsuit, which the district court dismissed, reasoning that it did not have the ability to hear the case because Carver had received a favorable determination by the EEOC and the DOJ had complied with the requirements set forth in its decision. Carver appealed.

The Ninth Circuit agreed with the district court. It noted that, under the Age Discrimination in Employment Act, an employee has two alternative options for seeking redress, referring to its decision in *Whitman v. Mineta* (9th Cir. 2008) 541 F.3d 932. He may either file a complaint with the EEOC and then appeal any loss to the federal court or he may go directly to court after notifying the EEOC.

If the employee chooses the first option and prevails, there are two avenues into federal court, instructed the Court of Appeals. First, he can sue to enforce the EEOC’s order. In an enforcement action, the employee may not challenge the EEOC’s decision regarding discrimination or what it

found to be the appropriate remedies. The only issue is whether the federal employer has complied with the remedial order, said the court. Alternatively, the employee can choose to bring a civil action against the agency. The Ninth Circuit noted with approval that its sister circuits have held that such an action is “de novo,” meaning that both the liability determination and the finding with respect to remedies would be at issue.

Carver argued that he only wished to enforce the EEOC’s order, but the court was not persuaded. “We do not think that Carver can so selectively choose which aspect of the administra-

tive disposition of his claim he wishes to enforce,” it said. “In particular, his argument ignores the petition for enforcement that he filed with the EEOC...and the EEOC’s resulting determination that the DOJ had fully complied with its remedial order.” The court concluded that the EEOC’s response to his petition for enforcement was part of the administrative disposition and that “Carver must either accept the EEOC’s administrative decision in its entirety or bring a de novo action in the district court.” (*Carver v. Holder* [9th Cir. 2010] 606 F.3d 690.) *

The trial court ruled in favor of Milan, awarding her back pay and emotional distress damages. It found that the city violated its duty to engage in an interactive process to identify reasonable accommodations; however, it refused to reinstate Milan because other workers would be displaced. Both sides appealed.

The Court of Appeal reversed the trial court. It agreed that the city had no duty to participate in an interactive process to find a reasonable accommodation for Milan because, after the city learned that her condition precluded her from returning to her position, she did not request any accommodation or in any way indicate to the city that she wanted to return to work.

The court pointed to the language of Government Code Sec. 12940(n), which requires an employer to “engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, *in response to a request for reasonable accommodation by an employee...*” with a disability. Thus, reasoned the court, the act requires that the employee initiate the process.

However, “no magic words are necessary,” said the court, quoting *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 179 CPER 74. “Each party must participate in good faith, undertake reasonable efforts to communicate its concerns, and make available to the other information which is available, or more accessible, to one party,” it continued. The employee is not required to say, “I want

Disabled Employee Must Initiate Reasonable Accommodation Interactive Process

UNDER CALIFORNIA’S Fair Employment and Housing Act, an employer has no duty to offer reasonable accommodation to a disabled employee who never expressly requested an accommodation or indicated she wanted to continue working, according to the Fourth District Court of Appeal in *Milan v. City of Holtville*.

Tanya Milan, an employee at a municipal treatment plant, injured her back on the job. The city’s workers’ compensation doctor concluded that she would not be able to return to her position. Milan was offered rehabilitation benefits, which she accepted. Milan believed she was still employed by the city because she continued to

receive a paycheck. She did not contact anyone at the city about her condition or her plans to return to work.

Eight months later, Milan received a notice of termination based on the workers’ compensation doctor’s finding and because there was no city job that she could reasonably perform. Milan was shocked because she had intended to return to work. She had not been contacted by the city prior to its decision and no one from the city ever inquired whether her condition had improved since she was examined by the workers’ compensation doctor. Milan was cleared to return to her position with some modifications by her treating physician, but the city refused to let her do so.

a reasonable accommodation...,” the court underscored. The employer has to meet the employee half-way, and if it appears that the employee may need an accommodation but doesn’t know how to ask for it, the employer should do what it can to help.”

And, even if it were to “generously interpret” an employee’s obligation under Sec. 12940(n), said the court,

“the record will not sustain a finding Milan met *her* obligations under the statute.” The law does not permit an employee to ignore notice that her employer believes she is not fit to work, be absent for more than 18 months, and make no attempt to communicate with the employer her desire to continue working. (*Milan v. City of Holtville* [2010] 186 Cal.App.4th 1028.) *

Refusing to Hire Men as Prison Lieutenants Is Unlawful Discrimination

THE NINTH Circuit Court of Appeals in *Breiner v. Nevada Department of Corrections* held that the policy of hiring only female correctional lieutenants at a women’s prison violates Title VII. The department failed to show that its policy imposed only a “de minimis” restriction on male prison employees’ promotional opportunities or that sex is a bona fide occupational qualification for the position.

Factual Background

After a female inmate had been impregnated by a male guard, the department’s director ordered an investigation which revealed that the prison had become an “uninhibited sexual environment.” Staff routinely supplied inmates with contraband in exchange for sex. When the department took control of the prison from the private contractor that had been operating it, the director decided to restaff the facility with women comprising 70 percent of the frontline staff. And, only

women would be hired to fill the three correctional lieutenant positions.

Four correctional officers brought a lawsuit alleging that the department’s refusal to hire male lieutenants violated Title VII’s prohibition on sex discrimination in employment. The district court dismissed the case, finding that the gender restriction had a “de minimis” or negligible impact on the men’s promotional opportunities and, alternatively, that the positions fell within Title VII’s exception when sex is a bona fide occupational qualification. The officers appealed.

Court of Appeals Decision

The three lieutenant positions at the women’s prison were the only ones in the system that rejected male applicants; 29 out of 37 lieutenant positions filled during a four-year period went to men. Pointing to these facts, the department argued that its policy with regard to the three positions did not violate Title VII.

The Ninth Circuit roundly rejected this “de minimis” theory. “It is beyond dispute that the denial of a single promotion opportunity such as the one here at issue is actionable under Title VII,” it said. “Whether there will be other promotional opportunities for which the person may become eligible has never been a consideration.” The court pointed out that the correctional lieutenant position pays more than the correctional sergeant job and is a prerequisite for the higher-paying position of associate warden. “That another opportunity may later arise for which the applicant is eligible does not negate the injury of being denied an earlier position on the basis of one’s sex, with the resulting loss of pay for a period and delayed eligibility for another promotion.”

“Further,” instructed the court, “Title VII is offended when an *individual* suffers discrimination with respect to a particular adverse employment decision, even if others of the same protected group are not similarly disadvantaged.” It disputed the lower court’s reliance on *Robino v. Iranon* (9th Cir. 1998) 145 F.3d 1109. In that case, prison officials assigned only female guards to six posts in a women’s prison — posts from which the inmates could be observed in the shower. The court found that the policy’s impact on male guards was too minimal to be actionable because it only impacted 6 out of 41 positions, and because the male guards had not suffered any tangible job detriment other than a reduced ability to select their watches. This

“limited concept” has no relevance in this case, said the appellate court, where the issue is failure or refusal to hire on the basis of sex, a clear violation of Title VII.

The court next considered whether being female is a bona fide occupational qualification for the correctional lieutenant position, which, if proved, would bring the department’s “women only” policy within an exception to Title VII’s prohibition against sex discrimination. The court noted that the BFOQ exception is “extremely narrow” in the case of sex discrimination and may be invoked “only when the *essence* of the business operation would be undermined” by the hiring of individuals of both sexes. To justify discrimination under this exception, an employer must prove that the job qualification is reasonably necessary to the essence of its business, and that it has a substantial basis for believing that all or nearly all men lack the qualification, or it is impossible or highly impractical to insure by individual testing that its employees will have the necessary qualifications for the job.

Here, said the court, the department did not clearly articulate the “job qualification” for correctional lieutenants that justifies the discriminatory policy. Reviewing the record, the court summarized the department’s reasoning as follows:

...it appears that the NDOC administrators sought to “reduce the number of male correctional employees being compromised by female inmates,” and that they believed the gender

restriction on shift supervisors would accomplish this because (1) male correctional lieutenants are likely to condone sexual abuse by their male subordinates; (2) male correctional lieutenants are themselves likely to sexually abuse female inmates; and (3) female correctional lieutenants possess an “instinct” that renders them less susceptible to manipulation by inmates and therefore better equipped to fill the correctional lieutenant role.

The court rejected all of these theories. The first failed because the department did not show that “all or nearly all” men would tolerate sexual abuse by male guards or that it is “impossible or highly impractical” to assess applicants individually for that qualification. The department’s conclusion that because the supervisors employed by the contractor were male and failed to prevent sexual abuse, all men were incapable of supervising frontline staff at a women’s prison, was insufficient to meet that test.

The second theory has “no basis in fact,” said the court, because there is no evidence that any correctional lieutenant had sexual relations with an inmate. And the third “relies on the kind of unproven and invidious stereotype that Congress sought to eliminate from employment decisions when it enacted Title VII.” “To credit NDOC’s unsupported generalization that women ‘have an instinct and an innate ability to discern...what’s real and what isn’t’ and so are immune to manipulation by female inmates would

violate ‘the Congressional purpose to eliminate subjective assumptions and traditional stereotyped conceptions regarding the...ability of women to do particular work,’” the court explained.

The appellate court distinguished *Dotbard v. Rawlinson* (1977) 433 U.S. 321, the only Supreme Court case to apply the BFOQ in the prison context. In *Dotbard*, the high court upheld a regulation prohibiting women from holding certain positions within a male prison where a substantial number of prisoners were violent sex offenders. There, said the Ninth Circuit, “the inmates’ violent behavior, which prison administrators could not directly control, rendered the gender restriction reasonably necessary.” In this case, “the problem is *employee* behavior,” and “prison administrators have multiple resources, including background checks, prompt investigation of suspected misconduct, and severe discipline for infractions, to ensure compliance with institutional rules.”

The court reversed the lower court’s order of dismissal and sent the case back to the trial court for further proceedings. (*Breiner v. Nevada Dept. of Corrections* [9th Cir. 2010] 610 F.3d 1202.) *

No Age Discrimination Where Plaintiff Cannot Show Discriminatory Intent

UNDER CALIFORNIA'S Fair Employment and Housing Act, an applicant alleging age discrimination must show that he was a member of a protected class, he was qualified for the position, he suffered an adverse employment action, and some other circumstance suggests discriminatory motive. While there was no question that the plaintiff in *Reeves v. MV Transportation, Inc.*, met the first three requirements, the First District Court of Appeal concluded that he failed to demonstrate discriminatory intent.

David Reeves, age 56, applied for a position as a staff attorney with MV Transportation. He was not selected for an interview, and Gail Blanchard-Saiger, age 40, was hired. Reeves alleged that his superior qualifications, the company's inconsistent justifications for its hiring decision, and the destruction of relevant evidence were a sufficient showing of pretext, either alone or in combination, to allow the matter to go to trial. The lower court dismissed the case, and Reeves appealed.

The appellate court recognized the company did not dispute that Reeves demonstrated a prima facie case of age discrimination, and Reeves did not dispute that the company identified legitimate, nondiscriminatory reasons for the hiring decision. The sole question to be decided on appeal

was whether Reeves could demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the proffered legitimate reasons for the action that a reasonable factfinder *could* find them unworthy of credence, and hence infer that the employer did not act for the asserted nondiscriminatory reasons."

Spoliation of evidence alone does not necessarily create a triable issue.

The court rejected Reeves's contention that his superior qualifications supported a finding of pretext. The court instructed that, when comparing the qualifications of competing candidates, the cases require that the disparity be "substantial" to support an inference of discrimination. In this case, Reeves' and Blanchard-Saiger's qualifications were "essentially equal."

The court accepted Reeves' claim that the person who made the hiring decision gave inconsistent explanations as to why he hired Blanchard-Saiger over Reeves. But, while recognizing inconsistencies, the court found "none that are consequential."

Reeves argued that the company's failure to retain the applications for the position was evidence of pretext. He also pointed to the fact that the individual who was responsible for the hiring decision testified at his deposition that, while he had retained resumes and emails pertaining to the applicants for a time on his personal computer, the computer was destroyed a week prior to his deposition.

The court agreed that the company's failure to retain the records was "spoliation," the destruction of evidence in pending or foreseeable litigation. By statute, the company was required to retain the records for at least two years. "However," said the court, "spoliation of evidence alone does not necessarily create a triable issue." It explained that "there must be some (not insubstantial) evidence" in addition to spoliation. "Where other substantial evidence of a discriminatory motive is lacking, no reasonable jury could award damages against the employer based *solely on speculation* as to what *might* be contained in documents *not in evidence*." Here, said the court, there was no other evidence of a discriminatory motive. (*Reeves v. MV Transportation, Inc.* [2010] 186 Cal. App.4th 666.) *

Public Sector Arbitration

Court Enforces Provision Delegating to Arbitrator Issue of Validity of Arbitration Agreement

WHEN A mandatory arbitration agreement provides that an arbitrator will decide any dispute over the validity of the arbitration agreement, a court must not decide the issue, the United States Supreme Court ruled in *Rent-a-Center v. Jackson*. Only if the delegation provision itself is challenged would a court need to decide whether the provision is valid before compelling arbitration, the court instructed. Since the employee challenged only the arbitration agreement, and not the provision delegating to an arbitrator the issue of validity of the agreement, the court held that the employer's motion to compel arbitration was properly granted. Based on the court's prior decisions, four justices dissented because of the employee's claim that the entire arbitration agreement was unconscionably one-sided in favor of the employer.

Mandatory Arbitration Agreement

Antonio Jackson signed a mutual agreement to arbitrate claims, which required arbitration of discrimination charges, as a condition of his employment with Rent-a-Center West, Inc. When he later filed a discrimination lawsuit in federal court, Rent-a-Center

filed a motion to compel arbitration of his claims. Jackson opposed the motion on the ground that the arbitration agreement was procedurally and substantively unconscionable.

The arbitration agreement contained a clause that an arbitrator, not a court, "shall have exclusive authority to resolve any dispute relating to the... enforceability or formation" of the agreement, including "any claim that all or any part of this agreement is void or voidable." Rent-a-Center contended that this "delegation clause" prevented the court from deciding whether the arbitration agreement was unconscionable because it gave the arbitrator the exclusive authority to decide the issue. The federal trial court agreed, but the Ninth Circuit Court of Appeals reversed the order compelling arbitration of the unconscionability contentions. Rent-a-Center asked the Supreme Court to review the decision.

Who Decides What

The court reiterated basic federal law that arbitration is a matter of contract, and that the Federal Arbitration Act requires that courts enforce arbitration agreements as they would any contract. The act recognizes that they

may be invalidated by defenses such as fraud, duress, or unconscionability.

Prior Supreme Court cases have addressed the question of who decides the validity of arbitration clauses in an agreement involving employment, financing, or other matters. If a challenge of fraud or unconscionability was made to the overall agreement, that question has gone to the arbitrator because the FAA authorizes courts to decide only questions of the validity of the arbitration clause. A challenge to the arbitrability clause, however, is decided by the courts. An invalid arbitration clause is severable from the rest of a valid contract.

Courts must enforce arbitration agreements as they would any contract.

In recent cases, the court has held that the parties may delegate questions of the validity or the scope of the arbitration agreement to the arbitrator, even though those questions otherwise would be decided by a court. The *Rent-a-Center* court instructed that a court should decide a dispute over the validity of a delegation provision in the same way it would decide the validity of an arbitration provision in any contract. If it was invalid it could be severed from the arbitration agreement.

No Challenge to Delegation Provision

Jackson, however, had not directly challenged the delegation provision in the Rent-a-Center arbitration agreement, the court found. He had charged that the arbitration agreement as a whole was procedurally and substantively unconscionable because it was imposed as a non-negotiable condition of employment. It was one-sided, requiring claims likely to be filed by an employee to be arbitrated, but not claims that an employer would bring, like trade secrets claims. It required Jackson to pay a portion of the arbitrator's fees and limited discovery.

Jackson did not argue that the delegation provision itself was unconscionable until the case reached the Supreme Court.

Focusing narrowly on the delegation clause, the court found no

challenge to it and held that it should be enforced by sending the question of validity of the arbitration agreement to arbitration. It did not view the arbitration agreement as part of a larger employment contract. The court wrote:

In this case, the underlying contract is itself an arbitration agreement. But that makes no difference. Application of the severability rule does not depend on the substance of the remainder of the contract....Accordingly, unless Jackson challenged the delegation provision specifically, we must enforce it.

The court reversed the judgment of the Court of Appeals. The district court's order compelling arbitration was upheld.

Dissenting View

The dissenting justices relied on a line of cases barely mentioned by the majority. In *First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, the court held that courts should not assume the parties had agreed to arbitrate a controversy unless there was "clear and unmistakable evidence that they did so." The question whether there was evidence of a clear and unmistakable intent to arbitrate is for a court to decide, the *First Options* court held.

Looking at whether there was a clear and unmistakable intent to arbitrate might have resolved this case in Jackson's favor, Justice Stevens wrote for the dissent. Gross inequality of bargaining power along with one-sided terms in the agreement can indicate that the weaker party had no choice and did not, in fact, assent to

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

-- Herm Albright, writer

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

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

Pocket Guide to Public Sector Arbitration: California

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

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the terms, he pointed out. In this case, the court should have resolved whether Jackson's unconscionability claims had merit before sending the case to an arbitrator.

Justice Stevens disagreed with viewing the delegation provision as a severable part of another agreement. A challenge to a stand-alone agreement to arbitrate is a challenge to the arbitration agreement, he pointed out, which the FAA authorizes the courts to decide. He observed that the majority's decision requires that a party who challenges the validity of an arbitration agreement now must do so with more specificity than in the past, identifying

specific sentences instead of mounting defenses to the entire arbitration provision. Moreover, the national policy favoring arbitration when questions of arbitrability are bound up in an underlying dispute are not implicated in this case, Stevens wrote. The dispute over the arbitration agreement is completely separate from the underlying discrimination issues in Jackson's lawsuit, he pointed out. Therefore the usual rule, following *First Options*, should govern who decides the issue of unconscionability of the arbitration agreement. (*Rent-a-Center, West, Inc. v. Jackson* [6-21-10] ___U.S. ___, 130 S.Ct. 2772.) *

Demotion of Mental Health Program Manager Overturned by Arbitrator

ARBITRATOR William Engler saw the two-step demotion of a program manager in the Contra Costa County Department of Mental Health to a mental health clinical specialist — after a 32-year career in the mental health community — as “tantamount to a discharge.” Charges that the grievant failed to properly supervise his subordinates were unfounded, the arbitrator held, and based largely on the fact that staff members who left the department were not replaced, leaving the grievant to perform their work.

The grievant had a long history in mental health work involving children and adolescents. He began a psychiatric crisis program that served poor neighborhoods, managed a chil-

dren's services outreach program in two elementary schools, established a therapy program (WRAPAROUND) that targets families dependent on county services, and initiated a student internship program. Since 1988, he has been the program manager for the West Contra Costa County Child and Adolescent Services unit, where he worked at the time of his demotion in 2009.

When the doctor in charge of WRAPAROUND left, the grievant inherited responsibility for the program throughout Contra Costa County. And, when the grievant's administrative assistant was laid off due to budget reduction, the grievant was called on to assume her duties.

As a basis for the demotion, the county alleged that the grievant had signed mileage reimbursement forms submitted by a paraprofessional staff member who grossly inflated her claims. An investigator's conclusion that the staff member had overbilled the county by \$1,500 was determined by computing the average number of miles driven by the employee's 20 coworkers. Also, the investigator was unaware that the employee could legitimately travel outside of Contra Costa County to assist her clients.

*The grievant did
not have the
resources to conduct
an in-depth review.*

Arbitrator Engler first noted that the county has no written policy directing how managers are to review travel reimbursement requests. The grievant was not responsible for authorizing the payment of travel expenses and employees sign their travel vouchers under penalty of perjury, the arbitrator observed.

Moreover, the arbitrator remarked, “It is unreasonable to assume that the Grievant would be able to check on the validity of the 17 employees who went to him for travel voucher authorization each month.” This would draw him away from his most important job, managing the programs benefitting the community.

The county also charged that the grievant failed to supervise the staff's submission of Medi-Cal claims, an important function that allows the department to recoup funds from the government. As with the travel voucher accusation, the arbitrator took note that the grievant was responsible for reviewing the claims for the entire program and was inundated with 120 to 150 documents each week. Engler reasoned that the grievant did not have the resources or the assistance to conduct an in-depth review of staff reports, searching for errors in Medi-Cal claims. He is "responsible for running the day-to-day operations of the program," Engler commented, "which is stretched for resources." In fact, the arbitrator observed, it is remarkable that there were only four Medi-Cal billings that the grievant reviewed incorrectly over a four-month period when thousands of Medi-Cal bills came to his desk.

The grievant also was charged with failing to discipline two subordinates who had not met the department's productivity standards. Arbitrator Engler was persuaded by the grievant's testimony that he delayed disciplining these employees because the productivity information used by the county was inaccurate. Management acknowledged that these figures might be wrong. It asserted, however, that discipline still should be initiated and, if it turns out to be based on incorrect information, the disciplinary action could be withdrawn. This approach does not provide a clear basis

on which to discipline employees, Engler remarked.

The arbitrator ordered the grievant be returned to his position as manager of the West County Children's Program and made whole for all back pay and benefits lost as a result of his demotion. (*Contra Costa County Mental Health Services and International Federation of Professional and Technical Engineers, Loc. 21* [6-14-10] 31 pp. Christina J. Ro Connolly, Esq., deputy county counsel; Christopher E. Platten, and Daniel A. Mendendez, Esq. (Wiley, McBride, Platten & Renner) for the union. Arbitrator: William E. Engler). *

Arbitration Log

- Released Time
- Contract Interpretation
- Past Practice

Cupertino Union School Dist. and Cupertino Education Assn. (4-7-09; 22 pp.). *Representatives:* Donald Velez, Esq. (Miller Brown & Dannis) for the district; Bill McMurray, chapter services consultant, for the union. *Arbitrator:* Jerilou H. Cossack (AAA Case No. 74 390 00594 08).

Issue: Did the district violate the collective bargaining agreement and the memorandum of understanding when it funded 33.3 percent of the association president's 75 percent position as representative instead of 33.3 percent of a full-time teaching assignment?

Union's position: (1) The association president is entitled to all of the released time provided by the parties' contract and a 2006 memorandum of understanding. The fact that she holds a 75 percent teaching assignment is irrelevant.

(2) Duties for which the association president incurs released time are not limited to the processing of formal grievances. The parties' intention was to provide released time to the president for a wide variety of activities.

District's position: (1) Provisions of the 2006 MOU are not subject to arbitration under the parties' contract.

(2) As the association president did not process any grievances, she was not entitled to released time.

Arbitrator's holding: The grievance is denied.

Arbitrator's reasoning: (1) The parties' collective bargaining agreement provides the exclusive representative two periods of released time during each school day to process grievances. A separate memorandum of understanding signed in 2006 allows the association president to use 33.3 percent released time funded by the district "in order to facilitate grievance process and/or prevention and the negotiation process." It further provides that, while serving as president, the employee is entitled to the same benefits as if she were a full-time district employee.

(2) The 2006 MOU is an agreement reached by the parties through bargaining and is part of their contract.

(3) The district has consistently provided the association president with 33.3 percent released time. The parties mutually agreed that the 33.3 percent is not limited to time spent processing grievances; it includes other activities of the president that are related to the responsibilities of that office.

(4) At the time the 2006 MOU was negotiated, the association president was a full-time employee and there was no discussion about a president who works less than full-time. The purpose of the language was to ensure that the president did not suffer any loss of compensation because of the performance of union duties.

(5) Although the duties of the association president do not diminish because the president is working for the district less than full-time, the district is not required to compensate the part-time president as if she were a full-time employee.

(6) The grievant elected to accept a teaching assignment at 75 percent time. That is the level of compensation, including benefits, to which the 33.3 percent is applied.

(Binding Grievance Arbitration)

- Salary Schedule Placement
- Contract Interpretation

SEIU Loc. 1000 and California Department of Corrections & Rehabilitation (3-19-10; 12 pp.). *Representatives:* J. Felix De La Torre, Esq., for the union; David M. Villalba, labor relations counsel, for the department. *Arbitrator:* C. Allen Pool.

Attention 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>.

Issue: Were vocational instructors properly placed on the new salary schedule contained in the parties' MOU?

Union's position: (1) The state violated the contract when it limited credit for placement on the salary schedule to credits earned after obtaining a bachelor's degree, and credit for hours worked only when the employee is in non-paid status.

(2) Seven years of in-trade experience in combination with a high school diploma is the equivalent of a bachelor's degree for initial placement on the salary schedule. Thereafter, any prior unapplied college credit and work experience are used for advancement on the salary schedule.

(3) The contract does not require that work experience be unpaid; it requires the state to accept all pertinent in-trade work regardless of whether it is paid or unpaid.

State's position: (1) The criteria for placement and advancement on the salary schedule are clearly expressed in the MOU. Credits must be earned after receipt of a bachelor's degree, and credits for hours worked must be for non-paid work.

(2) To qualify for salary advancement, work experience and education credits cannot be repetitious of previous experience. The intent of the negotiated agreement was to impose a pre-credential restriction on credit for salary advancement. An instructor cannot advance through the salary schedule until he or she qualifies to be placed on that schedule. Credits earned prior to attaining a teaching credential are not counted toward salary advancement.

(3) Contract language was intended to restrict credit for work experience to non-paid work. Paid work does not count toward salary advancement.

Arbitrator's holding: Grievance denied.

Arbitrator's reasoning: (1) Contract interpretation first demands an analysis to seek evidence of the parties' actual intent of the language placed in the MOU. Here, the intent can be derived from the language in the contract.

(2) The parties intended that current employees moving from the old compensation plan to the new salary schedule would not suffer a loss in salary. To ensure this result, the MOU includes a formula for calculating the daily salary rate and provides that an employee's initial placement on the salary schedule establishes the individual instructor's qualifications for that range.

(3) Exclusion of credit for experience and college courses taken before the issuance of a preliminary credential or bachelor's degree did not violate the law. After initial placement on the salary schedule, an employee can move across the salary ranges with attainment of credits earned after initial placement. The use of words that refer to future movement in the range leads to this conclusion.

(4) No evidence supports the union's claim that the state violated the contract by requiring that hours worked in the industry include only non-paid work experience. Although an employee cannot earn credit for advancement for in-trade work or training when he or she is being paid by the state, the MOU does not prevent an employee from earning credits for advancement if the in-trade

work is "off the clock" and the employee has obtained prior approval.

(Binding Grievance Arbitration)

• Progressive Discipline

City of Tracy and Tracy Police Officers Assn. (3-22-10; 20 pp.). *Representatives:* Jesse Lad, Esq. (Meyers Nave) for the city; Daniel T. McNamara, Esq. (Mastagni, Holstedt, Amick, Johnson & Uhrhammer) for the association. *Arbitrator:* John F. Wormuth (CSMCS Case No. ARB-09-0111).

Issue: Was the 30-day suspension and permanent removal of the grievant from his assignment as a canine handler appropriate for driving under the influence of alcohol?

City's position: (1) The grievant admitted that he was driving under the influence of alcohol and was convicted of a violation of the Vehicle Code. The gravity and seriousness of this justifies the discipline.

(2) The conviction for driving under the influence had a negative impact on the department's reputation in the community. The grievant's actions call into question his judgment.

(3) As part of his sentence, the grievant's driving privileges were restricted and suspended for 30 days. This disrupted the department's operational needs and placed a greater workload on the patrol unit.

(4) The parties' MOU permits the police chief to remove the grievant from his position as canine handler as part of a disciplinary action. While termination was considered, the department elected to mitigate that penalty in light of the grievant's good work record.

Association's position: (1) At all times, including during the internal affairs investigation and when questioned by the highway patrol, the grievant was truthful and admitted that he had driven under the influence of alcohol.

(2) During his employment as a police officer, the grievant has received positive evaluations and has been receptive to direction from his superiors.

(3) Under principles of progressive discipline, the grievant's prior reprimand for a chargeable traffic accident does not justify the 30-day suspension or removal from the canine assignment.

(4) Removal of the grievant from his canine assignment is an economic penalty that exceeds the bounds of the contract.

Arbitrator's holding: Sustained in part; denied in part.

Arbitrator's reasoning: (1) The parties' MOU incorporates principles of progressive discipline but permits an exception for the commission of a willful act of misconduct.

(2) During his six years of service as a police officer, the grievant has not been subject to significant disciplinary action. He has received positive evaluations and corrected areas marked for improvement. The grievant received a written reprimand for three traffic collisions that were his fault. Since then, no additional corrective measures were needed and he has successfully utilized the guidance of his supervisors.

(3) The parties' contract authorizes disciplinary suspensions up to 30 days. The severity of the grievant's offense justifies the 30-day suspension.

(4) The MOU provides for the removal of officers from their special assignments for reasons of performance, not as an extension of discipline. The city has not proved that the grievant cannot perform his duties as a canine handler because of his conviction for driving under the influence of alcohol.

(5) The city produced no compelling evidence that, because of his conviction, the grievant cannot testify in court. The city returned him to duty. The grievant's character and veracity are measured by his candor and truthfulness before, during, and after his arrest.

(6) The permanent removal of the grievant as a canine handler is unfair and punitive, rather than corrective, and imposes an unjustifiable and permanent reduction in pay.

(Binding Grievance Arbitration)

• Arbitrability

Amalgamated Transit Union, Loc. 256, and Sacramento Regional Transit Dist. (5-21-10; 16 pp.). *Representatives:* William Flynn, Esq. (Neyhart, Anderson, Flynn & Grosboll) for the union; Leslyn Syren, Esq., district attorney. *Arbitrator:* Christopher D. Burdick (CSMCS Case No. ARB-09-0246).

Issue: Is the grievance based on the parties' reciprocity agreement arbitrable?

Union's position: (1) Movement of funds from the union's pension plan to the pension plan covering unrepresented district employees is barred by the retirement plan reciprocity agreement.

(2) The district entered into an agreement to arbitrate when its labor relations director suggested that the

matter move directly to arbitration and thereafter submitted a request to the CSMCS for a list of arbitrators.

District's position: (1) Neither the parties' collective bargaining agreement nor the retirement plan covers this dispute concerning the allocation of money from one fund to another under the terms of the reciprocity agreement.

(2) Other labor groups who have retirement plans covered by the reciprocity agreement are indispensable parties to this arbitration and have not been joined.

Arbitrator's holding: The grievance is arbitrable.

Arbitrator's reasoning: (1) The district bears the burden of proving that the matter is not arbitrable. Doubts about arbitrability should be resolved in favor of arbitration.

(2) The dispute is not arbitrable under the terms of the parties' labor agreement because the contract does not reference or incorporate the retirement plan and a grievance is a dispute concerning the interpretation or application of the provisions of the labor agreement. Nor is the dispute made arbitrable under the terms of the retirement plan itself.

(3) The reciprocity agreement, which addresses the computation of service credit when an employee promotes to a position covered by another plan, includes no dispute resolution procedure.

(4) Under common law, a public agency may agree to arbitrate any dispute, such as retirement obligations and duties, for which it can be sued in civil court.

(5) The district's director of labor relations had the authority to enter into an agreement to arbitrate this dispute. Communication between her and the union representative, including the director's invitation that the parties bypass the normal steps of the grievance process and move directly to arbitration, her request for a list of arbitrators from CSMCS, and her written confirmation to the arbitrator of the time and place of the hearing, demonstrate a binding agreement was reached.

(6) The rule concerning indispensable parties does not apply to public sector labor arbitration where agencies typically have many bargaining units and employees in different units may enjoy similar or identical benefits and pensions.

(Binding Grievance Arbitration)

- **Seniority**
- **Layoffs**

SEIU Loc. 521, and Fresno County (5-29-10; 8 pp.). *Representatives:* Kerianne Steel, Esq. (Weinberg, Roger & Rosenfeld) for the union; Catherine Basham, Esq. (senior deputy county counsel). *Arbitrator:* Alan R. Rothstein (CSMCS Case No. ARB-09-0455).

Issue: Did the county violate the MOU when it laid off employees other than by date of hire?

Union's position: (1) The parties' MOU defines seniority as including all periods of employment in permanent county positions. Therefore, seniority for purposes of layoffs should be calculated using the employee's date of hire.

(2) No valid past practice contradicts or supersedes the contract language. The

union has not modified the definition of seniority; the clear language of the MOU remains unchanged.

County's position: (1) The provision of the MOU is ambiguous. The seniority provision does not refer to layoffs. A department's use of seniority does not constitute official seniority for layoff purposes.

(2) The union has filed two grievances that take the opposite position on the use of seniority when implementing layoffs.

(3) Individuals who were retained as investigators in the public defenders office worked in that classification longer than the employees who were laid off.

Arbitrator's holding: The grievance is sustained.

Arbitrator's reasoning: (1) Employers seeking to calculate seniority prefer to use other measures of performance rather than longevity. Unions prefer a straight-forward length-of-service measuring stick that harnesses employers' reliance on subjective criteria. A seniority system protects the employee with the longest period of continuous service.

(2) When a seniority clause is negotiated and included in a bargaining agreement, those provisions are used instead of regulations unilaterally adopted by the employer. The county must comply with the plain and unambiguous language of the contract.

(3) The county failed to establish that, in the past, it has used a layoff formula at odds with the contract but no grievance was brought. Layoff notices were not given to the union, and the county did not include the union in pre-layoff determinations.

(4) To remedy the contract violation, the grievants must be reinstated and made whole for their losses. Painful consequences to other employees result from the county's choice to implement the layoffs without adhering to the contract or meeting and conferring with the union.

(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 precedential 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. The full text of cases is available at <http://www.perb.ca.gov>.

Dills Act Cases

Unfair Practice Rulings

Failure to name department in the charge was not sufficient to warrant dismissal: CDCR.

(California Correctional Peace Officers Assn. v. State of California [Dept. of Corrections and Rehabilitation], No. 2108-S, 5-10-10; 3 pp. + 9 pp. R.A. dec. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: The charging party did not allege facts that showed CDCR engaged in surface bargaining over the effects of a change in policy concerning protective vests. The charging party's failure to name CDCR, rather than the Department of Personnel Administration, did not warrant dismissal.

Case summary: The MOU between the parties expired in 2006, and the charging party did not accept the state's final offer, which was implemented in September 2007. In November, CDCR notified the charging party that it intended to revise its protective vest policy to require non-uniformed officers to wear the vests under their clothing, consistent with the manufacturer's recommendations, rather than on the outside of their clothing as they had before.

In January, the parties met to discuss the impact of the decision. CCPOA passed 14 proposals to CDCR. CCPOA alleged that each proposal was either refused without a

counteroffer or met with a claim that it was outside the scope of representation. The union also alleged that the CDCR negotiating team refused to look at a CCPOA member who was speaking and walked out of negotiations despite the union's insistence that it was not finished passing proposals. CDCR wrote a letter in March 2008, that claimed none of the 14 proposals related to the change in the vest policy. The author claimed he had asked several times, "What items are within scope that we can reach agreement on, or what do you feel has not been addressed?"

CCPOA argued that the refusal to make counterproposals, the refusal to acknowledge a union member's concerns, and walking out of negotiations were indicia of surface bargaining. The R.A. dismissed the charges because the record did not show bad faith bargaining. He found CDCR merely drove a hard bargain and did not engage in surface bargaining because CDCR met its Dills Act obligations by explaining its bargaining position. CDCR's letter indicated that it made no counteroffers because CCPOA's proposals either did not concern the impact on unit members or were not within the scope of representation. Questions CDCR asked during the negotiations demonstrated that CDCR had a flexible position. In addition, the R.A. noted that CCPOA had not described the proposals that it believed CDCR should have countered.

The R.A. found also that the union had not identified the "who" or "what" in its allegation that CDCR team members had refused to acknowledge the concerns of a CCPOA team member. The Dills Act does not require negotiators to make eye contact, the R.A. said. The R.A. found that the allegations were insufficient regarding who walked out of negotiations, whether the CDCR team returned to the table that day, or whether it offered to schedule another meeting prior to walking out.

On appeal to the board, DPA argued that the charge was fatally flawed because it named only DPA as the respondent, rather than CDCR, which had engaged in all the conduct relevant to the charge. The board observed that DPA is the agency that receives service of Dills Act charges and had not shown any prejudice from the failure

to identify CDCR on the face of the charge. It affirmed the R.A.'s dismissal of the charge.

Union did not show it demanded to bargain effects of layoff decision: Dept. of Veterans Affairs.

(*Union of American Physicians & Dentists v. State of California [Dept. of Veterans Affairs]*, No. 2110-S, 6-1-10; 9 pp. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: The department's layoff decision was not within the scope of representation where there was no allegation that it subcontracted the laid off employees' work. The union did not allege facts showing it demanded to bargain over the effects of the layoff decision.

Case summary: The department decided to close an acute care unit at a veterans' home and lay off employees, including physicians, in a bargaining unit represented by the charging party. It sent layoff notices before it informed UAPD of its decision. When the UAPD president told Department of Personnel Administration representatives that the union wanted to negotiate over the decision, DPA refused. UAPD sent a letter claiming that the closure was illegal because it violated state law limits on contracting out and that the department had failed to bargain over the closure. It stated, "UAPD would have liked the opportunity to show the State it will only end up paying more." The department responded that the closure decision was non-negotiable. The charge also alleged that in a meeting later that week, UAPD representatives sought to negotiate the closure decision and its impact.

The board agent dismissed the charge on the ground that UAPD did not demand to bargain over the effects of the closure. UAPD asserted that it made two requests. It also contended that the closure decision was within the scope of bargaining because it involved contracting out services. DPA countered that the decision involved only a cessation of operations.

The board denied UAPD's request to file a reply brief on the issue of contracting out, since it was not a newly raised issue or argument.

The board noted that the decision to lay off is not within the scope of representation unless it stems from a decision to contract out services. It found, however, that the union had not alleged facts showing that the department had a contract with a private hospital to perform acute care services, even though the union alleged that after the unit was closed, residents were transported to nearby private hospitals if they needed acute care services. The union had not alleged the existence of an agreement. The board dismissed the union's argument that the services were contracted out because the state continued to pay for services via Medi-Cal. There was an indication, said the board, that Medi-Cal paid the hospitals directly, rather than through the department. Since there was no showing of a contract, the layoff decision was not within the scope of bargaining.

UAPD contended it had demanded to bargain over the effects of the layoff in its letter and in the later meeting with department representatives. The board found that the letter did not demand to bargain. It did not even mention the layoff. The allegations that UAPD representatives sought to negotiate over the impact of the closure decision provided no details of the demand and did not state that it named any negotiable effects. Therefore, the charge failed to allege facts showing the union had made a valid demand to bargain the effects of the decision. The charge was dismissed.

Charge failed to contain sufficient detail to state claim of unilateral change or bad faith bargaining: CDCR, Avenal State Prison.

(*California Correctional Peace Officers Assn. v. State of California [Dept. of Corrections and Rehabilitation, Avenal State Prison]*, No. 2111-S, 6-3-10; 2 pp. + 9 pp. B.A. dec. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: The charge failed to state a claim that CDCR engaged in surface bargaining or unilaterally changed its released time policy by ending released time for union members when the union's negotiator did not come to a bargaining session.

Case summary: The MOU between the parties expired, and the charging party did not accept the state's

final offer, which was implemented in September 2007. At an unspecified time, CDCR notified the union that it intended to change its policy regarding access to medical care for inmates. The parties agreed to meet for negotiations on May 23, 2008. The union's lead negotiator on the issue, Davis, requested that the parties negotiate in a location near Avenal State Prison. The union charged that the CDCR representative, Rojas, insisted on meeting at the prison. The charge stated that Davis responded he would not meet at ASP, and there would be no negotiations on May 23.

On an unspecified date, Rojas asked the CCPOA chapter president if he could meet on May 23 at ASP, but did not tell him of her communication with the lead negotiator. She authorized released time for four team members to be at the negotiations.

The union members came in civilian clothing. After the meeting began, Rojas cancelled because the union's lead negotiator was not present. She retracted the released time authorization for the attendees. They were given the choice of going home to put on their uniforms to return to work or using six hours of holiday time. CDCR admitted that it had authorized two hours of released time for the team members.

The R.A. noted that the charge failed to specify its theory how the Dills Act was violated, but he assumed that the union's charges were surface bargaining and a unilateral change in released time policy. The R.A. castigated the charging party for not specifying dates and the identities of individuals who made some requests, and insisted that the means of communication be specified.

The state's last, best, and final offer contained no policy on released time, and the union did not describe any existing policy. The charge also failed to state that a change was made before the union had notice and an opportunity to bargain. Therefore, the R.A. found the union had failed to state facts to support a unilateral change theory.

The R.A. noted that refusal to provide released time for negotiations constitutes bad faith bargaining, but found the charge failed to specify how long bargaining took place on May 23 or how many hours initially had been authorized.

The allegation that released time had been authorized "for the day" did not clearly imply an eight-hour day. The facts did not show that CDCR had refused to grant released time for negotiations. Even under the "totality of the circumstances" test, the charge did not state a claim of bad faith bargaining, the R.A. found. And, if it were true that Rojas arranged to meet with the team members knowing that the union's lead negotiator would not be present, the charge failed to state how this stalled negotiations since the parties are always free to arrange other dates. The board adopted the R.A.'s dismissal of the charge.

Union did not state claim of unilateral change or surface bargaining over layoffs: CDCR, DPA.

(California Correctional Peace Officers Assn. v. State of California [Dept. of Corrections & Rehabilitation, Dept. of Personnel Administration], No. 2115-S, 6-10-10; 12 pp. dec. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: The charging party's facts did not show that the state unilaterally established an area of layoff or that it engaged in surface bargaining over the area of layoff after it elected to close two facilities.

Case summary: CDCR decided to close two juvenile correctional facilities. The governor's budget, to which the legislature agreed, did not include funding for those facilities after July 31, 2008. DPA approved CDCR's layoff plans using a "proposed" geographic area of layoff for the facilities in March 2008. A geographic area of layoff would affect all employees in the region regardless of whether they worked at the juvenile facilities.

In late March, DPA gave written notice to CCPOA that it was closing the facilities on July 31, and that it was proposing layoffs by county. A few days later, the department notified affected employees they had been designated surplus employees and encouraged them to apply for vacancies. The letters included inconsistent information about the area of layoff. CCPOA filed a charge on April 18, 2008.

The parties met six times in May and July 2008. The state rejected the union's proposal that layoffs be made

statewide within classifications. CCPOA asserted the state implemented the layoffs in June by conducting interviews with employees to determine their relocation preferences. The facilities were closed July 31, and employees were relocated rather than laid off. The last bargaining session was on August 20.

The board held that CDCR could implement its non-negotiable layoff decision prior to the completion of bargaining over effects of the decision if the implementation date was not arbitrary, there was ample notice to the union, and the employer negotiated in good faith before and after implementation. It rejected CCPOA's assertion that the state already had made its decision on the geographical area of implementation before bargaining and actually began implementation by sending surplus letters and conducting interviews. The state had described the layoff area as "proposed," and had given four months notice prior to the implementation date, which was set when funding was eliminated. Notifying employees that they were surplus was not implementation, said the board, since the state could have changed the areas of layoff up to and after the layoff was carried out. The state continued to negotiate even after the facilities were closed.

The board found no indicia of surface bargaining. The union argued that the totality of the state's conduct amounted to bad faith bargaining. It pointed to the state's dissemination of its decision about the area of layoff to employees who had to make life decisions before bargaining ended and the fact it made no counterproposal during bargaining. The board dismissed as "speculative" CCPOA's argument that the area of layoff could not easily and quickly have been changed. It noted that each side was equally adamant about its position, which does not establish bad faith bargaining. It affirmed the dismissal of the charge.

Management's negative comments and EAP referral not retaliation or interference with employee rights: CDCR.

(California Correctional Peace Officers Assn. v. State of California [Dept. of Corrections & Rehabilitation], No. 2118-

S, 6-15-10; 10 pp. dec. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: Negative comments on a satisfactory performance evaluation and a referral to the Employee Assistance Program are not adverse actions that constitute retaliation or interference with the right to file grievances.

Case summary: Smith was the charging party's chief job steward. He filed six grievances between November 2007 and January 2008, and discussed them with his supervisor, Garcia. He also made informal information requests on working conditions to Garcia during this period before making formal requests to managers and headquarters.

Smith made written requests for overtime to Garcia in April, May, and December 2007. On an unspecified date, Garcia remarked to Smith that he was bringing his CCPOA issues to work.

In February 2008, Smith received an annual performance evaluation in which he was rated as having met or exceeded standards. It contained some negative comments about his overtime requests, requests for written instructions, and flippant comments. Smith filed a grievance concerning the evaluation, which CDCR denied. The charging party alleged that Smith was treated differently from three employees who were not union activists and received evaluations without negative comments.

In February, Smith began discussing with the warden a new policy that affected workload. In August 2008, Smith's captain told him to "let it go." Smith told him he had filed a grievance over the policy, but the captain referred Smith to the EAP. When Smith returned to pick up his written EAP referral, the captain told Smith he brought his CCPOA issues with him and that it had a negative effect on his attitude and work.

The board found the allegation that Smith filed information requests over working conditions did not show protected activity because it was not clear whether the requests were about personal concerns or union matters. His request for overtime was for his personal benefit, not protected activity. However, the board acknowledged that he engaged in protected activity when he filed grievances. Two mem-

bers of the board found that the performance evaluation was not an adverse action because it was a positive review, even though it contained negative comments. Although the evaluation was prepared soon after he filed grievances, timing alone is not sufficient to show a retaliatory connection between the protected activity and the adverse action. The discriminatory treatment claim failed because the charging party did not show that the three other employees who did not receive negative comments had engaged in conduct that was similar to Smith's. Garcia's comment about CCPOA issues did not demonstrate union animus. Therefore, the board found no nexus between Smith's grievances and the negative notes on his evaluation.

The board held that the EAP referral did not constitute an adverse action because it was voluntary and the services are confidential. The board did not find any facts that demonstrated how a referral to EAP tends to cause harm to employee rights since the referral was not mandatory. It affirmed the dismissal of the charge.

HEERA Cases

Unfair Practice Rulings

Union's leafleting in prohibited places not an unfair practice: AFSCME.

(*Regents of the University of California v. AFSCME Loc. 3299*, No. 2105-H, 4-21-10; 9 pp. dec. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: Leafleting in places prohibited by university access policies was only an isolated breach of contract, not an unfair practice, because AFSCME leafleters left the prohibited places when directed to move.

Case summary: The charging party alleged that AFSCME failed to meet and confer or participate in impasse procedures in good faith when the union leafleted in areas that university access policies had closed to union activities. AFSCME began leafleting outside the entrances to five medical centers after U.C. and its patient care technical unit reached impasse in negotia-

tions, but before university negotiations with the service unit (also represented by AFSCME) reached impasse. The most recent contracts with both units required the union to abide by the access regulations at each campus.

The university alleged that AFSCME violated the regulations at the San Francisco and Los Angeles campuses. At each campus, leafleters were ordered to move away from the entrance to the medical center. The charge indicated that the San Francisco leafleters left, but contained ambiguous allegations about the actions of the Los Angeles leafleters.

The university argued that, by leafleting in prohibited places without first renegotiating the access policies or grieving and arbitrating the reasonableness of the policies, the union had repudiated the access provisions of the collective bargaining agreement.

The board found that the record was not clear that the San Francisco leafleters ever leafleted in prohibited places, but the union did not deny that the Los Angeles leafleters violated the access policy. There was no dispute that AFSCME had not given notice and an opportunity to bargain before it began the unauthorized leafleting. However, the board said, PERB does not enforce isolated breaches of a collective bargaining agreement. AFSCME's conduct would not constitute an unfair practice unless it amounted to a change in policy that had a generalized impact or continuing effect on unit members' terms and conditions of employment.

The board found that the charge did not state facts that, if true, would prove a failure to bargain or participate in the impasse process in good faith. There were no allegations that the leafleters refused to leave prohibited places or that they returned to them. Therefore, the charge did not show that AFSCME's conduct had a broad or continuing impact on terms and conditions of employment. The charge was dismissed.

Union failed to allege facts showing a unilateral change in policy: U.C.

(*AFSCME Loc. 3299 and Regents of the University of California*, No. 2109-H, 5-19-10; 8 pp. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: The charging party failed to allege facts showing that the university changed its vacation and sick leave policies.

Case summary: AFSCME represents two units at the university. Both were unable to reach a settlement with U.C. after impasse procedures were completed. AFSCME conducted strike votes in both units from May 17 through 22, and delivered strike notices to U.C. on May 23. During the strike vote, U.C. advised employees on its website that it would presume any employee absent on the day of the strike was absent due to the strike, and that it would not pay for sick leave unless the employee submitted medical verification. U.C. also advised that authorization for vacation leave might not be granted, depending on operational necessity.

On May 13, a unit member, Sharpe, submitted a written request for vacation leave on June 2, which was approved on May 15. On May 20, her supervisor told her that the vacation leave would be rescinded if a strike were held that day.

The contracts between the parties allowed the university to demand satisfactory documentation of illness “when it appears to be justified,” if the employee is given notice prior to returning to work. They also provided that an employee could lose sick leave where the university determined it had been abused.

The collective bargaining agreements stated that vacation leave is scheduled at the convenience of the university and allowed consideration of operational needs. The contract covering Sharpe’s unit provided, “Once established, the University will endeavor to adhere to the vacation schedule.”

Among other allegations, AFSCME charged that the university had unilaterally changed sick and vacation leave policies and practices. The union claimed that U.C. had a practice of invoking the verification requirement only when

employees previously had abused sick leave. It also alleged that the university did not rescind scheduled vacation leave once a request was granted.

The board held that the charge did not demonstrate that U.C. changed its sick leave policy when it informed employees in advance that it would grant sick leave on the date of the strike only with verification. By giving advance notice, the university was merely enforcing the terms of the contract, the board said. The board dismissed AFSCME’s argument that a past practices provision in the collective bargaining agreement governed this case. It found no factual allegations that demonstrated a past practice of limiting the medical verification requirement to those who had abused sick leave. The contract’s provision on abuse of sick leave did not contain a medical verification requirement, the board observed. The past practices provision was inapplicable, the board reasoned, since it was limited to practices “in effect but not contemplated during negotiations...[that] are not in conflict with the intent of the Agreement,” and a provision on abuse of sick leave existed.

The board found that U.C. was within its contractual rights to consider operational needs when it announced that it might not approve vacation requests for the day of the strike. There were no factual allegations that showed a well-established practice of not rescinding scheduled vacation leave. The board stated the existence of such a practice was undermined by U.C.’s warning to Sharpe that it might rescind her vacation request. It affirmed the partial dismissal of the charge.

Representation Rulings

Nonrepresented case managers were properly placed in health care unit without proof of majority support: U.C.

(*Regents of the University of California and UPTE, CWA Loc. 9119*, No. 2107-H, 5-10-10; 32 pp. By Chair Dowdin Calvillo, with Member Wesley; Member McKeag dissenting.)

Holding: Proof of majority support among 163 case managers at the university’s medical centers was not required

before ordering that the healthcare unit of 4,000 employees be modified to include the classification. A party cannot waive its right to file a unit modification petition.

Case summary: Case managers are involved in patient care coordination and discharge planning, as well as utilization review for purposes of insurance and other third-party payer reimbursements. The classification did not exist in 1982, when PERB conducted U.C. unit determination proceedings. When employees began performing case management work in 1994, they were placed in nonrepresented classifications.

In 1997, University Professional and Technical Employees was certified to represent the healthcare professionals (HX) unit, which previously had been unrepresented. The unit includes a variety of patient care professionals, other than registered nurses who are represented by the California Nurses Association. Prior to the election, U.C. and the union agreed on the classifications that would be allowed to vote. In 1999, U.C. established a systemwide case manager title but did not place the classification into any bargaining unit. U.C. began to reclassify its case managers in 2002. UPTE filed grievances at several campuses but did not file a unit modification petition until 2005. By the time of the hearing, 163 case managers were covered by the petition. There are approximately 4,000 employees in UPTE's HX unit. UPTE sought to place all case managers required to have a registered nurse license into the CNA unit, and those who were not required to be RNs into the HX unit. Although some case manager positions at some hospitals require an RN license, the parties agreed that the RN designation was not generally required in the industry. The ALJ ordered that the unit be modified to include all non-supervisory case managers. CNA was not involved in the appeal to the board.

U.C. argued that UPTE had waived the right to petition for unit modification by not filing its petition until 2005. PERB disagreed. Noting that the parties cannot divest the board of jurisdiction to resolve a dispute over unit placement, it held that a party cannot waive its right to file a unit modification petition.

U.C. also contended that PERB should have required proof of majority support for UPTE representation among the case managers. In 2006, PERB amended Sec. 32781 of its regulations, which had allowed PERB to require proof of majority support on a case-by-case basis when adding classifications to an established unit. The new provision requires proof of majority support if the proposed addition would increase the size of the unit by 10 percent or more. The regulation implies that an addition of less than 10 percent does not create a question of representation, the board found, and therefore PERB cannot require proof of majority support. It dismissed the university's contention that case managers' exclusion from the unit for a long period of time should lead to a majority support requirement. To the extent that *Trustees of the California State University* (2004) No. Ad-342-H, 171 CPER 94, could be read to use a length of time criterion, it is overruled.

The board also rejected the contention that principles of employee free choice required proof of majority support. Employees have a right to choose which employee organization they want, but not to choose the bargaining unit in which their classification is placed, said the board.

The board found a community of interest between case managers and HX unit members. All consider themselves patient advocates. There is a significant degree of similarity in skills, knowledge, and level of education between case managers and HX members. They work together in care coordination and in discharge planning. Case managers were more likely to have staff meetings with social workers than with RNs and were in the same department as social workers at four campuses. Undue emphasis on internal community of interest or the uniqueness of the classification would lead to unnecessary proliferation of bargaining units, the board said. It affirmed the unit modification. Member McKeag dissented from the ruling that case managers should be placed in the HX bargaining unit. Evidence showed that they were satisfied with their unrepresented status and were more interested in being represented by CNA than UPTE. She also asserted that Sec. 32781 is silent regarding situations in which a petition seeks to increase the size of an existing unit by less than 10 percent.

Duty of Fair Representation Rulings

Failure to allow nonmembers to vote on bargaining proposal not a DFR breach: CFA.

(*Williams v. California Faculty Assn.*, No. 2116-H, 6-14-10; 2 pp. + 11 pp. B.A. dec. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: Restricting a vote on a furlough proposal to union members did not breach the duty of fair representation since the charged party gave nonmembers notice of the proposal and opportunities to comment on it.

Case summary: The charging party, a faculty member at the Northridge campus of the California State University, pays agency fees to CFA. CFA conducted an internal vote to determine whether faculty members supported renegotiation of the collective bargaining agreement to implement a furlough program. The union permitted only union members to vote during the election, which was held from July 13-22.

The union's main website solicited questions about the proposed furloughs from all bargaining unit members. On the Northridge campus, CFA invited all faculty to a June 25 discussion and encouraged them to "tweet" about their concerns.

On July 16, the charging party sent a letter to the CFA president complaining that not allowing nonmembers to vote was discriminatory, and that requiring payment of union dues was a poll tax. The union's director of representation responded that the duty of fair representation did not require that the union allow nonmembers to vote. He invited the charging party to express her views on the furlough proposal to the CFA president. The charging party informed the board agent that she was unaware of both the union's website and the June 25 meeting. She believed that the email invitation went only to union members.

The board agent explained that unions may exclude nonmembers from voting as long as the union provides them with an opportunity to communicate their views. She found that CFA had provided all unit members with notice of the proposed furlough program and an opportunity to communicate on the CFA website. The local Northridge

CFA website posted an invitation to the June 25 discussion, and an invitation to "tweet" about the proposal.

The B.A. rejected the charging party's claim that CFA's actions violated nonmembers' rights to freely associate under the U.S. Constitution because PERB does not have jurisdiction to enforce provisions of the constitution. The board adopted the B.A.'s decision to dismiss the charge.

Failure to allow nonmembers to vote on bargaining proposal not a DFR breach: CFA.

(*Halcoussis v. California Faculty Assn.*, No. 2117-H, 6-14-10; 2 pp. + 9 pp. B.A. dec. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: Where the charging party restricted a vote on a furlough proposal to union members and gave nonmembers notice of the bargaining proposal and opportunities to comment on it, the board reached the same conclusion as summarized above in *CFA (Williams)*, Dec. No. 2116-H.

MMBA Cases

Unfair Practice Rulings

City attorney bypassed union when he solicited employees to rescind service credits purchased under terms of MOU: City of San Diego.

(*San Diego Firefighters, Loc. 145, LAFF v. City of San Diego (Office of the City Attorney)*, No. 2103-M, 3-26-10; 22 pp. By Member Wesley, with Member McKeag; Acting Chair Dowdin Calvillo, concurring and dissenting.)

Holding: The city unlawfully bypassed the union; it did not unilaterally change the retirement service credit policy.

Case summary: Facing a severe funding crisis affecting its retirement system, the elected city attorney issued a press release informing all city employees that the contract provision permitting employees to purchase up to five years of service credit was unlawful and in violation of the city charter. The press release informed employees how to rescind any legally unauthorized purchases of service credits.

The city did not give Local 145 advance notice regarding the press release or offer to meet and confer.

The board affirmed the ALJ's conclusion that the city attorney's actions bypassed Local 145. His actions showed disregard for the MOU language authorizing employee purchases of service credit at a price set by the retirement system. Soliciting employees to rescind service credits seeks to influence a waiver of a benefit negotiated by Local 145.

The board rejected the argument that the city attorney's communication was protected speech. An employer may express its views on employment-related matters to facilitate full debate, the board explained, but employer speech that advocates or solicits a course of action is not protected. Employer speech that is used as a means of violating the act, such as bypassing the exclusive representative, is unprotected.

The board distinguished cases where the employer's speech communicated facts, arguments, or opinions but did not advocate a course of action that circumvents the exclusive representative or uses the communication to commit an unfair practice. In contrast, the city attorney's communication was not informational; it was designed to solicit employees to give up a negotiated benefit and is not protected speech.

The ALJ's finding that the city executed a unilateral change was overturned by the board. The charging party must demonstrate more than an attempt to change a policy. The city attorney solicited employees to rescind their service credit purchases, but the city never altered or terminated the service credit policy. Instead, the trustees of the retirement system adjusted the cost to purchase service credits, suggesting that the benefit would continue as revenue neutral to the city.

The board took judicial notice of the city charter provisions that name the city attorney as its chief legal advisor. However, the board held, the charter does not convey the authority to bypass the union and directly ask employees to rescind benefits included in their MOU.

Acting Chair Dowdin Calvillo agreed with the majority that the city did not unilaterally change a policy, but

found that the city did not bypass the union. The city attorney merely informed employees that there was a procedure for rescinding a purchase of improperly priced service credits and provided a form for the employee to do so. She found that encouraging employees to rescind their service credit purchases did not have a detrimental effect on the union and that the city did not advocate a course of action in circumvention of the exclusive representative.

Employees are not entitled to COLAs that are part of the MOUs covering their former bargaining units: County of Mendocino.

(Mendocino County Public Attorney's Assn. v. County of Mendocino), No. 2104-M, 4-21-10; 3 pp. + 14 pp ALJ dec. By Member Wesley, with Member McKeag and Acting Chair Dowdin Calvillo.)

Holding: Employees whose classifications were moved to a newly created bargaining unit were not entitled to wage increases that attached to the MOUs covering the units from which they migrated, and no unilateral change ensued when the county corrected the error.

Case summary: Attorney classifications from two existing bargaining units moved to a newly created unit effective April 2006. Negotiations between the county and the Mendocino County Management Employees Association got underway for an initial memorandum of understanding.

The two MOUs that covered the bargaining units from which the attorneys migrated provided for a 1 percent COLA effective September 2006. When this increase was implemented in these units, it mistakenly was applied to the employee classifications that had been removed. When the county realized this, it ceased payment of the COLAs to the employees in the new unit.

The ALJ found the county did not violate the statute by failing to grant a wage increase that was part of the MOUs covering units from which the attorneys migrated. And, he concluded that the county's prompt correction of the error was not an unlawful unilateral change. The board adopted the ALJ's decision as the decision of the board itself.

County obligated to bargain before placing prevailing wage measure on ballot: County of Santa Clara.

(*Santa Clara County Correctional Peace Officers Assn. v. County of Santa Clara*, No. 2114-M, 6-8-10; 19 pp. By Member McKeag, with Chair Dowdin Calvillo and Member Wesley.)

Holding: The county failed to bargain with the association before it placed a measure on the ballot that would have altered the prevailing wage provision of the charter.

Case summary: In 2004, the association and other labor organizations placed an initiative on the ballot to require that certain bargaining impasses be submitted to binding interest arbitration. The county notified the association of its intent to place on the ballot a measure that would require voter approval where an award rendered by the interest arbitration panel resulted in “greater cost” to the county.

The county also informed the association of its plan to submit a measure that altered the charter provision linking employee compensation to prevailing wages.

Although the human resources director did not believe the county was required to meet and confer over the two ballot measures, the parties met on four occasions. No agreement was reached.

In the November 2004 election, the voters rejected the unions’ interest arbitration measure and both of the ballot measures submitted by the county.

The association filed an unfair practice charge arguing that the county failed to meet and confer in good faith prior to submitting the ballot measures to the voters. An administrative law judge agreed, finding that both measures were within the scope of representation and, therefore, the county had an obligation to meet and confer with the association before it placed them on the ballot.

In *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, CPER SRS No. 28, the California Supreme Court announced that, prior to placing before voters an initiative that would change a matter within scope, the agency must satisfy its obligation to bargain. Relying on this case, PERB began its analysis by focusing

on whether the county’s two ballot measures concerned matters within the scope of representation.

The board found that the interest arbitration measure addressed a permissive, not a mandatory, subject of bargaining. The prevailing wage measure was within scope, the board held, as it sought to amend the existing wage provision of the charter.

PERB found that, while the parties met to bargain over both ballot measures, the county did not bargain to impasse before taking the measure to the voters. The association did not demonstrate bad faith by its bargaining conduct, the board said. And, when a party believes its counterpart is not conducting negotiations in good faith, the appropriate response is to file an unfair practice charge with the board. Rather than taking this course, the county resorted to self-help by unilaterally placing the prevailing wage initiative on the ballot.

PERB rejected the county’s contention that it was excused from bargaining because it faced a statutory deadline for submitting a ballot measure. The county was not faced with an imminent need to act prior to the deadline. The board also turned aside the county’s argument that waiting for the next election cycle would jeopardize the county’s financial resources and its labor relations program. The fact that the county believed inclusion of the measure on the November 2004 ballot was desirable does not constitute a compelling operational necessity to set aside its bargaining obligation.

Because the ballot measures failed, the board’s remedy did not include an order to return to the status quo, and it declined to compensate the association for “out-of-pocket losses.”

County was obligated to bargain before it placed prevailing wage measure on the ballot: County of Santa Clara.

(*Santa Clara County Registered Nurses Professional Assn. v. County of Santa Clara*, 2120-M, 6-25-10; 20 pp. By Member McKeag, with Chair Dowdin Calvillo and Member Wesley.)

Holding: The county failed to bargain with the association before it placed a measure on the ballot that would have altered the prevailing wage provision of the charter. The board relied on the same reasoning and reached the same conclusions as outlined above in *Santa Clara County Correctional Peace Officers Assn. v. County of Santa Clara*, 2114-M.

Union activist dismissed for unauthorized absences, not protected activity: Omnitrans.

(*Amalgamated Transit Union Local 1704 v. Omnitrans*, 2121-M, 6-25-10; 19 pp. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: The employer terminated the union president because of his unauthorized absences from work during a severe manpower shortage, not because of his protected activities.

Case summary: Dale Moore served as ATU president and as a member of its bargaining team. He also filed two grievances and requested and used union leave to participate in these activities. The employer was aware of Moore's activities. The employer inflicted an adverse action when it terminated Moore's employment as a coach operator.

In support of its decision to dismiss Moore and to demonstrate it had no anti-union motivation, the employer cited six absences during a 12-month period for which no medical certification was provided and, the board noted, ATU did not contend that these absences were the product of union animus.

Moore was charged for five additional absences based on his failure to properly request union leave on the employer's leave request form and failure to submit the request in writing 24 hours before the requested time off, both conditions established by an enforceable past practice.

Taken together, the board noted, these 11 charged absences were sufficient to justify termination.

In addition, the board also examined 13 additional absences on days when Moore's request for union business leave had been denied due to an extreme lack of manpower. Relying on its findings in an earlier case, *Omnitrans* (2008) PERB Dec. No. 1996-M, 195 CPER 87, the board reiter-

ated that Omnitrans had a contractual right to approve or deny requests for union leave. Longstanding participation in union activities does not shield an employee from routine employment decisions or insulate the employee from disciplinary action for misconduct, PERB said. The board concluded that "an employer may discipline an employee for failure to report for work even if the employee is absent due to union business, unless the parties have agreed that absences for union business are exempt from the attendance policy." The board found no such broad exemption in the parties' MOU.

PERB also found support in the record for the employer's assertion that, at the time of Moore's absences, Omnitrans experienced a manpower shortage caused by a large number of absent sick and injured drivers and because of driver turnover. The record also revealed that the employer incurred a considerable number of hours of unscheduled overtime on those days.

Evidence that Omnitrans allowed several coach operators leave to attend four meetings of the Cultural Design Team showed only a minor impact on driver availability. That Omnitrans did not formally declare a manpower shortage is of "minimal significance," the board said, noting that manpower varies from day to day and cannot be predicted with sufficient accuracy to justify a formal declaration.

The board rejected ATU's assertion that the manpower shortage was intentionally created. A failure on Omnitrans' part to plan for this contingency does not amount to a waiver of its right to deny union leave based on operational needs.

The union failed to prove that Moore's absences were charged in retaliation for his participation in union activities. Instead, the board concluded, Omnitrans proved that it would have dismissed Moore based on his unauthorized absences even if he had not engaged in protected activity.

Management's statements critical of union's organizing campaign interfered with right to represent employees: County of Riverside.

(*SEIU Loc. 721 v. County of Riverside*, No. 2119-M, 6-24-10; 25 pp. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: The county reasonably concluded that a unit of temporary employees did not share a community of interest warranting a separate bargaining unit. Statements by county executives and members of the board of supervisors interfered with the union's right to organize and represent employees.

Case summary: SEIU filed a petition with the county seeking to create a new bargaining unit consisting of all employees of the temporary assistance program. Relying on its local rules, the county denied SEIU's representation petition because it found the TAP employees lacked a community of interest. Affirming the ALJ, the board agreed.

PERB noted that, although the wages and benefits of TAP employees are unlike those of the county's permanent employees, all are paid 5.5 percent less than permanent employees performing the same duties. TAP employees do not receive paid sick leave or vacation time. Nor do they receive health benefits. TAP employees make a mandatory contribution of 3.75 percent of their base salary to the 401(A) pension plan. Based on these similarities, the board found that the TAP employees share a substantial mutual interest in collectively negotiating these matters.

However, the board also observed that TAP employees perform a broad variety of duties. They work as ground-keepers, IT systems administrators, auditors, behavioral health specialists, lifeguards, nurses, security guards, food service workers, housekeepers, and laboratory assistants. Accordingly, the education and licensing requirements are diverse. PERB also recognized that, while a miscellaneous unit of employees with varied job duties may be appropriate, it was not unreasonable for the county to place employees with different qualifications, skills, and job duties into separate bargaining units. Here, because permanent employees who perform the same job duties as the TAP employees

are assigned to separate bargaining units, the county could reasonably conclude that a unit of TAP employees who perform the same duties as their permanent counterparts was not appropriate.

The statement by the county human resources director, "You will get certification the day I die or retire," did not interfere with employees' rights because only union organizers, not employees, heard the director's statement. However, the board found that the director's remark interfered with SEIU's rights. By implying that the union's organizational efforts would be futile, the statement would tend to discourage union representatives from continuing their organizing efforts. The fact that the union was not discouraged does not alleviate the coercive nature of the statement.

Similarly, the county CEO's statement that he would be dead or the county would be out of business before the TAP workers got a union interfered with the union's right to represent employees.

Public statements made by members of the board of supervisors commenting that the organizing effort had been "burdensome," that the organizing debate was "not going anywhere," that the county should consider hiring private sector employees, and that it would be prohibitively expensive were SEIU certified as the TAP employees' exclusive representative constituted unlawful threats and efforts to stop the organizers' activities.

The board rejected the county's contention that public officials' statements are immunized from scrutiny under the MMBA, or that their statements were based on objective facts outside the county's control.

Abolishment of eligibility list was not adverse action and was consistent with past practice: County of Tehama.

(*Feger v. County of Tehama*, No. 2122-M, 6-28-10; 11 pp. + 22 pp. ALJ dec. By Member McKeag, with Chair Dowdin Calvillo and Member Wesley.)

Holding: The charging party failed to demonstrate that the county abolished an eligibility list in retaliation for her participation in a coworker's disciplinary arbitration.

Case summary: The charging party engaged in protected activity when she testified on behalf of a coworker in arbitration. The employer was aware of her activity. An administrative law judge found that abolishing the eligibility list constituted an adverse action because it deprived the charging party of an opportunity to compete in a selection interview for a higher-paying position. The board disagreed. It found that an adverse impact cannot be speculative. The fact that the charging party was one of three employees on the eligibility list did not mean she would have been hired. Noting that the charging party was ranked last on the list, PERB concluded that her potential loss of a promotional opportunity was insufficient to be deemed an adverse action.

The board affirmed the ALJ's conclusion that the county had a past practice of abolishing eligible lists when fewer than five candidates express interest in a vacancy. The evidence relied on by the ALJ was not hearsay because witnesses testified based on their experience and knowledge.

PERB upheld the ALJ's decision to deny the charging party's motion to exclude documents and strike testimony based on the county's failure to provide requested documents. The board agreed with the ALJ's reasoning that the union's right to information does not extend to an extra-contractual forum, such as a PERB hearing. Moreover, the board explained, PERB Reg. 32150 sets out the procedure for obtaining subpoenas to compel the production of documents. The charging party did not follow this procedure.

Representation Rulings

Petitions to disaffiliate from international organization dismissed: County of Siskiyou and Siskiyou County Superior Court.

(County of Siskiyou and Siskiyou County Employees Assn., and Siskiyou County Employees Assn./AFSCME; Siskiyou County Superior Court and Siskiyou County Employees Assn., and Siskiyou County Employees Assn./AFSCME, No. 2113-M, 6-7-10; 24 pp. By Acting Chair Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: Two petitions filed by SCEA seeking to disaffiliate from AFSCME were dismissed because SCEA

failed to show that there was substantial continuity of representation between the pre-disaffiliation organization, SCEA/AFSCME, and the post-disaffiliation organization, SCEA.

Case summary: The Siskiyou County Employees Association filed two petitions seeking to amend its certification as the exclusive representative reflecting its disaffiliation with AFSCME. An administrative law judge dismissed both petitions, and the matter was appealed to the board.

PERB first found that it had jurisdiction over the petitions to amend certification. PERB regulations regarding matters of representation apply where, as here, the local entities have not adopted a rule addressing a particular representation procedure. Since neither the county nor the superior court had adopted a local rule governing the amendment of certification, PERB had jurisdiction to review the petitions under its own rules. The fact that local rules permit decertification petitions does not divest PERB of jurisdiction, the board instructed, because the decertification process ousts the current representative while an amendment of certification is a change in form, not substance, of the representative. The board reasoned that a recognized employee organization should not bear the burden of decertification merely to disaffiliate from an international union.

Under PERB rules, a petitioner seeking to amend its certification to reflect disaffiliation must show a "substantial continuity" of representation and identity between the pre- and post-affiliated entity. Continuity of representation depends on a number of factors, the board explained. And where, as here, an administrator has taken control of the local organization, changes that are a result of that action must be considered.

As part of the imposition of the administrators, the local's officers and representatives were replaced. As a result, officers and representatives of SCEA no longer interacted with management; instead, officials of SCEA/AFSCME met with management of the county and the court. The employers did not choose to recognize SCEA/AFSCME, as SCEA argued, but they did continue to recognize SCEA/

AFSCME, the signatory to the MOUs. SCEA/AFSCME continued to occupy one of the union offices and attempted to regain control over the local's books and records.

Viewed as a whole, the board concluded, there was greater continuity between pre-disaffiliation SCEA/AFSCME and SCEA/AFSCME than between the pre-disaffiliation SCEA/AFSCME and SCEA. Failing to establish the substantial continuity of representation required to amend certification, PERB directed that the petitions be dismissed. It instructed that the existing question concerning representation be resolved under the local rules and procedures of the county and the court.

Trial Court Act Cases

Unfair Practice Rulings

No unilateral changes in court interpreter staffing rules or retaliation for strike activity: L.A. Sup. Ct.

(*California Federation of Interpreters, Loc. 39521 v. Los Angeles Superior Court*) No. 2112-I, 6-7-10; 5 pp. + 24 pp. Division Chief dec. By Member Wesley, with Member McKeag and Acting Chair Dowdin Calvillo.)

Holding: The court did not unilaterally change policies and practices for filling vacant assignments, making staff reductions, or imposing limitations on work hours. The court's actions were not retaliation for the employees' protected activity.

Case summary: The court did not affect a unilateral change when it ceased to allow "C" status employees (an interpreter holding a regular part-time position) and "F" status interpreters ("as-needed" employees) to apply for vacant full-time assignments. The parties' agreement gives the court the right to determine the number of employees in any status subject to the needs of the court. The MOU provision that conditions the right to be selected for an assignment based on seniority applies to situations where the court determines there is a need to fill the assignment.

The charging party failed to show that the court eliminated regular assignments and made changes to the

method of assigning relief and "as-needed" interpreters to cover daily vacancies based on bargaining unit employees' participation in a strike. No showing of unlawful animus was alleged. And, the number of assignments to be filled is a staffing or service level that is outside the scope of representation.

The exclusive representative is entitled to all information necessary and relevant to the discharge of its duty to represent employees. Here, the court made a partial response to the union's information request, but failed to provide information concerning the posting and filling of regular assignment vacancies. No violation was found, however, because the union did not reassert its request or communicate its dissatisfaction with the court's response.

The charging party also failed to allege that the court provided inadequate information related to the basis for the elimination of regular assignments. The court informed the union that it had no such information, and the charge fails to establish that the court had possession of the documents requested.

The board noted that the charge did not provide facts to show that the criteria for filling vacant assignments was made in retaliation for the interpreters' strike activity.

Activity Reports

ALJ PROPOSED DECISIONS

Sacramento Regional Office — Final Decisions

SEIU Loc. 1000 v. State of California (Dept. of Corrections and Rehabilitation/Kern Valley State Prison), Case SA-CE-1782-S. ALJ Christine A. Bologna. (Issued 4-22-10; final 05-20-10; HO-U-984-E.) It is undisputed that in January 2009, the respondent took adverse action against a job steward when it removed her from nursing duties and redirected her to the mailroom. It is uncontroverted that SEIU filed a separate unfair practice charge on the steward's behalf based on KVSP's conduct which allegedly interfered with her protected activities as a steward and bargaining unit representative, and that she also engaged in protected conduct by participating in a PERB settlement conference. The prima facie case element of employer knowledge is lacking. SEIU failed to prove that the state employer's agents responsible for communicating the redirection — the chief medical officer/health care manager and the employee relations officer — knew of the steward's participation in the settlement conference. The only KVSP representative who participated in the conference was not involved in the decision to reassign her to the mailroom. Although the labor relations advocate and the employee relations officer shared an office, that fact is insufficient to impute employer knowledge of protected activity to the chief medical officer/health care manager. Timing is present but cannot alone support a conclusion of unlawful motivation. Evidence from other institutions or different bargaining units does not demonstrate disparate treatment/departure from established procedures; no KVSP nurses receiving letters of instruction for patient care issues were under investigation; both the steward and another nurse under investigation for the same alleged misconduct were redirected to the mailroom and treated the same. Even if a prima facie case of discrimination/retaliation was demonstrated, CDCR/KVSP established non-discriminatory, legitimate business reasons for reassigning the steward in the absence of her and the union's protected activities.

Operating Engineers Loc. Union No. 3 v. County of Plumas, Case SA-CE-560-M. ALJ Shawn P. Cloughesy. (Issued 6-03-10; final 6-29-10; HO-U-988-M.) Allegations included bad faith bargaining and failure to provide information during

effects bargaining of the closure of the department and other layoffs. The failure to provide information was dismissed as some of the requests went to decision bargaining and the union failed to clarify its request. Bad faith bargaining was not shown by a switch of county negotiators after the layoff implementation date and no agreements were rescinded; the canceled negotiation dates occurred after the implementation of the layoffs, and the county's refusal to bargain the decision of the layoff was appropriate.

IBEW Loc. 1245 v. City of Roseville, Case SA-CE-607-M. ALJ Shawn P. Cloughesy. (Issued 6-07-10; final 7-06-10; HO-U-989-M.) The union alleged there was a unilateral change in policy regarding the definition of call back compensation without meeting and conferring. No violation was found. The plain language of the agreement dictates that the city did not have to pay a standby employee at a call back rate when he was not called out to perform his duties. While the city had paid employees at that rate in the past, the city was entitled to enforce the agreement. (Marysville Joint USD [1983] PERB Dec. No. 314, p. 10.)

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Weil et al. v. United Educators of San Francisco, Case SF-CO-736-E. ALJ Donn Ginoza. (Issued 04-13-10; final 05-11-10; HO-U-983-E.) A union representing day-to-day substitutes was found not to have breached its duty of fair representation by negotiating a new rule requiring substitutes to accept priority assignment to the school district's "hard-to-staff" schools in order to qualify for health benefits. The union believed in good faith that the amount of monies allocated for health benefits would increase due to a contemporaneous change that replaced an annual dollar cap with a potentially larger number of eligible substitutes. Nor did the union breach its duty of fair representation by failing to permit a membership ratification vote of the negotiated change since it provided notice of the change and an opportunity for members to express their views on the matter.

Park v. Golden Gate Bridge and Highway Transportation Dist., Case SF-CE-598-M. ALJ Donn Ginoza. (Issued 04-27-10; final 05-26-10; HO-U-985-M.) A public agency's removal of a ferry boat deckhand from the union hiring hall list as a result of a sexually offensive gesture to a female deckhand, and

his contemporaneous challenge to the boat captain's authority to send him home early, was not motivated by his grievance filing against the employer. Despite establishing other required elements for a prima facie case of discrimination, the employee failed to demonstrate a nexus to his protected activity, because close temporal proximity of the protected activity to the adverse action was the only circumstantial evidence shown.

King City Joint Union High School Teachers Assn. v. King City Joint Union High School Dist., Case SF-CE-2711-E. ALJ Donn Ginoza. (Issued 05-19-10; final 06-16-10; HO-U-987-E.) A veteran teacher who had been a longtime bargaining team member received a "letter of concern" for unprofessional conduct based on his use of profanity with the superintendent in an in-person, unscheduled meeting to discuss layoff criteria. Based on relevant contextual factors, the administrative law judge found the action was not unlawful discrimination. The teacher's personal accusation against the superintendent that he was targeting veteran teachers was reckless given the information actually available. The corrective action was of a mild nature and was appropriate for maintaining respectful relationships.

Los Angeles Regional Office — Final Decisions

California Faculty Assn. v. Trustees of the California State University, Case LA-CE-1054-H. ALJ Ann L. Weinman. (Issued 04-29-10; final 05-26-10; HO-U-986-M.) Due to the state's financial crisis, the university reduced its operating budget by \$31 million. The faculty union alleged the university bargained in bad faith, thereby rendering it unable to provide contractual salary increases. The union also alleged the university issued false statements to employees regarding the voluntary nature of the budget reduction. No violation was found, as the university's inability to provide salary increases was not caused by budget reduction, but rather by the state's non-funding of a special state "compact." Statements to employees were not false, as the state had notified the university of its "required" share of budget reductions.

Sacramento Regional Office — Decisions Not Final

SEIU Loc. 1000 v. State of California (Dept. of Corrections and Rehabilitation), Case SA-CE-1795-S. ALJ Shawn P. Cloughesy. (Issued 4-14-10; exceptions filed 5-20-10.) An

SEIU job steward was issued a letter of instruction (LOI) by her supervisor for her conduct while representing two registered nurses. The steward attempted to meet with the director of nursing because she was concerned that the supervising nurse would not convey to the director facts favorable to the employee. In doing this, the job steward held out her hand eight to ten feet from the supervisor and stated that she was talking to the director of nursing and not him. On another occasion, the job steward interrupted the reading of a LOI to ask whether she could ask a question as to the merits of an LOI, asked the director of nursing why she was not allowed to speak, and held up her hand toward the supervisor and redirected her question to the director for an answer. PERB found a violation, as her conduct was protected. (Rancho Santiago CCD (1986) PERB Dec. No. 602.)

California Correctional Peace Officers Assn. v. State of California (Dept. of Personnel Administration/Dept. of Corrections and Rehabilitation), Case SA-CE-1688-S. Chief ALJ Bernard McMonigle. (Issued 04-15-10; exceptions filed 06-02-10.) The most recent MOU between the parties expired on July 2, 2006. After the parties negotiated and reached impasse, the state implemented its "last, best, and final offer" in September 2007. To date, there exists no successor MOU. Subsequently, the California Department of Corrections and Rehabilitation and the California Correctional Peace Officers Association entered into negotiations on local issues affecting particular worksites. During each of the local negotiations, the parties reached agreement on several terms proposed by CCPOA. The state, however, refused to execute written agreements embodying the terms of the agreements reached, but instead sent "closure letters" containing its summary of the negotiations. A violation was found. (1) The Department of Personnel Administration is a proper respondent. (2) The charge was timely filed. (3) A request that this case be stayed and consolidated with later filed unfair practice charges involving the same conduct is denied. A PERB decision now would provide timely resolution to ongoing conflict between the parties. (4) Changes on matters within the scope of bargaining at the local level are subject to the duty to bargain under the Dills Act. (5) The refusal to sign a document embodying the terms of agreement is a per se violation of the duty to bargain. The Dills Act obligation to execute a signed agreement extends to local agreements as

well as the primary MOU between the parties. The evidence established that agreements were reached on specific proposals at each of the four local worksites. The contention that there was no “meeting of the minds” is rejected because the parties at each table failed to reach agreement on all of the proposals presented. There is no dispute over the meaning of the terms used in agreements that were reached. The state violated Dills Act sections 3519(a), (b), and (c) on four separate occasions when it refused to execute written agreements embodying terms reached during negotiations.

Operating Engineers Loc. 3 v. City of Hughson, Case SA-CE-537-M. Chief ALJ Bernard McMonigle. (Issued 6-3-10; exceptions filed 6-23-10.) Section 22.B of the MOU between the City of Hughson and SEIU provides for extra payment to an employee performing the duties of a higher-level position on an acting basis for longer than 30 continuous work days. The MOU lists chief plant operator (CPO) as a bargaining unit class, but does not establish a salary for that class. Beginning in May 2006, the city assigned an employee in the class of wastewater treatment plant operator II (WWTPO II) additional duties normally associated with the CPO, including signing and filing monthly, quarterly, and annual reports with the state using his license; ensuring compliance with state regulations; identifying and obtaining needed repairs; overseeing contractors; scheduling and training the other wastewater treatment operator; and providing safety training. The city clerk provided the employee with city letterhead identifying him as “Chief WWTP Operator,” and the employee was listed in the city’s internal phone directory with that title. After the city denied a grievance for out-of-class pay, the union filed an unfair practice charge alleging a unilateral change. A unilateral change violation was found.

The motion to join the employee as a party is denied because, as a member of the bargaining unit, he only has an indirect interest in the outcome and the bargaining obligation is owed to the exclusive representative, not to unit employees. The charge was timely filed because the union was unaware of the city’s non-compliance with the MOU until it began to investigate the grievance and received the city’s response, asserting that the CPO class did not exist. The city breached Section 22.B of the MOU by failing to pay the employee for performing the duties of the CPO class. The city’s arguments

that it never established a CPO position does not excuse its obligation to pay for out-of-class work. The argument that CPO duties performed by the employee were included within the duties of his WWTPO II position is also rejected, as CPO duties performed by the employee extended beyond the normal duties of a WWTPO II. The city never gave the union notice and an opportunity to bargain about its decision to assign CPO duties to a bargaining unit employee without complying with Section 22.B. The city’s conduct was not an isolated breach but a change in policy having a generalized effect or continuing impact on the terms and conditions of employment. Payment of wages for out-of-class work is within the scope of representation. Therefore, all elements of a unilateral change in violation of the MMBA have been established.

Chico Unified Teachers Assn., CTA/NEA v. Chico Unified School Dist., Case SA-CE-2475-E. ALJ Shawn P. Cloughesy. (Issued 6-23-10; exceptions due 7-19-10.) The union alleged that the district retaliated against a union activist when it transferred from high school to junior high school. This is a mixed motive case. The ALJ found the principal already had decided to transfer the activist for staff friction because the activist’s unprotected conduct was not conducive to the collaborative problem-solving environment she wanted to foster. After this decision was made, other employees came forward with written statements identifying instances when the union activist had a protected right to express or advocate. Because the principal’s decision to take the action occurred before she received the written staff statements, the transfer action was for non-retaliatory reasons.

Oakland Regional Office — Decisions Not Final

Coalition of University Employees v. Regents of the University of California, Case SF-CE-878-H. ALJ Donn Ginoza. (Issued 06-21-10; exceptions due 07-16-10.) The university’s adoption of a mathematical, amortizing method for determining the level of employer and employee contributions to its defined benefit plan was not a unilateral change because the subject was outside the scope of representation. The university determined it would resume employee contributions to the plan after more than 15 years of a contributions “holiday” when the plan was overfunded. The policy, adopted over objection of the union, conditioned the actual amount of employee contributions on

completion of collective bargaining, and other factors like the availability of funding and maintenance of a competitive salary structure. Thereafter, the university adhered to its statutory meet-and-confer obligation by submitting its proposal for the restart of employee contributions to all of the unions, including the charging party. Interjection of planning, study, and consideration matters into the bargaining process was premature and interfered with the employer's managerial prerogatives.

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Whitney v. County of Riverside, Case LA-CE-541-M. ALJ Shawn P. Cloughesy. (Issued 6-30-10; exceptions due 7-26-10.) Retaliation was alleged when the county released a probationary employee who requested representation from the union and copied the union on a memorandum. No violation was found. The charging party was unable to show the ultimate decisionmaker knew of his protected activity either personally or under a subordinate bias liability theory.

California Federation of Interpreters, Loc. 39521 v. Los Angeles Superior Court, Case LA-CE-23-I. ALJ Ann L. Weinman. (Issued 4-7-2010; exceptions filed 5-24-10.) The court unlawfully denied the union activist's requests for organizational leave, vacation leave, and status transfer, all in retaliation for her activities on behalf of the union. The court's actions resulted in her resignation and were found to be constructive discharge. The court also unlawfully rescinded the status transfer of another employee as a result of its actions against the union activist.

Davis, Jr. v. AFSCME Loc. 3299, Cases LA-CO-483-H and LA-CO-497-H. ALJ Ann L. Weinman. (Issued 6-8-10; exceptions due 7-6-10.) The complaint alleges the union uses an unlawful deduction-escrow-refund system for collecting fair-share fees from non-union employees of the university. The charging party relied on *Grunwald v. San Bernardino City USD* (9th Cir. 1993) 994 F.2d 1370, for the proposition that the union must make an "adequate explanation" of its system. However, *Grunwald* is a First Amendment case, not an unfair practice charge. Nothing in PERB regulations or HEERA mandates any special collection system or requires explanation. Dismissal was ordered.

Caporale v. Beverly Hills Unified School Dist., Case LA-CE-5261-E. ALJ Thomas J. Allen. (Issued 6-15-10; exceptions due 07-12-10.) The charge was found to be untimely, and the motion to amend the complaint was denied. The charging party had notice of the adverse action in March 2008; he was reassigned, not terminated, and did not file until October 2008. The proposed amendment was unrelated to the pending complaint.

Fallbrook Elementary Teachers Assn. v. Fallbrook Union Elementary School Dist., Case LA-CE-5271-E. ALJ Thomas J. Allen. (Issued 6-30-10; exceptions due 7-26-10.) Retaliation was found in the district's decision not to reemploy a teacher who had become a union representative. The principal's comment to the teacher that her union duties had "gotten in the way" combined with other facts showed a nexus between the teacher's status as a union representative and the district's decision not to reemploy the teacher.

Report of the Office of the General Counsel

Injunctive Relief Cases

Three requests for injunctive relief were filed April 1 through June 30, 2010. One was granted and two were denied by the board.

Requests granted

Regents of the University of California v. California Nurses Assn. (IR No. 583, Case SA-CO-114-H). On June 2, 2010, the university filed a request for injunctive relief to prohibit the union from planned strike activity involving the registered nurses bargaining unit at the university's medical centers, facilities, and locations. On June 3, the board granted the request.

Requests denied

SEIU Loc. 1000 v. State of California (Dept. of Developmental Services) (IR No. 582, Case SA-CE-1850-S). On May 19, 2010, the union filed a request for injunctive relief to prohibit the state from installing and using surveillance cameras at the Porterville Developmental Center. On May 24, the board denied the request.

SEIU United Healthcare Workers West v. Fresno County In-Home Supportive Services Public Authority (IR No. 584, Case SA-CE-671-M). On June 16, 2010, the union filed a request for injunctive relief to prohibit the county's implementation, via its last, best, and final offer, of wage reductions. On June 22, the board denied the request.

Litigation Activity

Five cases were opened April 1 through June 30, 2010.

California Correctional Peace Officers Assn. v. PERB; State of California (Dept. of Personnel Administration), California Court of Appeal, Third Appellate District, Case No. C064817. (PERB Case SA-CE-1665-S.) In April 2010, the union filed a writ petition with the appellate court alleging the board erred in PERB Dec. No. 2102-S.

Mendocino County Public Attorneys Assn. v. PERB; County of Mendocino, California Court of Appeal, First Appellate District (Division Five), Case No. A128540. (PERB Case SF-CE-432-M.) In May 2010, the union filed a writ petition with the appellate court alleging the board erred in PERB Dec. No. 2104-M.

PERB v. California Nurses Assn., San Francisco County Superior Court Case No. CGC-10-500513. (IR No. 583, Case SA-CO-114-H.) In June 2010, PERB sought and was granted a temporary restraining order and a preliminary injunction to prohibit the union's planned strike activity involving the registered nurses bargaining unit at the university's medical centers, facilities, and locations.

California Correctional Peace Officers Assn. v. PERB, Alameda County Superior Court, Case No. RG10517528. (PERB Case SA-CE-1636-S.) In June 2010, the union filed a petition for writ of ordinary mandate with the superior court, seeking to compel PERB to issue a complaint regarding the allegation dismissed in PERB Dec. No. 2106-S.

Coalition of University Employees, Teamsters Loc. 2010, IBT v. PERB; Regents of the University of California, Sacramento County Superior Court, Case No. 2010-80000574. (PERB Case SF-CE-905-H.) In June 2010, the union filed a petition for writ of ordinary mandate with the superior court seeking, among other things, to compel PERB to make a determina-

tion in Case SF-CE-905-H, and to increase the pay and duration involved in a factfinding case between the union and the university.