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- \_\_\_\_\_ Public Sector Arbitration
- \_\_\_\_\_ Arbitration Log
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	<u>No. of Articles/Summaries</u>			<u>Length of Articles</u>			<u>Depth of Coverage</u>		
	<u>To</u>	<u>Just</u>	<u>Too</u>	<u>Too</u>	<u>Just</u>	<u>Too</u>	<u>Too</u>	<u>Just</u>	<u>Not</u>
	<u>many</u>	<u>right</u>	<u>few</u>	<u>long</u>	<u>right</u>	<u>short</u>	<u>much</u>	<u>right</u>	<u>enough</u>
<b>Main Articles</b>	_____	_____	_____	_____	_____	_____	_____	_____	_____
<b>Local Government</b>	_____	_____	_____	_____	_____	_____	_____	_____	_____
<b>Public Schools</b>	_____	_____	_____	_____	_____	_____	_____	_____	_____
<b>State Employment</b>	_____	_____	_____	_____	_____	_____	_____	_____	_____
<b>Higher Education</b>	_____	_____	_____	_____	_____	_____	_____	_____	_____
<b>Discrimination</b>	_____	_____	_____	_____	_____	_____	_____	_____	_____
<b>General</b>	_____	_____	_____	_____	_____	_____	_____	_____	_____
<b>News from PERB</b>	_____	_____	_____	_____	_____	_____	_____	_____	_____
<b>Pub. Sector Arb.</b>	_____	_____	_____	_____	_____	_____	_____	_____	_____
<b>Arbitration Log</b>	_____	_____	_____	_____	_____	_____	_____	_____	_____
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Too many	Just right	Not enough	Too much depth	Just right	Not enough depth	Too much depth	Just right	Not enough depth
_____	_____	_____	_____	_____	_____	_____	_____	_____

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invites you to attend its 2011 Annual Meeting  
SAN DIEGO, CA. MAY 25-28, 2011

## PROGRAM THEME: VARIETIES OF THE ARBITRATION EXPERIENCE

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All Labor and Management representatives and advocates are encouraged to attend the next Annual Meeting of the National Academy of Arbitrators, the premier organization of arbitrators in the United States and Canada dedicated to the resolution of labor and employment disputes.

The meeting will take place at the beautiful San Diego Marriott Hotel and Marina, beginning Wednesday evening, May 25, and ending Saturday afternoon, May 28, 2011. Registration materials will be available by late January through the Academy's website: [www.naarb.org](http://www.naarb.org), or by contacting the NAA operations center at: (607) 756-8363.

Confirmed as the distinguished speaker for the meeting is Wilma Liebman, the current chair and long time member of the National Labor Relations Board. The meeting also will feature a much anticipated "fireside" chat with Ted Jones, a former Academy president, renowned arbitrator, and UCLA law professor. Another highlight of the program will be the address by NAA President Gil Vernon.

The Annual Meeting's program theme will be: "Varieties of the Arbitration Experience." Plenary sessions will include consideration of public sector economic crises and interest arbitration, cross-national perspectives on employee privacy rights, and the duty of fair representation in arbitration.

A series of afternoon sessions will focus on special arbitration proceedings for film and television, professional football, health care, labor organizing, airline consolidation, and statutory employment claims in the union setting. The emerging issue of workplace bullying also will be examined.

The program will include speakers who are labor-management advocates and arbitrators in California, and throughout the U.S. and Canada. Final details on participants will be available early in 2011.

In addition to the program's topical issues, special skills-enhancement sessions will be offered for labor and employment advocates in advance of the formal meeting, during the day on Wednesday, May 25, and also on Saturday morning, May 28.

Please save the dates of May 25 to May 28, 2011. The Academy hopes to see you in San Diego.

**\*CLE Accreditation Pending\***

# Garcetti Four Years Later: Can Public Employee Whistleblowers Be Protected?

*Priscilla Winslow*



*Priscilla Winslow is the assistant chief counsel of the California Teachers Association and has been representing public employees and their unions for over 25 years. She has championed the California Constitution as an independent source of free speech rights since litigating San Leandro Teachers Association v. San Leandro USD on behalf of the union.*

It has been more than four years since the United States Supreme Court issued its decision in *Garcetti v. Ceballos*,<sup>1</sup> holding that a public employee's speech is protected under the First Amendment only if it addresses a matter of public concern and was not uttered as part of his or her "official duties." The requirement that an employee's speech be about a matter of public concern was not new. That requirement has been part of the legal landscape since *Connick v. Meyers*,<sup>2</sup> a decision that in retrospect makes perfect sense because it prevents the transformation of every workplace grievance into a federal case. What was new in *Garcetti* was the rejection of meaningful protections for any public employee who registers legitimate complaints about how the public's business is conducted, or whose job duties require him or her to deliver bad news to the boss. As we will see, there are numerous post-*Garcetti* cases in which public employees have been fired for doing exactly that.

By now the facts of *Garcetti* are well-known but nevertheless bear repeating if for no other reason than to affirm a variation on the law school adage: "Bad facts make bad law." Instead the facts of this case teach us that gross injustice makes bad law. Ceballos was an assistant district attorney who believed that a Los Angeles deputy sheriff lied on an affidavit used to secure a search warrant. Ceballos reported this to his superior who called a meeting with the sheriff's department. The meeting was acrimonious and Ceballos was transferred to an undesirable assignment in a remote location. His complaint for retaliation for exercising his First Amendment rights resulted in the Supreme Court decision which makes the following chilling observation:

Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe on any liberties the employee might have en-



joyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created....Official communications have official consequences, creating the need for substantive consistency and clarity.<sup>3</sup>

Indeed, it is the pronouncement of the Supreme Court that has created consequences which are profoundly disturbing for the health of a vibrant and responsive democracy. *Garcetti* and its progeny take us through Alice's looking glass: employees who know the most about a particular subject or practice because it *is* part of their job (and who therefore have the most credibility) are the most vulnerable to employer retaliation and will be without First Amendment protection.

From a public policy perspective it was foreseeable that *Garcetti* would have at least three effects. It would discourage whistleblowers from reporting what they knew or suspected about government misconduct by leaving those employees without any constitutional protections for this type of speech. The decision also seemed to drive those employees who were inclined to report their concerns internally up the chain of command to instead air their revelations in a public forum, such as a meeting of their employer's governing board, or to the press. It is far less likely that a court could conclude that such a public report was part of the employee's "official duties." Indeed, many unions give exactly that advice to members as a way of insulating their reports from retaliatory consequences. Third, assuming that not every public employee who has important information that touches on a matter of public concern has the pluck to make a speech to a governing board or to call the news media, it is quite likely that citizens will be deprived of significant information concerning the conduct of the public's business. In this aspect, the U.S. Supreme Court contradicts the legislative and judicial currents favoring greater transparency in the conduct of the public's business.<sup>4</sup>

What has been the legacy of *Garcetti*, and how has it affected public employees in California? This article will review the response to *Garcetti* by federal and California courts and suggest ways to protect public employees from retaliation under both state and federal statutes.

## *Judicial Response to Garcetti*

Lest there be any doubt about the disastrous and presumably unintended consequences of *Garcetti*, we need only consider the case of *Pagani v. Meriden Board of Education*,<sup>5</sup> where a teacher, who like education employees in California, was mandated by statute to report suspected child abuse. He reported on a fellow teacher who had shared nude photos of himself and two women with minor students. The reporting teacher was fired, but he found no redress in federal court because reporting the conduct was part of his official duties and therefore unprotected speech under *Garcetti*.<sup>6</sup>

Other employee complaints about workplace conditions or illegal actions of others in the government have fared equally poorly. In *Morey v. Somers Central School Dist.*,<sup>7</sup> a school custodian's report to his superiors that insulation material he cleaned up might contain asbestos was considered part of his official duty speech. Even though he was not charged with identifying or abating asbestos, he was expected to clean and maintain the school building, so the report fell within his official duties. A professor's report regarding a colleague's sexual harassment allegations fell within "official duties" as the department chair.<sup>8</sup>

A school administrator who complained internally about a campus police officer's treatment of students and her belief that an African-American student had been illegally suspended was speaking in her official capacity because part of her duty was to insure that students receive their due process rights.<sup>9</sup>

Compliance inspectors in a public works department who made internal complaints about the improper reporting of sewer overflows to state authorities and possible violation of environmental laws were not protected against retaliatory termination because part of their job duties included investigating the causes of sewer overflows and trying to address that problem by writing ordinances to abate overflows.<sup>10</sup> A financial-aid counselor whose duty it was to verify the accuracy of student-aid files and report any perceived fraudulent activity lost her job when she did just that by reporting up the appropriate chain of command her belief that her supervisor was falsifying information and awarding aid to ineligible students. This speech was not constitutionally protected because it was part of her specific job responsibilities.<sup>11</sup>

A human resource director for the District of Columbia who warned her superiors that she believed the organization's salary policies and decisions may be tainted by race and sex discrimination was not rehired. Her suit was dismissed because her speech — reporting on employment policies — was part of her official duties.<sup>12</sup>

Labor speech, i.e., that associated with filing and processing grievances, has also received Alice-in-Wonderland-type treatment. In *Weintraub v. Board of Education of the City of New York*,<sup>13</sup> a teacher complained of retaliation in violation of his First Amendment rights when he suffered adverse action after filing a grievance complaining about a school administrator's failure to discipline a student who had thrown books at the teacher during class. The court held that the grievance was part of the teacher's "core duties" as a public school teacher, which was to maintain class discipline. Therefore his grievance about the principal's failure to support the teacher's efforts to maintain class discipline was not protected because it was "pursuant to [his] official duties."

*Decotiis v. Whittemore*<sup>14</sup> offers a perfect example of how *Garcetti* works to deprive the public of relevant information by punishing the public employees who seek to provide that information. A speech therapist who worked for regional child development services gave parents information about advocacy groups and urged them to contact those groups to explore their rights to appropriate services for their children. In a very expansive interpretation of "official duties," the court reasoned that because the plaintiff's speech was directed at individuals she would not have encountered but for her employment, because the subject of the speech was related to the employment and because it reflected special knowledge the plaintiff gained through her position, it was not part of her "official duties" and therefore not protected.<sup>15</sup>

Some lower courts have been willing to recognize that speech spoken outside the "chain of command" is usually not part of an "official duty" and is more likely to be protected.

For example, in *Casey v. West Las Vegas Indep. School Dist.*,<sup>16</sup> a school superintendent raised several complaints to her school board, to federal agencies, and to the state attorney general about the way the district administered the Head Start Program. The court found that her remarks to the school board were not protected. Because she was complaining up the chain of command, her speech was by definition part of her official duties. But her complaints to the attorney general were protected because no part of her official duties required her to report suspected wrongdoing to the attorney general. The

court's analysis of the plaintiff's report about suspected fraud in the Head Start program to federal authorities was more nuanced and underscores an additional problem with the "official duties" test. Part of Casey's job duties included insuring the proper use of federal money, and she was required to report any improper use to federal authorities. Thus, this critical speech to the U.S. government concerning waste of its money was not protected speech.

This ruling highlights a particularly dangerous feature of the mechanistic adherence to the "official duties" test. All a public employer need do to insulate itself from constitutional claims arising from whistleblowers is to impose a duty on all employees to report illegal or wasteful conduct. By relying so heavily on the "official duties" test, *Garcetti* cedes to employers the job of delineating free speech rights of their employees. Before *Garcetti*, that was the courts' job.

### ***Academic Freedom After Garcetti***

*Garcetti* contains an important note related to academic freedom in which the court demurs on the issue of whether the decision applies to academic employees or changes prior law concerning academic freedom.<sup>17</sup> However, any hope that this would assist academic employees was quickly laid to rest, at least for K-12 teachers in at least one federal appellate circuit. In *Mayer v. Monroe County Comm. School Corp.*,<sup>18</sup> a

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social studies teacher was asked by one of her middle school students about her opinion of the Iraq war. Earlier, there had been a community demonstration against the war. She replied that although she did not attend the demonstration, she “honked for peace” as she drove by. After parents complained about this interchange, her contract was not renewed for the following year. In dismissing her First Amendment claim, the Court of Appeal held that the school does not regulate a teacher’s speech as much as *hires* that speech. Thus, everything a teacher says in a classroom is part of his or her official duties, as the speech is a commodity the teacher “sells” to the employer.

However, a federal district court in Ohio took a different view of K-12 teacher speech. In *Evans-Marshall v. Board of Education of Tipp City Exempted Village School Dist.*,<sup>19</sup> a teacher alleged she was dismissed for giving her ninth graders an assignment concerning the American Library Association’s list of the 100 most censored books, including *Siddhartha* and *Heather Has Two Mommies*. Also included in this objectionable assignment was a film version of *Romeo and Juliette* and *To Kill a Mockingbird*. Relying on the academic freedom comment in *Garcetti*, the court refused to apply its “official duties” test and instead balanced the interest of the speaker in free expression against the interest of the employer in maintaining the efficiency of the public service.

A federal district court in California reached a similar conclusion in *Johnson v. Poway Unified School Dist.*<sup>20</sup> when presented with a teacher who alleged his free speech rights were violated when his employer ordered him to remove banners he had hung in his classroom for 25 years proclaiming, “One Nation Under God,” “In God We Trust,” and similar messages. The court refused to apply the *Garcetti* analysis because of the academic environment in which the speech arose, and held that *Tinker v. Des Moines Independent Community School Dist.*<sup>21</sup> was still good law, i.e., that teachers did not give up their free speech rights simply by virtue of their employment. The court found in the teacher’s favor.

The right of a high school teacher to criticize his employer’s deficiencies in implementing a state law requiring the infusion of African and African-American history in the history curriculum was recognized in *Sherrod v. School Board of Palm Beach County*.<sup>22</sup>

Several cases involving university-level speech have fared equally as well where courts have carved out an academic freedom exception to the *Garcetti* “official duties” doctrine. For example, in *Kerr v. Hurd*,<sup>23</sup> the court ruled that a medical school professor’s speech urging the use of forceps-assisted vaginal deliveries of babies rather than unnecessary Cesarean section deliveries is entitled to First Amendment protection even though he made the statement in his role as an employee of the medical school.

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### ***Decisions Favoring Free Speech Rights***

Of course, not all federal decisions after *Garcetti* have produced pro-employer results. Several have delineated circumstances in which the public employee speaks as a citizen. In *Reinhardt v. Albuquerque Public Schools Board of Education*,<sup>24</sup> a speech pathologist filed a complaint with the state education department alleging that her employer was violating the federal

Individuals with Disabilities in Education Act. The court found this speech to be protected under the First Amendment because she had not been hired to ensure the school district’s compliance with IDEA. Her consultation with an attorney and the filing of a complaint with the state went beyond her official responsibilities, as she had no duty to report such violations.

Offering truthful testimony in a variety of tribunals has been held to be protected on the theory that the duty to appear in court and give truthful testimony is a duty of all citizens generally. The public employee’s status should not rob him or her of that basic constitutional protection.<sup>25</sup>

Some courts have also recognized that complaints made outside the chain of command do not constitute speech made

as part of the employee's official duties. In *McAvey v. Orange-Ulster Boces*,<sup>26</sup> an employee who complained both internally and to a news reporter and the local police department about possible fraud and suspected student abuse and the school's failure to investigate such abuse was held to be protected speech. In a similar vein, *Kelly v. Huntington Union Free School Dist.*,<sup>27</sup> ruled that teachers were protected by the First Amendment when they complained to their supervisors about the misconduct of a department chair and when they asked their students to urge their parents to attend a school board meeting to protest cuts to the gifted and talented program at the school.

### ***The Ninth Circuit's Approach to Garcetti***

In cases decided by the Ninth Circuit after *Garcetti*, the court has naturally recognized that public employee speech is protected only if the plaintiff spoke about a matter of public concern and if he or she spoke as a private citizen. It has broadly defined "public concern" as being related to "any matter of political, social, or other concern to the community."<sup>28</sup> Subjects of public concern include "unlawful conduct by a government employee, misuse of public funds, wastefulness and inefficiency in managing and operating government entities."<sup>29</sup>

In assessing the "official duties" part of the test, the Ninth Circuit has focused on the employee's actual duties and not on such artifices as whether he or she was reporting up the chain of command or whether the employee aired concerns publicly or within the public employer's organization.<sup>30</sup> It is guided by this test: "Statements are made in the speaker's capacity as citizen if the speaker had no official duty to make the questioned statements, or if the speech was not the product of performing the tasks the employee was paid to perform."<sup>31</sup>

This approach was exemplified in one of the first opportunities the Ninth Circuit had to apply *Garcetti*. In *Freitag v. Ayers*,<sup>32</sup> a female correctional officer complained up the

chain of command that inmates were sexually harassing her. When the officials failed to take action, she wrote to the director of the Department of Corrections and ultimately to a state senator and to the California inspector general. The court held that her complaints to officials in the chain of command were made pursuant to her official duties, which included reporting inmate misconduct. But her reports to the senator and inspector general constituted speech as a citizen because her official duties did not include reporting to those individuals.

The court took a similar approach a year later in *Marable v. Nitchman*,<sup>33</sup> a case in which the chief engineer on a Washington State Ferry made internal and external complaints of corrupt financial practices by managers of the ferry system. Complaining about corrupt practices was totally outside Marable's duties as chief engineer. His speech was therefore protected.

Most recently, the Ninth Circuit has continued to carefully analyze when speech is part of official duties and when it is spoken in the capacity of citizen. In *Anthoine v. North Central Counties Consortium*,<sup>34</sup> a low-level employee jumped the chain of command and reported directly to the chairman of the consortium's governing board that his immediate supervisor had lied about that status of the agency's compliance with legal obligations. Because the employer presented no evidence that the employee's speech was "a product of performing the tasks the employee was paid to perform, the employer was not entitled to summary judgment."<sup>35</sup>

### ***Will Garcetti Be the Rule Under the California Constitution?***

When the U.S. Supreme Court retreats from previous protections of speech, the question arises whether California will follow suit or apply the state constitution's Liberty of Speech Clause to chart a different course.<sup>36</sup> The state Supreme Court has done so in two notable cases: *Robins v. Prune-*

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yard Shopping Center,<sup>37</sup> in which it held that private shopping centers will be treated as public forums, in contrast to the federal rule established in *Hudgens v. NLRB*.<sup>38</sup> The California Supreme Court also forged its own view in *Gerawan Farming, Inc. v. Lyons*,<sup>39</sup> holding that commercial speech is entitled to greater protection under the state constitution than under the federal constitution, eschewing the federal rule established in *Glickman v. Wileman Bros. & Elliot, Inc.*<sup>40</sup>

Since *Garcetti*, one California Court of Appeal has addressed this question. In *Kaye v. San Diego County Public Law Library*,<sup>41</sup> the Fourth District upheld the termination of a law librarian who had been fired for sending emails to his superiors and coworkers accusing management of being hypocritical, autocratic, and deliberately squandering public funds. The communication did not go beyond the library, but the governing board concluded that the emails were “intentionally calculated to disrupt the office, undermine the authority of the Director, and impinge upon working relationships within the Library.” The court held that *Garcetti* applied to cases brought under the Liberty of Speech Clause and upheld summary judgment against the plaintiff without any analysis of whether the speech touched on a matter of public concern or whether it fell within the speaker’s official duties.

In response to the self-represented plaintiff’s argument that the California Constitution offers greater protection for free speech, the *Kaye* decision described four factors that would justify California courts departing from federal First Amendment jurisprudence:

1. Something in the language or history of the California provision suggests that the issue should be resolved differently than under the federal rule;
2. The U.S. Supreme Court issues a decision that limits rights established by earlier precedent in a manner inconsistent with the spirit of the earlier opinion;
3. Vigorous dissenting opinions or incisive academic criticism of the federal decision; or
4. Following the federal rule would overturn established California doctrine affecting greater rights.

Despite giving lip service to many state court decisions that describe the Liberty of Speech Clause as broader and more protective than the First Amendment, the *Kaye* court

found that none of the factors mentioned above warranted a departure from *Garcetti* and upheld summary judgment against the librarian. This conclusion is rather remarkable in that it ignored several facts that point to the opposite conclusion and ignored the substantial body of California law that departs from federal interpretation which is more restrictive of free speech. Applying this four-part test, the opposite conclusion can and should be reached.

The first part of the test — something in the history of the state constitution suggests a different resolution than what is dictated by the federal rule and following the federal rule would overturn established California doctrine affecting greater rights — has been answered by the California Supreme Court. As that court noted in *Fashion Valley Mall v. NLRB*,<sup>42</sup> a case in which the court refused to follow federal precedent in *Hudgens v. NLRB*,<sup>43</sup> and held that privately owned shopping malls were public forums under state law:

Our decision that the California Constitution protects the right to free speech in a shopping mall, even though the federal constitution does not, stems from the differences between the First Amendment...and article I, section 2 of the California Constitution. [quoting *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 486, “It is beyond peradventure that article I’s free speech clause enjoys existence and force independent of the First Amendment’s. In Section 24, article I states, in these very terms, that ‘[r]ights guaranteed by [the California Constitution] are not dependent on those guaranteed by the United States Constitution.’ For the California Constitution is now, and has always been, a ‘document of independent force and effect’ particularly in the area of individual liberties.”<sup>44</sup>

The textual difference in the constitutions, and in particular Section 24’s express declaration of the independence of the state constitution, taken together with decisions such as *Fashion Valley* and *Gerawan*, provide ample justification to satisfy the first prong of *Kaye*’s test.

In applying the second part of the test — the U.S. Supreme Court’s decision limits rights established by earlier precedent in a manner inconsistent with the spirit of the earlier opinion — *Kaye* failed to recognize the sea change *Garcetti* represented in the case law regarding public employee speech. Prior to *Garcetti*, public employees’ speech would be protected if it was about a matter of public concern, and

if after weighing the employee's interest in commenting as a citizen on matters of public concern against the government's interest in its efficient administration, the court concluded that the balance tipped in favor of the speech.<sup>45</sup>

*Garcetti* added an additional barrier to obtaining constitutional protection for public employee speech by imposing the "official duties" test, as "the First Amendment does not prohibit managerial discipline based on an employee's expression made pursuant to official duties."<sup>46</sup> Although the *Pickering/Connick* line of cases referred to the employee's interest in commenting as a citizen on matters of public concern, judicial focus was always on the subject matter of the speech and the balancing of interests between free expression and the efficiency of the government enterprise. It was not until *Garcetti* that First Amendment protection would hinge on a mechanistic analysis of job duties.<sup>47</sup>

The third part of the test — the presence of a vigorous dissent or incisive academic criticism of the federal decision — was ignored by the *Kaye* court in a breezily dismissive observation that many cases have dissents and criticism. *Garcetti* was a 5-4 decision with very scholarly and well-reasoned dissents penned by Justices Souter and Breyer. Simply because they lack the bombastic insult that frequently characterizes Justice Scalia's opinions does not mean they were not "vigorous."

Finally, following *Garcetti* would arguably overturn established California doctrine affecting greater rights. Several pre-*Garcetti* state court decisions involving public employees who were retaliated against for complaining about government malfeasance concluded that their speech was protected using the *Pickering* balancing test.<sup>48</sup> In cases that did not involve retaliation for whistleblowing, California courts have also applied a balancing test to protect public employees' right to engage in political speech with each other in the workplace.<sup>49</sup> *Garcetti* is a departure from this more protective approach to free speech rights of public employees in general.

The California Supreme Court denied *Kaye*'s petition for review, so we will not have the ultimately definitive view

of whether *Garcetti* will be imported into the California Constitution for the foreseeable future.

### *Non-Constitutional Sources of Protection for Public Employee Speech*

In the meantime, California public employees are not completely without remedies if they have been retaliated against for engaging in *Garcetti*-type speech, i.e., that which complains about government wrongdoing, fraud, or misuse of funds, or seeks to protect the health and safety of others and is a matter of public concern. Several specific state and federal laws would apply to many of the cases discussed earlier in this article, although not all statutes provide the same robust protection of the Constitution. Moreover, most of these statutes are subject to complex exhaustion of administrative remedies and pre-filing claims requirements, and some have statutes of limitations as short as 30 or 60 days.

The most broadly protective statute, Labor Code Sec. 1102.5, prohibits retaliation against employees, including public employees, who disclose information to a "government or law enforcement agency" where the employee has reasonable cause to believe the information discloses a violation of a federal or state statute, or non-compliance with a state or federal rule or regulation. This section also explicitly protects an employee from retaliation for *refusing* to engage in conduct that would be a violation of a federal or state statute or regulation.<sup>50</sup> Subsection (e) also makes explicit that a public employee's report or complaint to his or her "employer" constitutes a disclosure to the government agency. Left unsettled is whether a complaint to a lower-level administrator is considered a report to the employer or agency.

The California False Claims Act,<sup>51</sup> prohibits employers from retaliating against employees in the terms and conditions of their employment for disclosing information to "a government or law enforcement agency" or for furthering a false claims action. This statute was applied to vindicate

*Garcetti added an additional barrier to obtaining constitutional protection for public employee speech by imposing the 'official duties' test.*

the rights of a teacher who was dismissed for complaining about inadequate staffing at a juvenile detention center.<sup>52</sup> The federal False Claims Act,<sup>53</sup> also applies to public employees who are retaliated against for reporting to federal authorities instances of false information submitted by the employer in order to obtain federal grants.<sup>54</sup>

The California Whistleblower Protection Act,<sup>55</sup> protects employees of the state, California State University, and the University of California from retaliation for reporting acts that violate state or federal law or regulation, or that constitute corruption, malfeasance, fraud, coercion, misuse of government property, incompetency, or inefficiency, etc. Similar statutes protect school district employees<sup>56</sup> and municipal employees.<sup>57</sup> The federal Whistleblower Protection Act provides similar protections.<sup>58</sup>

Employees who express their opposition to workplace discrimination on the basis of any characteristic protected by California's Fair Employment and Housing Act are protected against employer retaliation.<sup>59</sup> Title VII has an analogous provision.<sup>60</sup> Both of these statutes protect employees who "oppose" discriminatory practices as well as those who file charges with the Equal Employment Opportunity Commission or Department of Fair Employment and Housing, or assist with investigations or testify at hearings on the charges. The complaining employee is protected even if he or she was not legally correct that discrimination had actually occurred.<sup>61</sup>

Public employees who complain about race discrimination either in employment or on behalf of third parties, such as students, will find protection against retaliation under the Civil Rights laws.<sup>62</sup>

Section 504 of the federal Rehabilitation Act protects those who complain about discriminatory treatment of individuals with disabilities, but applies only to employers who receive federal funds, which includes most public schools and universities. *Settlegoode v. Portland Public Schools*<sup>63</sup> protected a special education teacher whose contract was not renewed after she complained about the school district's failure to provide adequate educational services to disabled students. So too will school employees who complain about sex discrimination

against students or employees be protected against retaliation under Title IX.<sup>64</sup> The same principle applies to complaints about race discrimination in schools.<sup>65</sup>

Employees who complain about health and safety issues on the job are protected against retaliation in California by Labor Code Sec. 6310. For example, *Hentzl v. Singer*<sup>66</sup> held that an employee who agitated for a smoke-free workplace was protected against retaliatory discharge in violation of public policy. Federal statutes protecting health and safety whistleblowers are legion, frequently particularized to a specific industry, and beyond the scope of this article to survey.

In light of all these statutory protections, is it so important to have a constitutional protection for public employee speech that arises from employees' revelations about government activity that is of public concern? From both an employee perspective and for the good of the public interest, the answer is yes. The statutes are no substitute for constitutional protection. Many have extremely short time lines within which to file the necessary administrative charges or complaints, e.g., 30 or 60 days. Failing to exhaust those administrative remedies can result in the cause of action being dismissed. Some of the statutes require a report to the governmental agency, and it is far from clear whether a report to an immediate lower-level supervisor constitutes a report to the government agency.

Moreover, the typical whistleblower protection statute does not address all expressions that clearly fall within the realm of public concern. Most cover reports by employees of statutory violations, fraud, waste, or inefficiency, but would not necessarily apply to an employee's complaint about policy matters. For example, a teacher who complains that her principal fails to support her in student discipline, and that there is a pattern in the school district of not supporting teachers when they discipline students, is not complaining about illegal or wasteful conduct. Protection under a whistleblower law is far from clear. Or imagine a teacher who expressed his strong disagreement with the method selected by his employer to teach reading in the primary grades; or the firefighter responsible for assigning shifts who complained that recent financial cutbacks leave the city unprotected.

These statements undoubtedly relate to matters of public concern, but they do not fit within common definitions of whistleblowing. Because an employer could easily make a convincing claim that the teacher's and firefighter's speech is part of their official duties, they are vulnerable to retaliation and would have no recourse.

## Conclusion

Public employees have information that empowers the rest of the citizenry to make informed decisions about the conduct of the public's business. It is usually through public employees that we as a society can operate as effective overseers of the government, and the evisceration of their rights under the *Garcetti* decision harms us all.

- 1 (2006) 547 U.S. 410.
- 2 (1983) 461 U.S. 138.
- 3 *Garcetti v. Ceballos*, *supra*, 547 U.S. at 421-422.
- 4 See *International Federation of Professional & Technical Engineers v. Superior Court* (2007) 42 Cal.4th 319 (public employees' salaries are not entitled to the "personnel file" exception under the California Public records Act).
- 5 (D. Conn. 2007) 2006 WL 3791405. This case was not reported in the official federal reporters. The same is true for all other cases cited in this article bearing the "WL" citation.
- 6 It is also true that the California Supreme Court has demurred to invitations to deviate from federal free speech jurisprudence in other contexts such as the federal public forum doctrine. See *San Leandro Teachers Assn. v. San Leandro Unified School Dist.* (2009) 46 Cal.4th 822.
- 7 (S.D. N.Y. 2010) 2010 WL 1047622.
- 8 *Ezuma v. City University of New York* (E.D. N.Y. 2009) 665 F.Supp.2d 70.
- 9 *Converse v. City of Oklahoma* (W.D. Okla. 2009) 649 F.Supp.2d 1310.
- 10 *Abdur-Rahman v. Walker* (11th Cir. 2009) 567 F.3d 1278.
- 11 *Battle v. Regents of the State of Georgia* (11th Cir. 2006) 468 F.3d. 755.
- 12 *Wilburn v. Robinson* (D.C. Cir. 2007) 480 F.3d 1140.

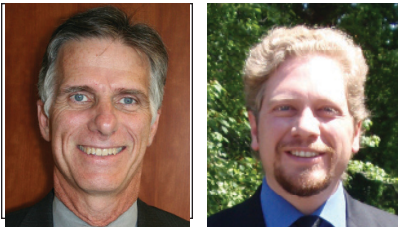
- 13 (2d Cir. 2010) 593 F.3d 196.
- 14 (D. Me. 2010) 680 F.Supp.2d 263.
- 15 See also *Rodriguez v. International Leadership Charter School* (SDNY 2009) 2009 WL 860622 (special education teacher's complaints to school officials that her students' needs were not being met were spoken in her official capacity and therefore not protected).
- 16 (10th Cir. 2007) 473 F.3d 1323.
- 17 The court noted: "We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." *Garcetti v. Ceballos*, *supra*, 547 U.S. at 425.
- 18 (7th Cir. 2007) 474 F.3d 477.
- 19 (S.D. Ohio 2008) 2008 WL 2987174.
- 20 (S.D. Cal. 2010) 2010 WL 768856.
- 21 (1969) 393 U.S. 503.
- 22 (S.D. Fla. 2010) 703 F.Supp.2d 1279. In some ways, this was an easier case for the plaintiff to prevail in even using the "official duties" test, as the teacher's complaints were made at a public meeting of the school board, which provided an additional justification to conclude that the plaintiff was speaking as a citizen, rather than as part of his official duties.
- 23 (S.D. Ohio 2010) 694 F.Supp.2d 817.
- 24 (10th Cir. 2010) 595 F.3d 1126.
- 25 *Whitfield v. Chartiers Valley School Dist.* (W.D. Pa. 2010) 707 F.Supp.2d 561.
- 26 (S.D. N.Y. 2009) 2010 WL 2744745.
- 27 (E.D. N.Y. 2009) 675 F. Supp. 2d 283.
- 28 *Huppert v. City of Pittsburgh* (9th Cir. 2009) 574 F.3d 696, 703.
- 29 *Huppert*, *supra* at p. 703-04.
- 30 See *Thomas v. City of Beaverton* (9th Cir. 2004) 379 F.3d 802, 810.
- 31 *Eng v. Cooley* (9th Cir. 2009) 552 F.3d 1062.
- 32 (9th Cir. 2006) 468 F.3d 528.
- 33 (9th Cir. 2007) 511 F.3d 924.
- 34 (9th Cir. 2010) 605 F.3d 740.
- 35 See also *Alaska v. EEOC* (9th Cir. 2009) 564 F.3d 1062, an aide to the governor who spoke publically about governmental misconduct was not acting in the scope of her duties because those duties "didn't require her to complain."
- 36 This clause provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."



- 37 (1979) 23 Cal.3d 899.
- 38 (1976) 424 U.S. 507.
- 39 (2000) 24 Cal.4th 468.
- 40 (1997) 521 U.S. 457. It is also true that the California Supreme Court has demurred to invitations to deviate from federal free speech jurisprudence in other contexts such as the federal public forum doctrine. See *San Leandro Teachers Assn. v. San Leandro Unified School Dist.* (2009) 46 Cal.4th 822.
- 41 (2009) 179 Cal.App.4th 48.
- 42 (2007) 42 Cal.4th 850.
- 43 (1976) 424 U.S. 507.
- 44 *Fashion Valley Mall v. NLRB*, *supra*, 42 Cal.4th at 862.
- 45 See *Pickering v. Board of Education* (1968) 391 U.S. 563 (teacher who wrote a letter to the local newspaper criticizing his employer handling of bond issues and allocation of financial resources was protected by the First Amendment against retaliatory discharge because his speech did not impede his ability to do his job and was clearly about a matter of public concern); *Givhan v. Western Line Cons. School Dist.* (1979) 439 U.S. 410 (school teacher who complained to her superiors about the lack of desegregation in her school was entitled to First Amendment protection); *Connick v. Meyers* (1983) 481 U.S. 138 (workplace grievances are not matters of public concern and therefore not entitled to constitutional protection).
- 46 *Garcetti*, *supra*, 547 U.S. at 424.
- 47 This author is not the only one to characterize *Garcetti* as a significant departure from earlier precedent. See *Doucette v. Minoqua Hazelhurst, Lake Tomabawk Joint School Dist. No. 1* (W.D. Wis. 2008) 2008 WL 2412988: “In *Garcetti v. Ceballos* [citation omitted], the Supreme Court dramatically changed the landscape of retaliation cases brought by public employees when it held that the First Amendment’s protections do not extend to statements made by employees ‘pursuant to their official duties.’ This holding imposes a substantial new obstacle for employees: most cases decided by the court of appeals since *Garcetti* have resulted in dismissal as a result of a conclusion that the plaintiff was speaking as an employee rather than as a citizen.”
- 48 *Kirchmann v. Lake Elsinore Unified School Dist.* (1997) 57 Cal. App.4th 595; *Gray v. County of Tulare* (1995) 32 Cal.App.4th 1079; *Southern California Rapid Transit Dist. v. Superior Court* (1994) 30 Cal.App.4th 713.
- 49 *Los Angeles Teachers Union v. Los Angeles City Board of Education* (1969) 71 Cal.2d 551; *California Teachers Assn. v. San Diego Unified School Dist.* (1994) 45 Cal.App.4th 1383.
- 50 Lab. Code Sec. 1102.5c.
- 51 Gov. Code Secs.12650 et seq.
- 52 *LaVine v. Weis* (1998) 68 Cal.App.4th 758. However the California Supreme Court held that the main provisions of the False Claims Act are not applicable to public entities. *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164. While this case holds that public entities cannot be sued in *qui tam* actions by private parties, it remains unclear whether the retaliation section of the False Claims Act is now also not applicable to public entities.
- 53 31 USC Sec. 3730.
- 54 *U.S. ex rel. Sarafoglou v. Well Medical College of Cornell Univ.* (S.D. N.Y. 2006) 451 F.Supp.2d 613.
- 55 Gov. Code Sec. 8547.
- 56 Ed. Code Sec. 44110.
- 57 Gov. Code Sec. 53298.
- 58 5 USC Secs. 2302(b)(8) and (b)(9).
- 59 Gov. Code Sec. 12940(h). The traits protected by the FEHA are race, age, sex, religion, national origin, sexual orientation, gender, physical or mental disability, medical condition, and marital status. Harassment based on any of these characteristics is also prohibited, and complaints about such harassment are also encompassed in the anti-retaliation section of FEHA.
- 60 42 USCA Sec. 2000-e(a).
- 61 *Burlington Northern & Santa Fe Railway Co. v. White* (2006) 548 U.S. 53.
- 62 42 USC Sec. 1981. *Humphries v. CBOCS West* (7th Cir. 2007) 474 F.3d 387; *Tucker v. Talledega City Schools* (11th Cir. 2006) 171 Fed. Appx. 289 (Sec. 1981 applies to retaliation for complaints about discrimination against students).
- 63 (9th Cir. 2004) 371 F.3d 503, 516.
- 64 *Jackson v. Birmingham Board of Education* (2005) 544 U.S. 167.
- 65 See *Peters v. School Board of City of Virginia Beach* (E.D. Va 2007) 2007 WL 295618.
- 66 (1982) 138 Cal.App.3d 290.

# The Mediator's Role as Gatekeeper Under EERA and HEERA

*Paul Roose and Jerry Fecher*



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IN CALIFORNIA public sector labor relations, the state mediator serves as peacemaker. This can be gleaned from Labor Code Section 65, which includes this key sentence:

In the interest of preventing labor disputes the department [of Industrial Relations] shall endeavor to promote sound union-employer relationships.

This mandate, enacted in 1947 and assigned to the State Mediation and Conciliation Service (SMCS) for implementation, underlies all of the work of state mediators. More-defined roles are spelled out in the state's public sector labor relations statutes, put in place in the 1970s. Of all the public sector laws, the Educational Employment Relations Act and the Higher Education Employer-Employee Relations Act stand alone in granting a gate-keeping component to the mediator, who decides whether or not to release a case to the more adversarial formal phase of factfinding.

This article explores that unique role. It explains what the statutes say about the impasse process in the K-14 and public university setting, and the mediator's part in that process. It provides some statistics on impasses under both acts — how many contract negotiations reach impasse, how many are resolved in mediation, how many go on to factfinding, and how many result in strikes.

The article describes typical mediation scenarios and how mediators respond to the parties' bargaining tactics and strategies. It covers what to expect from your mediator in these impasse cases. And it explains how a mediator works with the parties to move efficiently through the mediation process to get a deal — or to determine that no deal is possible at the time.

### *Fewer Impasses — But Harder Cases*

Looking at the last four years, the number of contract talks ending in impasse under California's education labor relations laws has declined significantly. From a high of 180 impasses in 2006-07, the number this past fiscal year was 85.

But the percentage of cases ending in factfinding has jumped. Only 12 percent of impasses were released to factfinding in 2006-07, whereas last year 32 percent made it past the mediation process. It is interesting to note that the number of cases going to factfinding each year has remained relatively steady — in the low- to mid-20s. The following chart shows the trends.

PERB impasse cases — EERA and HEERA	Number of cases in mediation, closed by FY	Average hours per case	Number (and %) released to factfinding	Number of strikes
09/10	85	29	27 (32%)	3
08/09	79	33	22 (28%)	1
07/08	138	32	28 (20%)	1
06/07	180	33	22 (12%)	1

Also noteworthy is the number of hours per case — it has remained relatively steady in the low 30s over this four-year period. This generally reflects that the parties met with a mediator on the average of three or four days before making a deal, or discovering that they could not make one. And the number of strikes in public education — in a state with over 1,000 school districts, dozens of community college districts, and a massive U.C. and CSU system — has ranged from one to three a year.

Considering there are normally at least two bargaining units (certificated and classified) recognized by each public education employer, and in many cases multiple units, it is remarkable how few cases go to factfinding — or beyond.

The labor or management advocate in the middle of one of the intractable disputes, however, takes small consolation from the statistics. This is why it is important to talk about the role of the state mediator in those toughest cases — and what advocates can do to improve outcomes.

### *To Release or Not to Release — That Is the Question*

One of the most challenging aspects of the state mediator's job is to determine whether and when to release an EERA or HEERA dispute to factfinding, a decision not taken lightly since the consequences of the decision are significant. With the release by the mediator, the parties may proceed to factfinding. Unless they settle at the factfinding step, the union is presumptively in strike-legal status, and the employer is free to unilaterally implement. Without the mediator's release, there are significant legal barriers to unilateral action by either side.

The mediator's authority as gatekeeper to factfinding

derives from the language in EERA and HEERA. The applicable reference is contained in EERA Article 9 Impasse Procedures, section 3548.1. Factfinding:

If the mediator is unable to effect settlement of the controversy within 15 days after his appointment and the mediator

declares that factfinding is appropriate to the resolution of the impasse, either party may, by written notification to the other, request that their differences be submitted to a factfinding panel.

Identical wording is found in HEERA Article 9 Impasse Procedures, section 3591.

As a practical matter, the mediator's willingness to release a case is substantially influenced by the desires of the parties. There are three typical scenarios:

- Both parties are interested in continuing mediation
- Both parties want to be released
- One party wants release but the other does not

Under the first scenario, where both parties want continued mediation, it is unlikely that a mediator would release the parties to factfinding. In one instance, the mediator went so far as to meet with a school district for 30 sessions and 300 hours before reaching a tentative agreement. Normally, this is a situation where progress is being made, both sides

perceive that to be the case, and each side finds value in the continued efforts.

One would think that in scenario two, the mediator would automatically release the parties to factfinding where both parties were requesting to move on. This is not necessarily so. It would be unusual for a mediator to release a case after just one meeting. A second session allows time for the teams to go back to their principals, report on the outcome of the first session, and get additional direction. A second session often will bring new ideas for settlement.

Moreover, the mediator has to judge the conditions based on a 360-degree review of all factors. Sometimes advocates feel compelled to speak on behalf of the most intransigent elements on their teams and push for release. A demand for factfinding is generally a posture showing that the party believes its positions will prevail in a factfinder's recommendation. That side may believe it can parlay that recommendation into a weapon to bludgeon the other side into submission. A demand for factfinding is primarily a message: "We are prepared to fight, and we believe we will prevail." In situations where both sides are demanding release, it is often the case that both sides are spoiling for a fight.

But the mediator may have picked up clues during conversations with key players that a settlement is achievable. The mediator goes back to SMCS' original purpose under Labor Code Section 65 — to promote harmonious labor relations. It is the mediator's role to provide a forum to reframe the issues so the parties can get back to looking at their underlying interests. When the parties have run out of ideas, the mediator will often float options.

The need to try every possible avenue to a deal must, however, be tempered by realism on the part of the mediator. Every labor-management dispute settles, eventually. But sometimes, the timing is not right at the initial mediation phase. Mediators are tasked with making that judgment at the critical juncture.

Clearly, the most difficult situation for the parties and the mediator is scenario three, when one side demands release and the other wants to continue mediation. It is often the moving party — the party seeking the most change in the collective bargaining agreement — that becomes impatient. In the last couple of years, as education budgets have been squeezed, it has tended to be the employers who are in a

hurry to get through mediation and on to the next phase. They are eager to get to the point where they can legally impose furlough days, benefit cuts, or caps. In prior years, it was the unions who generally were the moving parties seeking a quick trip through the mediation process because they were seeking compensation improvements. They were eager to get strike-legal.

The mediator remains studiously neutral in this phase of the dispute and tries to set aside the consideration of which side favors release and which side does not. Rather, the mediator judges whether continued mediation might lead to a settlement. After all, a settlement produced by one or two more meetings is a much more expeditious route to a final product than a lengthy factfinding process. While factfinding has statutory time frames under both laws, it is difficult to find a neutral factfinder who has available dates to complete the process within those time constraints. And the mediator, because of Labor Code Section 65, favors a solution resulting from a bargained agreement, not one imposed through a strike or unilateral implementation.

### *Mediator Strategies for Getting Unstuck*

The strategies mediators employ to get the parties to go forward are as diverse as the individual style of each mediator. There are, however, some strategies that are frequently used to move toward a resolution.

**Subcommittees.** It is rare when only one issue is presented to a mediator in a contract impasse. Often, there are multiple issues of disagreement at the initial meeting between the parties. Some issues, while difficult to resolve, are simple in structure, such as when a management position of no increase in pay contrasts with the union's position of a 2 percent wage hike. Conversely, some issues might be so complex that they take up too much time and foment disagreement on minutia, resulting in loss of focus. One such situation would be a proposal to revamp the health care plans available to employees. In many cases, the management and union people who are the most experienced in these areas might not even be on the main negotiating committee. Additionally, the parties are often dealing with third-party brokers who present several plan options from several different providers. There are also numerous details such as

copayments and deductibles to discuss, as well as availability of the network to members.

Given such complexities, mediators often suggest the formation of a subcommittee within the mediation process. A mediation subcommittee includes a couple of knowledgeable people from each team, possibly people from outside the teams, and the mediator. All discussions fall under mediation confidentiality. The subcommittee does not make decisions, only recommendations back to the whole teams.

Alternatively, the mediator may suggest a side letter or contract provision setting up a post-settlement subcommittee to work on complex details. In this scenario, while the parties do not cede their right to argue their respective positions vigorously in that forum, the overall issues that stand in the way of a signed contract can be reduced. The advantage to a more expeditious resolution cannot be emphasized enough, especially in more recent times when overall economic conditions and state and federal funding reductions have wrangled with public sector budgets.

For management, getting a more immediate agreement on issues such as furlough days or compensation may stave off immediate budgetary crises. In many cases, such a scenario is much more palatable for the agency than waiting for all the details of complex issues to be resolved in mediation. For unions, an immediate resolution on direct economic issues while allowing a subcommittee to deal with a complex issue may help to cement a more desirable position for its members, especially when an agency's financial position has been getting worse over time.

**Sidebars.** In most contract impasse mediations, there are several individuals on each committee. They can include attorneys representing each side, union presidents and other officials, human resources personnel, supervisors, and employees. Every committee has a different makeup, and the personalities and styles extend across a wide continuum. Often, there are one or two people on each side who are more likely to make movement, and they are usually joined

by one or two people to whom the idea of any compromise is odious. There are times when the parties are extremely deadlocked due to the strength of the non-compromisers on each committee.

Mediators will frequently use a "sidebar" to attempt to break the deadlock. A sidebar is a meeting with one or two people from each committee, along with the mediator. Typically, it includes the chief spokesperson from each team, plus the highest-ranking individual from each side (such as union president or superintendent). The timing of such

a request is often foundational to its success, and it largely is determined by the experience of each individual mediator in a particular case rather than by an objective test. Mediators conduct a sidebar meeting only if both parties agree to do so voluntarily. One pitfall in asking for a sidebar is that some committee members (especially the strong non-compromisers) may feel left out of the proceedings. The explanation that anything coming out of the meeting will be brought back to the committee may help ease that concern.

The mediator is there to guide the discussion in the sidebar. But often the parties, being unburdened from their full teams, will talk freely. The mediator allows this discussion to flow without interjecting his or her own ideas, as this uninterrupted conversation often produces the best results. On some occasions, one or both of the parties will express anger in a manner that would not have taken place in front of their whole team. At this point, the mediator may step in to keep the discussion on track.

The sidebar is also extremely helpful toward the end of the mediation process if there appears to be a hopeless deadlock. Those who participate in the sidebar may more clearly understand the risks of not settling the dispute (such as deferred implementation of needed proposals or the costs in presenting a factfinding case), as they frequently happen to be the ones who have to justify the expense of moving the matter forward to their respective organizations.

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hopeless deadlock.*



**Involving higher-ups.** At certain points in the mediation process, a seemingly absolute deadlock can be broken by the involvement of people not on the committee but who have the authority to extend the parameters of their team's ability to move. Often, negotiating teams are given strict guidelines of what can be offered during mediation. A team may want to go forward but is constrained by directives from other individuals who are not present. As an example, in the educational arena, a superintendent or board members may be able to grant more authority to a management negotiating team in order to "get the deal done." Similarly, a union negotiating team may seek broader discretion than it had been given from the larger organization with which it is affiliated. It is not uncommon for parameters to be fixed by a statewide or national team that is not at the table.

The least complex manner in which a mediator can work with higher-ups is when either party voluntarily suggests doing so. A management spokesperson may ask to run a union proposal past the superintendent or a board member to see if there is an ability to move. It must be emphasized that getting higher-ups involved is rarely used at the outset of mediation, and only towards the end when the issues that remain are either few or singular. If either team is requesting to talk to higher-ups at the beginning of the process, mediation will be extremely difficult and have a high probability of failure.

It is problematic when one side needs to consult frequently with someone outside the mediation process while the other side is ready to work. Interruptions to consult with higher-ups can disrupt the flow and conversation elemental in reaching a compromise. Moreover, there is no guarantee that these people are immediately accessible, and mediators could face requests to end that day's proceedings prematurely because the person who needs to be consulted cannot be reached. This is why at the very first meeting, mediators often request that both teams have their decision makers present and ready to make decisions.

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accomplished.*

Even when used sparingly toward the end of a mediation process, additional problems can arise when someone arrives late to the process. A higher-up who has not been involved from the beginning is often new to the dynamics that have evolved and the work that has been accomplished. While they may offer a fresh perspective, their involvement can also precipitate a shut down since they may believe that their team has given up too much already, may not comprehend the reasons for each side's movements, and may not fully understand the ramifications of entering into the factfinding procedure.

Even if there is a sense that bringing in higher-ups might assist in breaking the deadlock, mediators avoid doing so without a team's consent because it sends a message to the affected team that their authority is not respected. Ultimately, the parties are in dispute — not the mediator. The mediator works with and through both teams to attempt a resolution.

### ***The End Game: Mediators' Strategies to Achieve Agreement***

Many EERA and HEERA impasses settle when failure appears certain. Mediators will employ some or all of the following strategies to test whether

a deal is achievable.

**Meeting face to face.** Prior to ending the mediation process, a mediator may ask the parties to convene one last time in a face-to-face meeting. Typically, the request may be that the chief spokesperson from each team, plus the local president and superintendent or chancellor, meet with the mediator. The purpose of the meeting is to check whether "something was lost in translation" as the mediator shuttled between caucuses. It is also an opportunity for the parties to look each other in the eye and decide "do we really want to go to the next, more adversarial, phase? What will that do to our union/district/relationship?"

**Bringing in high-ranking individuals.** Some mediators may insist that the highest ranking individuals in each

organization get directly involved in the discussions, prior to releasing the case to factfinding. On the management side, this usually involves the superintendent or community college president. On the union side, this may involve someone higher than the union representative who serves the local or chapter. Further involvement is not requested as an attempt to bypass the chief spokesperson from either side. It is a reflection of the reality that certain individuals are in positions of influence to determine the outcome.

**Allowing time to reflect.** Even if all settlement discussions fail and the mediator ends the mediation without setting an additional date, the mediator may delay releasing the case. Some will wait one week before writing the letter to the Public Employment Relations Board. This gives the parties one more opportunity to return to their governing bodies and explain the gap between the parties, seek additional authority, and possibly come up with a creative solution.

**Bringing in SMCS post-factfinding.** Finally, some mediators ask the parties to agree to use a state mediator in any post-factfinding negotiations, if it gets that far. This goes back to the Labor Code 65 framework outlined at the beginning of this article. SMCS' role is to provide mediation in the interests of preventing work stoppages and promoting harmonious labor-management relations. If a dispute has reached the stage where a factfinder's report

has been issued and no settlement has been reached, then it is ripe for a strike or unilateral implementation of terms and conditions. At this critical juncture, the mediator wants to help the parties avoid unilateral action. If the mediator gets involved at this stage, he or she serves at the pleasure of both sides, as long as they want the mediator there. In this phase, the mediator does not have authority to hold the parties in mediation.

### ***The Mediator's Single Goal — Tentative Agreement***

Whether the parties are talking about a 5 percent raise or a 5 percent salary cut, the mediator is in a truly neutral role and has no stake in an outcome. A mediator remains above the policy considerations and principles that drive the content of a tentative agreement. Our goal is to assist the parties in reaching an agreement voluntarily, without strikes or disruptions of service. Obviously, that is not always possible at the impasse mediation stage. But a mediator's job is to make sure that every path has been explored before releasing a case to the next step, in accordance with the underlying public policy encapsulated in the California Labor Code and implemented since 1947 by the California State Mediation and Conciliation Service: "to promote sound union-employer relationships." □

## **SAVE THE DATE**

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Registration information and a speaker list will soon be on the CPER website, <http://cper.berkeley.edu>

# Is California Next?

*Katherine J. Thomson*

*With the startling developments in Wisconsin spreading around the country, CPER Co-Chair Katherine Thomson asks that we consider the justification put forward for a shocking proposal.*

WE ARE NOT Wisconsin or Ohio, but is public employee collective bargaining in California safe from attack? Can proponents of a new initiative convince the California electorate that our public employees are overpaid and blame the unions for a budget deficit that ballooned during the Great Recession?

## *Proposed Constitutional Amendment*

Lanny Ebenstein, a Santa Barbara economist and founder of the California Center for Public Policy, has formed Californians for Public Union Reform, which recently registered as a political committee with the California Secretary of State. Although its initiative has not yet appeared on the attorney general's website, the California Center for Public Policy has posted a proposed amendment to the state Constitution that it attributes to Californians for Public Union Reform. It states:

No state, county, municipal, or like government officer, agent, or governing body is vested with or possesses any authority to recognize any labor union or other employee association as a bargaining agent of any public officers or employees, or to bargain collectively or to enter into any collective bargaining contract, memorandum of understanding, or other agreements with any such union or association or its agents with respect to any matter relating to public officers or employees or their employment or service.

## *Are California Public Employees Overpaid?*

Why does Ebenstein want to end collective bargaining in the public sector? The answer appears in his publications: He believes public employees are overpaid. Ebenstein, a visiting professor in the economics department at the University of



California Santa Barbara, wrote a piece in December for the *Los Angeles Business Journal* entitled, “Unions Push Pay Out of Scale.” The article excerpted parts of his study, “Reforming Public Employee Compensation and Pensions.”<sup>1</sup> The paper lays out the salaries of clerical workers employed by the cities of Los Angeles and Santa Barbara. It implies that the salary for a worker with five years of experience is higher than in the private sector, but does not specify any salary of a comparable private sector position. The study then looks at compensation of managers and elected officials of the city of Bell, although they were not unionized.

His comparison of paid sick leave days asserts that the standard in the private sector is six days that are lost if not used. Other public sector leave benefits are described, but there is no information on what the most common leave policy is for a private employer in Los Angeles or Santa Barbara. A section describing public employee pensions follows, but with no comparison to private sector pensions.

One recent study that does make the comparisons is, “The Truth about Public Employees in California: They are neither Overpaid nor Overcompensated.”<sup>2</sup> The result: the picture is complicated.

The study reports that, on average, California public employees’ pay is about 7 percent lower than pay in the private sector, but it acknowledges that benefits of public workers are more generous. However, once education, experience, and other factors that influence pay are taken into account, there is no statistically significant difference in compensation costs between the private and public sectors. The authors examined only the compensation of full-time employees in 2009. Total compensation, including wages and benefits, was measured by the employer’s cost of employing the worker.

The overall comparisons come from a statistical regression analysis that controls for education, experience, gender, race, disability, hours of work, and the size of the

employer. That breakdown is necessary for the study to avoid misleading results. For example, 55 percent of public workers have a bachelor’s degree or higher education, compared to 35 percent in the private sector. Large employers pay 35 percent more than smaller ones, and public entities are generally medium or large employers. Firms with at least 500 employees provide 33.5 percent of employee total compensation in the form of benefits, whereas small employers’ benefits costs are about 27.2 percent of their employee compensation. While public sector employers pay more for their employees’ health,

retirement, and sick leave costs, they provide less vacation and supplemental pay, such as overtime and bonuses, than do large private sector employers.<sup>3</sup>

A separate analysis shows that less-educated public workers are better compensated than employees with the same educational background in the private sector. Employees who did not graduate from high school are paid 14 percent more than their counterparts in the private sector, and the compensation gap jumps to 24 percent once benefits are included. While these employees could be called “overpaid,” they constitute only 3 percent of the public sector workforce and average \$41,725 in total compensation annually.

The 13 percent of government employees with a high school degree are paid 2 percent less than their private sector counterparts, but receive 7 percent more in total compensation. Those with some college are paid 5 percent higher on average and enjoy 15 percent higher total compensation. Workers with an associates degree are paid the same as they would be paid in the private sector, but receive 10 percent higher total compensation.

Employees with at least a bachelor’s degree would be better off in the private sector. Except for those with masters degrees, they receive salaries that are 12 to 14 percent lower than those in the private sector with similar educational attainment, and are still 5 to 6 percent behind the private sector average when benefits are included. The group that is

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at the greatest disadvantage in the public sector is employees with master's degrees. They earn 33 percent less pay and receive 28 percent less in total compensation. While their counterparts in the private sector earn \$107,000 annually, public employees with a masters degree average only \$71,527 each year.

Employees with less than a bachelor's degree comprise 45 percent of the public sector workforce. The average wage of the highest paid of these categories — associates degree — is \$53,617. The higher earners are the 55 percent of the workforce who earn less than they would in the private sector.

Legislation to weaken public employee collective bargaining and battling reports on compensation are popping up all over the country.<sup>4</sup> It could happen here. \*

1 <http://californiacenterforpublicpolicy.com/Reforming-Public-Employee-Compensation-Pensions.pdf>.

2 By Sylvia Allegretto and Jeffrey Keefe. October 2010. <http://www.irle.berkeley.edu/cwed/wp/2010-03.pdf>. Allegretto is an economist with the Center on Wage and Employment Dynamics at the Institute for Research on Labor and Employment, University of California, Berkeley, and Keefe is a professor at Rutgers University.

3 Health and welfare insurance benefits constitute 11.8 percent of the average public employee's compensation, but only 7.7 percent of the average private sector worker's compensation. Retirement benefits comprise 8.2 percent of public employee costs, but only 3.6 percent of private sector employee costs. The numbers for large private sector employers are 8.2 percent for insurance costs and 5.6 percent for retirement costs.

4 The House held a hearing on March 9, 2011, concerning whether federal workers are overpaid. In Michigan, the governor released a report claiming that state classified employee compensation was 113 percent higher on average than compensation in the private sector, but admitted that the analysis did not compare employees with similar jobs, years of experience, or education. ("Dollars and Sense: How State and Local Governments in Michigan Spend Your Money," [http://www.michigan.gov/documents/snyder/2011\\_Guide\\_to\\_MI\\_Financial\\_Health\\_01312011\\_344193\\_7.pdf](http://www.michigan.gov/documents/snyder/2011_Guide_to_MI_Financial_Health_01312011_344193_7.pdf).) When the Economic Policy Institute did its analysis controlling for education, experience, organizational size, gender, race, ethnicity, citizenship, disability, and hours of work, it found that Michigan public workers are not overpaid compared to their private sector counterparts. ("Are Michigan Public Employees Overcompensated?" By Jeffrey H. Keefe. February 3, 2011. <http://accountabilityinreform.files.wordpress.com/2011/02/epicompstudyfinal.pdf>.)

CPER mourns the loss of our  
supporter, board member,  
and friend.

# John Liebert

1929-2011



John Liebert, pre-eminent public sector labor relations attorney and founding member of Liebert Cassidy Whitmore passed away on February 7, 2011. He was 81. Through his willingness to help, give advice, and contribute articles to the journal, he was as good as a supporter gets and we will miss him both at our meetings and in the labor relations community. Thank you, John.

John emigrated as a boy from Nazi Germany, living in Holland when Hitler struck, and navigating to New York on ships that were attacked by German U-Boats. He entered with thousands of refugees through Ellis Island with his mother and two brothers, to start a new life in America. John grew up in New York City and earned his Bachelor's degree from the University of California, Berkeley and his Juris Doctorate from the Hastings School of Law, University of California, San Francisco.

He built his outstanding reputation in public sector labor relations by successfully representing hundreds of public agencies — including cities and counties, schools, colleges and special districts — throughout California, Arizona, and Nevada. He negotiated hundreds of labor agreements; his expertise encompassed the full sweep of public sector labor and employment law. John is also known for pioneering and establishing labor and employment training programs throughout the state of California.

John began his legal career with the City of Sacramento, first serving as a Deputy City Attorney, then as Assistant City Manager and finally as Labor Relations Counsel. He left Sacramento to join Paterson & Taggart, where he met Dan Cassidy. In 1980, along with four other attorneys, John and Dan formed the firm that is Liebert Cassidy Whitmore, which has grown into California's leading public management labor, employment, and education law firm with over 70 attorneys in four offices.

During the course of his career, John served as a spokesperson for the League of California Cities, National Public Employer Labor Relations Association, and the California State Association of Counties, testifying before legislative committees and federal and state executives on topics ranging from application of the Fair Labor Standards Act to, and extension of the jurisdiction of the Public Employment Relations Board over local agencies. He was recognized by both the National and California Public Employer Labor Relations Associations with their highest awards of excellence.

John was preceded in death by his wife, Marijke and son, Doug. He is survived by son Drew and daughter Deb, 9 grandchildren, 2 great grandchildren and hundreds of colleagues, friends and mentees who will forever be in his debt and collectively strive to honor his legacy.

The family requests that any remembrances be made to the American Diabetes Association.

## Recent Developments

# Local Government

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### Layoff Decision Not Negotiable, Only Effects

WHEN FACED with a budget crisis, the City of Richmond was not required to meet and confer with the firefighters union when it decided to lay off some firefighters as a cost-saving measure, the California Supreme Court ruled in *IAFF Loc. 188 v. PERB*. The city's duty to bargain with the employee organization extends only to the implementation and effects of the layoff decision, said the court, including the number and identity of the employees to be laid off and the timing of the layoffs.

The court also affirmed the lower court's ruling that permits limited review of the Public Employment Relations Board's decision not to issue a complaint based on an unfair practice charge.

The case dates back to 2003, when the city made the decision to lay off 18 of its 90 firefighters. The city sent layoff notices to the firefighters whose positions were being eliminated. On three occasions, the city met with the union to discuss the effects of the layoffs on the remaining firefighters. But, because Local 188 hoped to avert the layoffs, it came to the table arguing that other cost-saving measures were available which would make the layoffs unnecessary.

When the city rejected the union's argument, Local 188 filed an unfair practice charge with PERB, alleging that the city violated the Meyers-

Milias-Brown Act when it failed to meet and confer over the city's layoff decision and the effects of the layoff on the safety of the remaining firefighters. A PERB board agent declined to issue a complaint and, following an appeal by the union, the board affirmed the B.A.'s ruling. It concluded that the city's decision to lay off some of its employees is not subject to collective bargaining, and that Local 188, by repeatedly seeking to bargain over the layoff decision itself rather than its effects, had waived its right to bargain over those effects.

Local 188 petitioned the Court of Appeal for review of the board's decision not to issue a complaint in the matter and argued that the decision to lay off firefighters is subject to collective bargaining. The appellate court crafted a narrow exception to the rule that a decision not to issue a complaint cannot be appealed and found that the decision to initiate layoffs is not bargainable under the MMBA. The union appealed.

#### Review of Decision Not to Issue Complaint

At the heart of the procedural issue is MMBA Sec. 3509.5(a), which provides that "any charging party, respondent, or intervenor aggrieved by a final decision or order of the board in

an unfair practice case, except a decision of the board not to issue a complaint in such a case,...may petition for a writ of extraordinary relief from that decision or order." The petition is to be filed in the district Court of Appeal with jurisdiction over the county where the events occurred.

The Court of Appeal read this language to mean that a PERB decision not to issue a complaint is not reviewable under this language of the MMBA, but found that the legislature did not preclude superior courts from exercising traditional mandate jurisdiction to consider challenges to such decisions on one or more of the

*Courts must narrowly  
construe and  
cautiously apply  
these exceptions.*

narrow grounds under which similar decisions may be challenged under the National Labor Relations Act or the Agricultural Labor Relations Act.

The Supreme Court agreed. It found that limiting judicial review of an agency decision not to issue an unfair labor practice to the three grounds articulated in *Belridge Farms v. ALRB* (1978) 21 Cal.3d 551, on which the Court of Appeal relied, "strikes an appropriate balance between the Legislature's interest in giving such agencies broad discretionary authority and the courts' obligation to discharge their constitutional powers and responsibilities." The court explained:

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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.

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

## Pocket Guide to the Meyers-Milias-Brown Act

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

<http://cper.berkeley.edu>

The first of these grounds — that the agency decision violates a constitutional right — merely respects and protects the state Constitution's hierarchical authority over statutory law, while the second ground — that the agency has exceeded its statutory powers — is necessary to ensure that administrative agencies do not purport to exercise powers beyond those actually delegated to them by the Legislature. The third ground — that the agency action is based on an erroneous statutory construction — allows courts to correct a clearly erroneous construction of the MMBA by PERB when that erroneous construction potentially affects a large class of cases and threatens to frustrate an important policy that the MMBA was enacted to further. Judicial review under this ground furthers the Legislature's purpose in creating the agency and defining the scope of its authority.

The court stressed the narrowness of its ruling. "It remains true that a refusal by PERB to issue a complaint under the MMBA is not subject to judicial review for ordinary error, including insufficiency of the evidence to support the agency's factual findings and misapplication of the law to the facts, or for abuse of discretion." Courts must narrowly construe and cautiously apply these exceptions, the high court instructed, "to avoid undue interference with the discretion that the Legislature has intended PERB to exercise."

The court next turned to the question of the scope of representation and the negotiability of the layoff decision. After discussing federal case law under the NLRA, the court focused on its often-cited decision in *Fire*

*Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608. After a detailed recitation of the facts in the *Vallejo* case, the court reaffirmed the rule enunciated in that case:

Under the MMBA, a local public entity that is faced with a decline in revenues or other financial adversity may unilaterally decide to lay off some of its employees to reduce its labor costs. In this situation, a public employer must, however, give its employees an opportunity to bargain over the implementation of the decision, including the number of employees to be laid off, and the timing of the layoffs, as well as the effects of the layoffs on the workload and safety of the remaining employees.

Returning to the standard of review used to contest the board's refusal to

issue a complaint, the court concluded that in this case, Local 188 did not show that PERB's refusal to issue a complaint was based on a misunderstanding of this rule and, therefore, did not show that it was based on an erroneous construction

of the MMBA. (*International Association of Fire Fighters, Loc. 188 v. Public Employment Relations Board* [1-25-11] Supreme Court No. S172377, \_\_\_Cal.4th\_\_\_, 2011 DJ-DAR 1233.)\*

## No Constitutional Infringement Posed by Prohibited-Association Policy

A POLICY THAT prohibits police officers from having a personal relationship with persons known to be criminals does not impermissibly intrude on the freedom of association, the Second District Court of Appeal held. The court found sufficient evidence that the sheriff's department had a legitimate interest in preserving its reputation, and that the officer's conduct harmed the department.

The Los Angeles County Sheriff's Department's policy manual prohibits officers from knowingly maintaining a

personal association with persons who are under criminal investigation or indictment, or who have an open and notorious reputation in the community for criminal activity.

Officer Emir Bautista befriended a female prostitute and heroin addict. On two occasions, officers of the Gardena Police Department encountered Bautista in the woman's company. They warned Bautista that he was jeopardizing his employment by associating with the woman. That same month, Bautista moved in with her. They eventually married.

The department began an internal affairs investigation into Bautista's personal association, and he was charged with violating department policy. A four-day hearing was conducted by a civil service commission hearing officer, who upheld discharge as an appropriate penalty. The commission upheld the hearing officer's decision, and Bautista appealed.

Bautista challenged the termination on the ground that the policy violated his constitutional right to freedom of association. It encompasses the right to intimate association, including marriage.

The trial court found that the policy was rationally related to a legitimate purpose of preserving the credibility and integrity of the department and avoiding possible conflicts of interest.

On appeal, the court upheld the county's rule. It relied on United States Supreme Court cases that distinguish between laws that prohibit marriage from those that have an incidental ef-

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

**-- Vernon Sanders Law, baseball player**

CPER's best-selling Pocket Guide provides a clear explanation of the protections relating to investigations and interrogations, self-incrimination, privacy rights, polygraph exams, searches, personnel files, and administrative appeals. The Guide includes summaries of key court decisions, the text of the act, a glossary of terms, and an index.

This Guide is a must for each and every peace officer and for those involved in internal affairs and discipline.

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

By Cecil Marr and Diane Marchant (Updated by Dieter Dammeier) • 13th edition (2009) • \$16

<http://cper.berkeley.edu>



fect on one's right to choose a marriage partner. Since the department's policy affected Bautista's right to intimate association only incidentally, the court did not apply the strict scrutiny test that applies when regulations directly burden the right to marry.

Instead, the court looked at whether the policy was rationally related to a legitimate state purpose. It found that Bautista's long-standing relationship with the woman and her multiple detentions with the Gardena Police Department — while Bautista was with her — embarrassed the department and undermined its reputation in the law enforcement community and in the public it is charged with protecting.

The court also concluded that the penalty imposed by the department was not excessive. While finding that the commission's penalty determination was not an abuse of discretion, the court observed that the department's guidelines for discipline indicate that punishment for a violation of the prohibited-association policy is discharge and, per the guidelines, "may not be reduced." The court also found that Bautista's close personal relationship with the woman evidenced his poor judgment and undermined the department's trust and confidence in him as a law enforcement officer. (*Bautista v. County of Los Angeles* (2010) 190 Cal. App.4th 869.) \*

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## Mandatory Mediation and Factfinding Under the MMBA?

ASSEMBLY Member Toni Atkins (D-San Diego) has introduced legislation that would amend the Meyers-Milias-Brown Act to eliminate the right of local public agencies to implement a last, best, and final offer when the parties reach a bargaining impasse. Instead, A.B. 646 would provide that, if the parties fail to reach agreement on a memorandum of understanding, either party can request that the Public Employment Relations Board appoint a mediator. If the board agrees that a bargaining impasse exists, the bill would require PERB to appoint a mediator, who would be paid from the board's coffers.

The bill also would authorize either party to request that the bargaining dispute be submitted to a factfinding panel if the mediator is unable to bring the parties to agreement within 15 days and the mediator determines that factfinding would be appropriate. The factfinding panel would consist of one member selected by each party and a third member selected by the board and designated the panel chairperson. Without the consent of both parties, the board's choice could not be the same person who served as the mediator. The panel has the authority to mutually agree on a person to serve as chairperson in lieu of the person selected by the board.

If the dispute is not resolved by the three-person factfinding panel within 30 days, the panel would be required to make findings of fact and to recommend the terms of a settlement agreement. Mirroring provisions in other public sector collective bargaining statutes, the proposed legislation sets out criteria that would guide the factfinding panel. The report would be advisory only.

A.B. 646 would require the board to compensate the panel chairperson unless the parties select their own chairperson, in which case, costs are to be divided equally between the parties.

The bill does not prohibit the mediator from continuing mediation efforts on the basis of the findings of fact and the recommended terms of settlement put forward by the factfinding panel.

On his California PERB blog, Tim Yeung of Renne, Sloan, Holtzman & Sakai voiced concern whether PERB would be able to foot the bill for the mediators and factfinders. With over 2 million employees covered by the MMBA, Yeung questions how PERB could possibly fund the bill's mandate.)\*

# Public Schools

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## Court Finds Interns Are Not ‘Highly Qualified’ Teachers Under NCLB; Congress Reacts

IN A CLOSELY watched case, the Ninth Circuit Court of Appeals, by a vote of two to one, invalidated a federal regulation that permitted teachers who are participating in alternative-route teacher training programs — but who have not yet obtained state certification — to be characterized as “highly qualified teachers” under the No Child Left Behind Act. In *Renee v. Duncan*, California public school students, their parents, and two non-profit organizations claimed that a disproportionate number of interns teach in public schools that serve minority and low-income students. This distribution of interns has resulted in a poorer quality of education than those students would have otherwise received. The district court had dismissed the case, granting summary judgment in favor of the secretary of education.

On appeal, the majority recognized that the “overarching goal” of NCLB is “to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education.” It “seeks to close the achievement gap between high- and low-performing children, especially the achievement gap between minority and non-minority students, and between disadvantaged

children and their more advantaged peers.” “A premise of NCLB is that good teachers — defined by Congress as ‘highly qualified’ teachers — are crucial to academic success,” said the court. Further, in order to be eligible to receive Title I funds to supplement the educational needs of disadvantaged students, the act requires states to identify steps they will take to ensure that “poor and minority children are not taught at higher rates than other children by inexperienced, unqualified, or out-of-field teachers.”

NCLB defines “highly qualified teacher” as one “who has obtained full State certification as a teacher (including certification obtained through alternative routes to certification).” Federal regulations that implement the act repeat this definition of “highly qualified teacher,” but also include a teacher who “is participating in an alternative route to certification program under which...[t]he teacher... [d]emonstrates satisfactory progress toward full certification as prescribed by the State.” The court noted that “[n]either NCLB nor the Secretary’s regulation defines ‘alternative routes to certification.’”

The appellants did not object to

characterizing an alternative-route teacher who *has* already obtained full state certification as a “highly qualified teacher.” They did, however, object to characterizing an alternative-route teacher who *has not yet* received full state certification but who merely “demonstrates satisfactory progress toward” full certification as “highly qualified” within the meaning of the act.

Neither the act nor the regulation defines the term “full State certification,” said the court. However, the precise question at issue, “is not the meaning of ‘full State certification’ as used in the NCLB,” it explained. Rather, it “is the difference between the meaning of ‘*has obtained*’ full State certification in the statute...and the meaning of ‘*demonstrates satisfactory progress toward*’ full State certification in the regulation.” “The difference between having obtained something and merely making satisfactory progress toward that thing is patent,” the court said. Finding that the regulation impermissibly expands the definition of “highly qualified teacher” contained in the act by including an alternative-route teacher who has not yet achieved “full State certification,” the court held the regulation invalid.

In 2004, California promulgated regulations that “piggybacked” on the federal regulation. The state regulations provided that a teacher “meets NCLB requirements” if the teacher is “enrolled in an approved intern program for less than three years” *or* if the teacher has a full credential. Because



the state's regulation also included teachers who had not yet achieved full state certification, the court found those regulations invalid as well.

The court rejected the secretary of education's argument that the appellants did not have standing to bring suit to invalidate the state regulations, finding that they met all three necessary requirements. First, appellants have suffered an injury. The appellant students attend California public schools where a significant number of interns teach. Evidence shows that a disproportionate number of interns teach in California public schools that serve minority and low income students. "For example," said the court, "forty-one percent of interns in California teach in the twenty-five

percent of schools with the highest concentrations of minority students. In contrast, two percent of interns in California teach in the ten percent of schools with the lowest concentration of minority students." The court noted that Congress, in adopting NCLB, decided that "teachers with 'full State certification' are, in the aggregate, better teachers than those without such certification."

The court also found that the appellants showed a "causal connection" to California law. "To the degree that the federal regulation, and the piggy-backing California regulations, have had the effect of permitting California and its school districts to ignore the fact that a disproportionate number of interns teach in schools in minority

and low-income areas, there is a causal connection between the challenged regulation and the injury of which Appellants complain."

Regarding the third standing requirement, the court found that the appellants' injury is likely to be redressed by the invalidation of the federal regulation because, without it, "California is very likely out of compliance with NCLB." It explained that the change in legal status of the federal regulation would likely motivate California to take steps to increase the number of teachers with credentials in minority and low-income schools in order to comply with the act. (*Renee v. Duncan* [9th Cir. 2010] 623 F. 3d 787.)

In reaction, Congress enacted legislation defining "highly qualified"

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-- Robert Frost, poet

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## **Pocket Guide to the Educational Employment Relations Act**

By Bonnie Bogue, Carol Vendrillo, Dave Bowen and Eric Borgerson • 8th edition (2011) • \$18  
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for purposes of NCLB to include teachers pursuing their credential through an alternative certification program, thereby nullifying the court's decision. A provision inserted one day before the government funding bill was passed in December includes in the definition of "highly qualified teacher" those participating in alternative-route training programs who have not yet obtained full state certification. Senator Tom Harkin (D-IA), chairman of the Senate education committee, said, in support of the legislation, that the Ninth Circuit's decision in *Renee* "could cause significant disruptions in schools across the country and have a negative impact on students."

The legislation drew outrage from civil rights, disability, parent, student, community, and education groups throughout the country. More than 50 organizations signed a letter to President Obama criticizing the provision. Urging a reversal, the letter notes that the amended law "disproportionately impacts our most vulnerable populations: low-income students and students of color, English-language learners, and students with disabilities who are most often assigned such underprepared teachers." The full text of the letter is at: [www.napas.org/images/Documents/Advocacy/Legislation/Education/President Obama Letter on Highly Qualified.pdf](http://www.napas.org/images/Documents/Advocacy/Legislation/Education/President%20Obama%20Letter%20on%20Highly%20Qualified.pdf). \*

contract, he had a statutory right to his administrative position and automatic contract renewal.

Rejecting that argument, the court was guided by *Barthuli v. Board of Trustees* (1977) 19 Cal.3d 717. In that case, the California Supreme Court found that school district administrators do not have a statutory right to

*Agosto had neither a  
statutory right nor a  
property right.*

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## No Property Interest in Administrator's Position in Community College District

A COMMUNITY college district administrator has no statutory or property interest in his job and is not entitled to reinstatement. In *Agosto v. Grossmont-Cuyamaca Community College Dist.*, the Fourth District Court of Appeal backed up the district's position that it was not required to return David Agosto to his former position as vice president at Cuyamaca College.

Agosto had been hired in various administrative positions since 1995 under the terms of two-year employment contracts. In 2006, he was informed of the board of trustees' decision not to renew his current appointment and

that he would not be offered any other administrative position. Agosto filed a writ of mandate seeking reinstatement to his former administrative position and the appropriate back pay. The trial court concluded that reinstatement was not proper because, it said, "an administrator, unlike a teacher, does not possess a statutory right to his position."

On appeal, Agosto relied on Education Code Sec. 72411 and asserted that, because the district had failed to give him six months' advance notice of its determination not to reemploy him at the expiration of his two-year

their administrative posts. The court in *Barthuli* relied on a statute applicable to school district administrators but substantially similar to the language of Sec. 72411, which pertains to administrators in community college districts. The *Barthuli* court announced that, in his position as an administrator, Barthuli was not a permanent employee. "The Legislature has not given him a property right in the administrative position." His tenure rights, the Supreme Court concluded, "are those of a classroom teacher and not those of an administrator."

The *Agosto* court found that this reasoning applied to community college administrators and concluded that Agosto had neither a statutory right nor a property right to his administrative position.

The notice provisions of Sec. 72411 do not create a property right in

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the administrative position, the court continued. Relying on *Loehr v. Ventura Community College Dist.* (9th Cir. 1984) 743 F.2d 1310, the *Agosto* court reiterated that the procedural requirements of Sec. 72411 are not intended to be “a significant substantive restriction” on the district’s decision-making power over the employment of administrators and “creates no contractually protected property interest.”

Agosto also put forth an argument based on Assembly Bill 1725, which, in 1988, took tenure rights away from community college administrators and replaced them with contract rights.

Assuming that A.B. 1725 removed the right of community college administrators to earn tenure while serving in an administrative position, the court said, *Barthuli* is still controlling. Under the current statutory scheme, community college administrators continue to retain certain statutory rights to faculty positions once their administrative position terminates. But, the court concluded, the statute does not create a right to reinstatement to the administrative position. (*Agosto v. Grossmont-Cuyamaca Community College Dist.* [2010] 189 Cal.Appl.4th 330.) \*

satisfactory performance and was not dismissed for cause.

The statute also requires that appointment to probationary faculty member be accomplished through a process adopted by the district governing board to ensure that the administrator possesses the “minimum

## *Entezampour satisfied all conditions in the Education Code and board policy.*

---

### Ousted Dean Entitled to Faculty Position

WHEN THE North Orange County Community College District decided not to renew Mohammad Entezampour’s employment as dean of science, engineering, and mathematics, he was entitled to a reassignment to one of two open faculty positions for which he was qualified. The appellate court relied on Education Code Sec. 87458, which provides that an administrator “shall have the right to become a first-year probationary faculty member once his or her administrative assignment expires or is terminated.”

In 2003, Entezampour was hired to serve as the dean at Cyprus College. He was not a tenured member of the faculty at the time he was fired. Entezampour was notified that the district would not renew his contract

as dean in 2007. The reason was not for cause.

Citing Sec. 87458, Entezampour sought retreat rights and an assignment to a first-year probationary faculty member position as a general biology instructor or as an instructor of anatomy and physiology.

The trial court dismissed Entezampour’s petition, but the Court of Appeal reversed.

The court found that Entezampour satisfied all of the requirements of Sec. 87458. That is, he was employed in an administrative position that was not part of the classified service; he had not previously acquired tenured status as a faculty member in the North Orange County CCD; and he had completed at least two years of

qualifications for employment as a faculty member.” The district’s policy fulfills this mandate, the court said. It requires that an administrator be reassigned only in a discipline for which the employee possesses minimum qualifications and within a faculty service area for which the administrator is qualified.

The district agreed with the Court of Appeal that Entezampour satisfied all of the conditions set out in the Education Code as well as board policy. However, the district argued that Sec. 87458 does not impose a mandatory duty on an employer. The district retained discretion in deciding whether to deny or grant Entezampour’s request for appointment. In support of its position, the district relied on *Wong v. Oblone College* (2006) 137 Cal.App.4th 1379, 178 CPER 31, where the court remarked that the right to reappoint-

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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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ment under Sec. 87458 is not absolute, and said that “it would be unreasonable to interpret section 87458 to require a college to either create or keep open a position to which a terminated administrator could ‘retreat’ regardless of the college’s need for that faculty position or the availability of funds.”

The appellate court here distinguished *Wong* because, at the time

Entezampour was informed that his administrative assignment would not be renewed, there were two open faculty positions in his field of study at Cypress College, and he had requested an assignment before the application period for either had closed. The court noted Entezampour’s Ph.D. in biology and his 24 years of teaching experience. Both positions were filled

by less-qualified individuals, one who had recently graduated and had limited teaching experience that did not include biology. The district did not have discretion to refuse to honor Entezampour’s reassignment request. (*Entezampour v. North Orange County Community College Dist.* [2010] 190 Cal.App.4th 832.) \*

# Higher Education

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## PERB May Award Damages for Losses Caused by Unlawful Strike Threat

IN LINE WITH its precedent under the Educational Employer-Employee Relations Act, the Public Employment Relations Board ruled in *CNA v. Regents of the University of California* that unfair practice strikes are legal under the Higher Education Employer-Employee Relations Act, even if they occur prior to the completion of impasse procedures. However, since the board found CNA's strike threat an illegal economic action, it was confronted with the question whether it has authority to award damages for illegal strike activity. After discussing differences between private and public sector labor relations and labor laws, the board decided that it has authority to award monetary damages for an employer's direct economic losses as part of a make-whole order. PERB also established a test for determining whether a strike threat and preparations are unlawful.

The decision results from two consolidated cases. In one, CNA alleged bad faith bargaining by U.C. In the other, U.C. claimed CNA threatened to engage in an illegal strike prior to reaching impasse in negotiations. The university filed exceptions to the ALJ's decision. CNA unsuccessfully petitioned the Court of Appeal

to review PERB's decision reversing the ALJ.

### No Unfair Practices Found

During negotiations between CNA and U.C. in 2005, the union proposed that staffing ratios required by California regulations be incorporated into the collective bargaining agreement, but U.C. refused. There were several discussions in which the U.C. negotiator claimed that the issue was not a mandatory subject of bargaining, but indicated that the university was still researching the question. U.C. also repeatedly told CNA that the university did not want to incorporate the ratios into the contract because an arbitrator, rather than a judge, would rule on the staffing law if there were a dispute. CNA charged that U.C. had engaged in bad faith bargaining by refusing to bargain over staffing ratios.

PERB ruled that staffing ratios are a negotiable subject because they affect workload. The fact that the union sought to make government staffing minimums enforceable in a contractual grievance procedure did not render the proposal outside the scope of representation.

Contrary to the ALJ, however, the board found that U.C. had fulfilled

its bargaining obligation. U.C. never denied that the ratios were a mandatory subject of bargaining, it said, and discussed its reasons for disagreeing with the proposal. U.C. merely engaged in hard bargaining when it proposed not to change contract language. Its position was rational because it did not want an arbitrator to decide whether it was breaking the law, PERB reasoned.

A second allegation related to information requests. In anticipation

*The staffing information  
the union requested  
was necessary and  
relevant to negotiations.*

of bargaining over staffing, CNA requested information relating to the patient classification system. U.C. provided documents, but not the formulas and methodology used to determine staffing levels. The university explained that its five hospitals leased the software used to make the decisions, and the vendors claimed the formulas were proprietary and confidential. When the union asked for proof, the university provided two licensing agreements that did not ban release of the information, one that did, and two letters refusing to grant U.C. permission to share the information. CNA did not follow up on its request. Three weeks later, it charged that the failure to provide information was an unfair practice.



PERB found that the information the union requested was necessary and relevant to negotiations. However, the evidence indicated that some of the information was unavailable to U.C., and that the university had made a good-faith, reasonable effort to obtain it from the vendors. Although the union claimed at the hearing that the responses regarding two of the contracts were insufficient, the board found that U.C. had complied with its bargaining obligation because CNA had not followed up on the requests after being given some of the documents.

Unlike the ALJ, PERB did not examine allegations that U.C. had disciplined unit members for sympathy strike activity because the charge had been deferred to binding arbitration and was resolved when the parties ultimately reached an agreement on a three-year contract. Therefore, PERB ruled that evidence about the disciplinary actions should not have been considered.

### **Unfair Practice Strikes Legal**

Although the board dismissed the bad faith bargaining charges against the university, U.C.'s charge that the union had threatened an illegal strike remained. Prior to CNA's strike notice, the university had presented the union with its last, best, and final offer on June 22, 2005. The union's negotiator contended the parties could not be at impasse because of the university's refusal to bargain and failure to provide documents.

In the days leading up to the strike vote, the union communicated that it

would be recommending rejection of the LBFO. It also described several unfair practices by U.C. that it asserted were sabotaging meaningful negotiations, and stated it would be recommending that nurses authorize a strike. After members voted overwhelmingly to reject the LBFO and authorize a strike, the union gave U.C. notice on

## *Whether a strike constitutes an imminent threat to public health and safety should be determined on a case-by-case basis.*

July 8 of its intention to strike on July 21 and attached a list of alleged unfair practices by the university. The union already had filed an unfair practice charge in mid-June. In mid-July, it added the charges relating to the information request and refusal to bargain over staffing ratios.

On July 12, U.C. filed its own unfair practice charge and requested an injunction against the strike. A week later, PERB granted the request for injunctive relief, and on July 20, a court issued a temporary restraining order against the strike. As a result, union members held a rally instead of a strike. The contract was settled during factfinding six months later.

PERB pointed out that the legality of strikes under HEERA had not been addressed previously. For guidance, it turned to precedent under EERA. Although its recitation of prior board law is confusing, the board ultimately announced, "[I]t is well-established that EERA does not prohibit all strikes by public school employees." As HEERA, like EERA, is silent about strikes, the board found nothing in the language of HEERA that would lead to a different result in the higher education sector.

PERB also rejected U.C.'s request that it declare any strike at a health care institution to be a violation of HEERA due to the "extreme risk to health and safety" posed by a strike. The board observed that health care workers in the private health care sector have been allowed to strike legally for decades. It instructed that whether a strike is an unfair practice because it constitutes an imminent threat to public health and safety should be determined on a case-by-case basis.

### **CNA's Strike Threat Unlawful**

Although there was no strike, U.C. contended the threat of a strike constituted an unfair practice. Noting that no criteria have been established to gauge when a strike threat or preparations are unlawful, PERB set out a two-pronged test. To determine whether a strike threat is an unfair practice, the board will examine whether the threat and preparations are "(1) in furtherance of an unlawful strike; and (2) sufficiently substantial to create a reasonable belief

in the employer that the strike will occur.”

PERB reiterated the rule that a strike prior to exhaustion of impasse procedures creates a presumption that a union is refusing to negotiate or participate in impasse procedures in good faith. The union can rebut the presumption by proving the strike was provoked by an employer’s unfair practices and that the union was acting in good faith. Since CNA had not proven that U.C. committed any unfair practices, it could not show it was provoked. As a result, PERB found that the strike threat and preparations were made to place pressure on the university to reach agreement prior to impasse.

CNA’s strike preparations were substantial, the board declared. After conducting a well-publicized strike vote, the union announced it would strike all U.C. locations where nurses were employed. The union issued a strike manual, spoke to the press about the strike, and stated it had established an emergency task force to provide treatment to patients during the strike. PERB found these preparations sufficient to support the university’s belief that the strike would occur.

### **PERB May Award Damages**

U.C. contended that PERB should award damages if CNA committed an unfair practice. The board examined California Supreme Court decisions and held that it had the power to make an employer whole for expenses necessarily incurred or for economic harm

suffered from unlawful strike activity, including strike preparations. If damages were not available for preparations, a union could escape liability by calling off the strike at the last minute, the board observed.

PERB cited a case involving the Fair Employment and Housing Commission, in which the court held that administrative agencies had inherent authority to award damages for expenditures or economic losses incurred as a result of a party’s viola-

*An award of damages  
‘further the purpose  
of HEERA by main-  
taining the relative  
bargaining power of  
the parties.’*

tion of the law. Applying the teaching of that case, PERB held that it has the power to award make-whole damages, but not emotional distress or punitive damages, which courts have held agencies have no power to award without express statutory authority.

PERB rejected the union’s assertion that injunctive relief is the only remedy available for unlawful strike activity. While the Supreme Court has suggested that an injunction would better accomplish the goal of preventing strikes than an award of damages after harm is done, it never has held that injunctive relief is the only rem-

edy, PERB pointed out. Case law that restricts court awards of damages for a public sector strike does not bar PERB from deciding whether a monetary remedy would effectuate the purposes of the act, the board observed.

PERB turned aside the union’s argument that a case barring the Agricultural Labor Relations Board from awarding damages against a striking union should govern the outcome of this case. The act authorizing the ALRB expressly provides for make-whole remedies against employers but not unions, PERB noted. That provision is unique to the ALRB, the board observed, since unions have been ordered to pay damages to employers under other statutes, such as the National Labor Relations Act. Although the National Labor Relations Board may not award punitive or general compensatory damages, it has awarded monetary remedies for expenses incurred as a result of the union’s bad faith bargaining.

CNA cited an NLRB decision in which that labor board determined it had no authority to award strike damages. The NLRB reasoned that Congress had granted federal courts jurisdiction to hear suits for damages from unlawful strike activity. Since no similar statute exists in California, the case is not relevant, PERB said.

In addition, the board pointed out important differences between private and public sector bargaining. Under the NLRA, a pre-impasse economic strike may be lawful and protected. Both the Supreme Court and PERB

have held that an economic strike prior to the completion of statutory impasse procedures is an illegal pressure tactic in the California public sector. The private employer may exert its own economic pressure by locking out employees and hiring permanent replacements for striking employees. These options are not available to the public employer because it must continue to provide services to the public, the board observed. The public employer also may find it difficult to hire many employees with highly specialized skills.

PERB law demonstrates a balance in allowable economic pressure activity and remedial orders for bad

faith bargaining, the board asserted. Just as a union may not engage in an economic strike prior to completion of impasse procedures, an employer may not implement terms and conditions of employment until impasse procedures have been exhausted. If an employer implements a negotiable item before impasse, PERB orders the employer to make employees whole for any resulting losses, the board pointed out. It continued:

A system whereby a failure to participate in impasse procedures in good faith subjects an employer, but not an employee organization, to monetary liability is contrary to the express purpose of HEERA "to foster harmonious and cooperative labor relations."

Otherwise, the board explained, a union could use a pre-impasse strike to pressure an employer in bargaining with no risk to itself or its members — other than loss of pay during the strike — because the employer cannot lock out or replace employees. PERB reasoned that an award of damages for unlawful strike activity "furthers the purpose of HEERA by maintaining the relative bargaining power of the parties until the statutory impasse procedures have been completed."

PERB rejected arguments that a remedy would have a chilling effect on the exercise of collective bargaining rights. The only conduct that might be chilled by an award of damages, the board said, is pre-impasse strike

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**Justice may be blind, but she has a very sophisticated listening device.**

**-- Edgar Argo, writer**

How do hearing officers and arbitrators assess whether discipline or a discharge should be upheld? How should representatives for employers, unions, or employees prepare and present a disciplinary case?

The answers are in this Guide, which provides: a description of the "tests" that arbitrators apply to decide whether an employer had just cause for discipline or discharge; an explanation of how statutory law and collective bargaining agreements may limit the arbitrator's traditional discretion; advice to practitioners on how to evaluate a case, decide whether to settle a case, and if not, prepare for a hearing; information on common remedies with an explanation of how statutory rights affect remedial awards; and a description of the various statutory schemes that govern disciplinary hearings in different sectors of public employment in California. The guide is generally applicable to both arbitrations and civil service disciplinary hearings.

## **Pocket Guide to Just Cause: Discipline and Discharge Arbitration**

By Bonnie Bogue and Katherine J. Thomson • 1st edition (2010) • \$18

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activity that PERB has long held to be unlawful.

PERB announced limits on damages awards. If an employer does not seek an injunction to stop the strike, it has not mitigated its losses and will not be awarded damages. The employer may also be found to have failed to mitigate losses arising from strike preparations, the board instructed. The cost of replacement workers and revenue lost during a strike may be awarded if it outweighs the savings from not paying striking workers. The cost of maintaining operations and mitigating foreseeable effects of the strike may be compensable employer preparations if directly caused by the strike threat. Where the benefit of employer activities undertaken in the face of a strike are speculative or not quantifiable, no damages will be awarded.

Board Member Neuwald concurred in the holding that CNA engaged in preparations for an unlawful strike. However, she disagreed that damages were appropriate in this case because the injunction was sufficient to terminate the union's strike activity. Since impasse procedures were successful in settling the contract several months later, she asserted that a monetary remedy would not foster harmonious and cooperative labor relations.

Because the ALJ had not taken evidence of strike-related damages, the board remanded the case to the ALJ to take evidence and propose a decision on the issue of damages. (*California Nurses Assn. v. Regents of the University of California* [2010] PERB Dec. No. 2094-H.) \*

## U.C. Reforms Its Retirement Benefits

FOLLOWING A trend across the country, the University of California adopted a plan in December that will require new employees to work longer before becoming eligible for pension benefits. It also announced plans to hike pension contributions and decrease its contributions to retiree health care. U.C.'s pension plan is better funded than other plans in the state, but it will not remain healthy without increased contributions and stock market gains. Like most employers, it has not prefunded its retirement health benefits program. Because of a combined unfunded liability of \$21 billion for the pension and health benefits programs, the university decided it had to stem the accrual of future liability by reducing the benefits of employees hired after June 30, 2013. The plan redesigns remain subject to bargaining for represented employees.

### Trouble Ahead

While U.C.'s retirement plan is 87 percent funded on an actuarial value basis, the effect of the stock market crash in 2008-09 has not yet been fully recognized. Because of a five-year "smoothing" policy, only 20 percent of the investment gains or losses are included in the valuation for each of the five previous years. If the market value of investments were used in the calculation, the funded ratio of assets to accrued liability would be only 73 percent as of July 1, 2010. In addition,

U.C. and its employees have not been making any contributions until recently, and the current contribution rate is very low. As a result, actuaries predict further decreases in the funded ratio.

Add to that a \$14.9 billion unfunded liability in the retiree health benefits program. U.C. has been paying the

*U.C.'s pension plan  
will not remain  
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increased  
contributions and  
stock market gains.*

cost of the benefits from operating funds. The annual cost was only \$250 million in 2009-10, but is expected to grow to \$270 million this year.

### Contribution Holiday Backfires

In 1990, U.C.'s retirement fund was so over-funded that both the university and its employees stopped making pension contributions. Nearly 80 percent of U.C. employees had never contributed to the fund until they began making payments in April 2010. Last September, the regents approved a plan to raise the employer contribution from 4 percent to 7 percent of compensation beginning July 2011, and to 10 percent on July 1, 2012. Employee contributions will

rise from approximately 2 percent to 3.5 percent this year and to 5 percent the following year. The Coalition of University Employees, which represents clerical employees, still has not agreed to restart contributions, since salaries have been stagnant.

The steep hike in contributions is not nearly enough, however. To address the unfunded liability as well as the normal cost of the pensions, the suggested total payment to the fund for 2010-11 is nearly 23 percent of pay. This deficit in funding will only add to future actuarial losses and require even higher contributions from U.C. and its employees. As a task force on post-employment benefits warned last August:

If the University were to follow its previous plan of slowly ramping up contributions, [the annual required contribution] would eventually rise well above 50% of covered compensation since the slow ramp-up creates a shortfall each year that adds to the unfunded liability.

This situation led to a set of recommendations, which have been fiercely debated over the last six months. In December, the regents adopted new eligibility criteria for retirement health benefits and a lengthier age minimum for retirement. The task force did not recommend switching to a defined contribution plan, since the defined benefit retirement plan helps to retain faculty and staff, even when they could obtain higher salaries from other top universities.

## New Plan Designs

Currently an employee can retire at age 60 with a benefit equal to 2.5 percent multiplied by the employee's years of service and highest average compensation over 36 consecutive months. Employees hired after July 1, 2013, however, will have to work until 65 to obtain the maximum 2.5

### *The plan redesigns remain subject to bargaining for represented employees.*

percent factor. Whereas employees now can retire with a lower benefit at 50 years of age, the minimum retirement age will be 55 for those hired after June 2013. New hires will continue to become vested after five years of service.

In addition, new hires will not enjoy several features of the current plan that are very costly. Current employees can cash out a lump sum when they retire. If they decide to delay receipt of their benefits for several years after retirement, a cost-of-living adjustment is made in the intervening years. UCRP also provides a partial survivor benefit to spouses and other dependents without a decrease in the retiree's pension. The later retirement ages and elimination of several features will decrease the normal cost to fund the new tier to about 15.1 percent of compensation. U.C. will pay 8.1 percent of the total.

Fiscal concerns and employee retention goals also led to retiree health program changes. The report of the Joint Regents' Committees on Finance and Compensation explained:

[N]ew eligibility rules would encourage longer service with the University, thereby reducing costs as retirees' health care coverage provided by UC integrates more quickly with Medicare coverage.

The committees noted that retiree health care benefits and rates are subject to termination and are not accrued or vested benefits. Therefore, they could be changed for current employees.

Nevertheless, the regents decided to "grandfather in" employees to some extent. If employees saw that they were about to lose health care benefits unless they retired, the university could suffer a mass exodus of eligible employees. Also, it would be difficult for retirees in their early 50s to obtain alternate coverage. Therefore, the new design grandfathers in employees who are at least 50 years old and have at least 5 years of service by July 1, 2013. Those employees will continue to be eligible for 50 percent of the maximum employer contribution if they have 10 years of service. The university contribution increases for each year of service to 100 percent after 20 years of service.

Yet a "100 percent" contribution will not pay the full premium. Even now, the regents pay on average only 86 percent of the full premium. The regents approved a plan that would



gradually reduce that floor to 70 percent.

Current employees who are not grandfathered in will be able to enroll in U.C. retiree health plans, but will receive no employer subsidy. Employees hired after June 30, 2013, will not be eligible for retiree health benefits until they reach age 55, but the university will not contribute to health care premiums unless they wait until age 56. Even then, the university will chip in 5 percent of its maximum premium payment if the employee has 10 years of service, increasing to 10 percent when the employee has worked for 20 years. The new eligibility table gradually increases the university contribution with age and with years of service. No employee becomes eligible for a 50 percent contribution unless he or she is at least 60 years old, and an employee must be 65 with at least 20 years of service to earn the full benefit.

The decisions are the culmination of a project that began in 2009, when U.C. President Mark Yudof convened a Post Employment Benefits Task Force. After the task force presented its recommendations in August, Yudof consulted with the academic senate and staff representatives before proposing the changes that the regents adopted. \*

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## UAW Agrees to Contract Without Fee Waivers

ACADEMIC STUDENT employees ended a second lengthy battle for student fee waivers at California State University without success. The 5,400 teaching assistants, tutors, and graduate assistants made important non-economic gains, but were unable to garner raises or fee waivers despite an increase in student fees of 53 percent over the prior three years. In contrast, ASEs at the University of California, who negotiated fee waivers for undergraduate ASEs in 2007, reached agreement on a pact that provides a minimum 2 percent salary increase for each year of a new 2010-13 contract.

### Another Factfinding

This is the second contract with CSU for the United Auto Workers, Local 1423, and the second time the issue of fee waivers has gone to factfinding. The first contract did not guarantee fee waivers but did make the implementation of waivers in 2006-07 “subject to the administration’s determination that it has received funding sufficient to implement the cost of [the] benefit.” When the university declined to waive student fees in 2006, the parties entered negotiations, which proceeded to impasse, mediation, and factfinding. At that time, the panel was considering a proposal for a full fee waiver, which would have cost CSU \$14.6 million in lost student revenue. Noting the waiver would amount to

a 42 percent compensation increase, the factfinding panel recommended against the benefit. (See story in *CPER* No. 185, pp. 43-45.) That contract ended in September 2008.

This time, UAW asked for much less. Because student fees to attend CSU have increased 53 percent since 2007-08, the union asked the university to roll back fees for eligible ASEs to 2007-08 levels, at a cost of \$4.7 million. Alternatively, UAW asked the factfinding panel to recommend that fees be frozen at current levels.

The panel declined. Neutral panel member Fred D’Orazio explained, “The University has been forced to rely increasingly on student fee revenue to maintain basic services, and the cost of implementing any of the Union’s proposals will increase over time in the face of potential decreased State funding.” The panel acknowledged that, while the wages of ASEs had not been cut, the impact of increased fees would be equivalent to a 26 percent wage reduction, since ASEs must be students to retain their employment. The panel also accepted the university’s position, however, that a roll-back in fees would be tantamount to a 20 percent raise for teaching assistants, and an even greater gain for graduate assistants and tutors. As other employee units have not received salary increases and have suffered furloughs, the “pay-cut” argument did not persuade the panel.



Neither did the fact that administrators and other unionized employees at CSU enjoy partial fee waivers convince the panel that an inequity exists. Those fee remissions for two classes per term are seldom used by other employees, the panel pointed out, and were won under different bargaining conditions.

*U.C. is less reliant  
on state funding  
and student fees  
than CSU.*

Comparison to University of California ASEs also did not sway the panel. U.C. is less reliant on state funding and student fees than CSU, D’Orazio explained, and there was insufficient evidence before the panel to make an informed comparison of ASE duties or employer funding. He recommended that the issue be revisited in reopeners next year.

### **More Protections**

As UAW had agreed before fact-finding to accept the panel’s decision, the parties were able to quickly conclude negotiations. They had reached agreement on other terms before reaching impasse on fee waivers.

The new contract requires greater specification of expected duties when students obtain ASE positions. The union was concerned that some students were working more hours than

they were paid for. New ASEs will also be able to attend employee orientations at which the union will explain their rights. Students employed through the university, but who work off-campus, now have the same pay and other contractual rights as those employed on-campus.

Once an ASE has an appointment for a specified duration, the student is protected even if the position is eliminated. CSU must place the ASE in another job that pays the same or pay the salary without an assignment. When evaluated, the ASE now has the opportunity to provide input before the report is filed.

The union negotiated additional non-discrimination rights. ASE’s are now protected from discrimination on the basis of gender identity or gender expression.

While voicing its disappointment about the failure to achieve any fee remissions, the UAW executive board emphasized that the new contract “makes critical progress on advancing our rights as employees.” CSU’s senior director of labor and employee relations, Bill Candella, told *CPER* he is hopeful that the contract will reduce grievances. “We worked collaboratively to reach mutually acceptable solutions on workload issues. There were compromises on both sides.” \*

# State Employment

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## State Employee Furloughs Valid Because Ratified by Legislature

UNIONS WON several arguments but lost their war on furloughs in *Professional Engineers in California Government v. Schwarzenegger*. The California Supreme Court ruled that furloughs of represented employees in 2009-10 were legal even though the governor lacked authority to impose them unilaterally. While the governor had no power to furlough represented employees under the Constitution or the Government Code, the court found the legislature ratified the invalid December 2008 Executive Order when it passed its February 2009 budget.

The decision brought an end to three consolidated cases filed by Professional Engineers in California Government and California Association of Professional Scientists; California Attorneys, Administrative Law Judges and Hearing Officers in State Employment; and SEIU Local 1000. While State Controller John Chiang was a defendant in the lawsuits, he joined the unions on appeal, arguing that only the legislature, not the governor, had the power to cut employee pay unilaterally by ordering a furlough.

### Unilateral Order

In December 2008, Governor Schwarzenegger declared a fiscal emergency and called the legislature

into special session to address the state's budget deficit and cash-flow crisis. Among many cost-saving proposals, he advocated one furlough day a month for state employees for 18 months, but the legislature failed to reach agreement with him on a new budget.

Having failed to convince legislators to agree to furlough state employees and implement compensation takeaways, Governor Schwarzenegger decided to decree furloughs and layoffs by executive order. Citing the financial crisis, he directed the Department of Personnel Administration to implement a plan to furlough state employees two days a month beginning February 2009, and extending until June 30, 2010. Only after he issued the executive order did the state notify the unions of the furlough decision and offer to bargain over the impact.

In February 2009, the legislature passed a revised 2008-09 budget, which the governor signed. The Budget Act stated:

Notwithstanding any other provision of this act, each item of appropriation in this act...shall be reduced, as appropriate, to reflect a reduction in employee compensation achieved through the collective bargaining process for represented employees or through existing administration authority and a proportionate reduc-

tion for nonrepresented employees (utilizing existing authority of the administration to adjust compensation for nonrepresented employees) in total amounts of \$385 (million) from General Fund items ....

Several unions challenged the governor's authority to order the furloughs, which reduced state employees' incomes by nearly 10 percent. After unions lost three cases at the trial court and appealed, the Supreme Court took the unusual step of transferring the cases directly to its docket.

### No Constitutional Authority

The trial court had ruled that both statutory law and the collective bargaining agreements with the unions authorized the governor's action. (See story in *CPER* No. 195, pp. 54-58.) The Supreme Court disagreed with that analysis, yet found the order valid because the legislature had ratified it.

The court first examined whether the governor had authority to furlough represented employees without meeting its collective bargaining obligations. The governor argued that, because the constitution vested the "supreme executive power of the state" in him, he could act unilaterally in a fiscal emergency. The court held the state constitution provides no authority to unilaterally furlough represented employees. It reminded the governor that the constitution grants the *legislature* the authority to establish or revise the compensation of state employees, and that any action the governor has taken in this area has been valid only because the legislature delegated its authority.

## Dills Act Governs

The governor also argued that several statutory provisions authorized the unilateral furlough order. The court prefaced its analysis with a review of *Department of Personnel Administration v. Superior Court (Greene)* (1992) 5 Cal.App.4th 155, 94 CPER 8. The case demonstrates that, even in a fiscal crisis, the power of the governor unilaterally to alter wages or other terms and conditions of employment is governed by statutory provisions, and the legislature maintains ultimate control over salaries of represented employees, the court instructed.

Section 19851 establishes a 40-hour workweek, but the governor focused on an exception that allows workweeks “of a different number of hours” to be established “to meet the varying needs of the different state

agencies.” He contended that Sec. 19849 authorized DPA to adopt rules governing hours of work, as well as overtime compensation. The court, however, found the statutes irrelevant to the furlough scenario. The furlough was an across-the-board change that applied without regard to varying agencies’ needs, the court pointed out. To emphasize its point that Sec. 19851 was irrelevant, the court examined the legislative history, which shows the purpose of the statute is to establish the hours an employee must work before potentially becoming entitled to overtime compensation. For this reason, the court also rejected the unions’ arguments that the statute forbids the governor from reducing the workweek to less than 40 hours.

Throughout the opinion, the court criticized the trial court’s premise — that the furlough should be

characterized as a reduction in work hours rather than a reduction in salary. The furlough was adopted not because of a lack of work or reduced need for services, the Supreme Court reasoned, but because of a need to reduce payroll expenses. Its major effect was to reduce the pay of state employees. Therefore, the validity of the executive order should be evaluated by considering whether the governor had authority to reduce pay as a cost-saving measure, the court instructed.

If the trial court had viewed the furlough as a pay cut, it would have been forced to contend with Sec. 19826(b), which bars the governor from “adjusting a salary range” of represented employees. In *Greene*, an appellate court ruled that unilateral implementation of a 5 percent pay cut for represented employees during a fiscal crisis violated Sec. 19826(b). The

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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>

trial court avoided the effect of the statute by finding that the furloughs did not affect salary ranges or rate of pay, only hours of work.

The court also noted that the trial court had ignored the subsection of Sec. 19851 which provides that the terms of a collective bargaining agreement prevail when there is a conflict with the statute. Neither statute gave the governor independent authority to cut salaries unilaterally, the court held.

*The furlough was adopted not because of a lack of work, but because of a need to reduce payroll expenses.*

Neither do the emergency sections of the Dills Act provide the governor with authority to skip the collective bargaining process altogether, the court ruled. The section merely governs when notice needs to be given to exclusive representatives, the court held. It provides that, in an emergency, the notice need not be given prior to taking action, but must be given as soon as practical. It does not provide any independent authority to act unilaterally in an emergency.

The court noted that the governor has one power to act unilaterally in the face of a fiscal emergency — the power to lay off employees. But it found no gubernatorial power to reduce hours and pay. The only statute that authorizes reduced hours and pay

pertains to voluntary reductions in time and prohibits coerced reductions for individual employees.

The court rejected the idea that the power to lay off includes the power to reduce hours and wages. A reduction in hours does not fit within the layoff statute, which prescribes how employees are to be selected for layoff, it explained.

The Supreme Court repeatedly returned to the teaching of *Greene* that the scope of the governor's authority over wages and hours of represented employees is governed by the Dills Act. The act provides that the terms and conditions of an expired collective bargaining agreement continue in effect until a new agreement is reached or the parties reach impasse. Although the state's agreements with all the plaintiff unions had expired by December 2008, no impasse in negotiations had been reached. Therefore, the court held most statutory provisions, including Secs. 19851 and 19849, were superseded by conflicting MOU provisions, and the governor had no authority to furlough employees unless authorized by the agreements.

The court did not answer the question whether the MOUs allowed the furloughs, however. Since the trial court's findings that the MOUs authorized furloughs relied in part on the fact the contracts incorporated Sec. 19851, that reasoning was rendered erroneous under the Supreme Court's holding about the effect of Sec. 19851. Second, the court indicated that the trial court had ignored language in the contract provisions that might have led to a different result.

### For Lack of a Comma

While the unions won on the first issue — the governor's authority — they lost at the next step. Citing the section of the Dills Act that requires economic provisions of labor contracts to be approved by the legislature, the court emphasized that "the Legislature retained its ultimate control (through the budget process) over expenditures of state funds required by the provisions of an MOU." Although the executive order was illegal at the time

*The governor's authority over wages and hours of represented employees is governed by the Dills Act.*

it was issued, the court interpreted the legislature's enactment of a new budget in February as validation of the furlough order.

"The new legislation explicitly reduced the 2008-09 fiscal-year appropriation for state employee compensation to a level reflecting the reduced compensation to be paid under the Governor's furlough plan," the court observed. Therefore, the salaries promised in the MOUs were no longer fully funded.

Furthermore, said the court, the legislature's language indicates that it approved the furlough plan as one way to reach the compensation savings required by the budget act. The parties

disputed the meaning of the phrase, “reduction in employee compensation achieved through the collective bargaining process for represented employees or through existing administration authority and a proportionate reduction for nonrepresented employees (utilizing existing authority of the administration to adjust compensation for nonrepresented employees).” While SEIU and the state controller insisted that the language indicated that collective bargaining was the only way the legislature intended to achieve reductions of represented employees’ compensation, the governor’s interpretation of the language placed a comma after “existing administrative authority.” The Supreme Court agreed with the governor. Reading the phrase “existing administrative authority” to apply to represented employees was the only way that the parenthetical phrase (utilizing existing authority of the administration...) would not be redundant, it reasoned.

The parties also disagreed about the meaning of the phrase, “existing administrative authority.” Did it mean the governor’s authority to lay off employees, as the unions contended, or did it refer to the executive order, as the governor maintained? The court saw different interpretations. Could the legislature have intended to ratify the furlough plan only if a court determined the order was lawful, or did lawmakers intend to approve the plan regardless of the governor’s authority? The court found the second interpretation more reasonable.

The court buttressed its interpretation by examining the legislative

history. The analyses in both houses indicated the bill reflected the cost-savings of the furlough plan and other compensation takeaways proposed by the governor. In addition, the court did not think it reasonable that the legislature intended the governor to resort to his only other power — lay-off — if it failed to reach collectively bargained agreements to furlough. By enacting the employee compensation reduction provisions, the court held, the legislature exercised its own powers to authorize the furlough plan, if the governor could not achieve the compensation reductions through collective bargaining.

The unions contended that the budget act’s assertion that the legislature was not changing the Dills Act conflicted with the Supreme Court’s interpretation of the legislature’s intent. There is no conflict, the court replied, since the legislature has always reserved its authority to alter wages and other terms of employment. The budget act was an exercise of its ap-

propriations authority, and did not expand executive authority by allowing the administration to implement furloughs the court explained. The court affirmed the judgment, although not the reasoning, of the trial court, which validated the furloughs.

Justice Corrigan concurred in the decision, but wrote separately to express her agreement with the trial court that the furlough program was properly seen as a reduction in hours, so that Sec. 19826 would not prohibit it. She also questioned the majority’s opinion that existing statutes do not limit the legislature’s authority to change salaries of represented employees. Under the single subject rule, which does not allow the legislature to change agency powers using the budget bill, the legislature could not validly have expanded its authority over furloughs, she argued. (*Professional Engineers in California Government v. Schwarzenegger* [2010] 50 Cal.4th 989.) \*

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## SEIU Contract Furthers Schwarzenegger’s ‘Pension Reform’ Plan

THE UNION representing 95,000 state employees agreed to diminished pension benefits for new hires and higher employee contribution rates for current employees, but gained increased employer health plan contributions and pay stability in a three-year contract its members ratified last November. Other than offering less protection from furloughs, the SEIU Local 1000

agreements are similar to several pacts the Department of Personnel Administration negotiated last summer. Three state units are bargaining with the new Brown administration, and three unions reached tentative agreements as *CPER* went to press. Legislation passed late in the session has removed the issue of pension roll-backs from the table.



Local 1000, which represents nine bargaining units, has been without a contract since June 30, 2008. The legislature never approved a tentative agreement reached with the Schwarzenegger administration in February 2009. (See story in *CPER* No. 195, pp. 54-58.) The focus of negotiations then was furloughs, elimination of two holidays, and layoffs. This time the governor wanted pension reform.

### Pension Changes

Like other unions that reached agreements with the state last summer, SEIU agreed to delay the age at which a miscellaneous or industrial employee becomes entitled to retire with a pension payout of 2 percent of highest average pay multiplied by years of service. The union agreed to this roll-back just as the legislature enacted S.B.X 6 22, which rolls back pensions of all future employees to pre-1999 levels. While current employees can obtain a 2 percent benefit at 55, new hires will not be able to earn that high a pension until they reach the age of 60. At age 63, they reach the highest earnable pension factor of 2.418 percent.

New safety employees will no longer be eligible for a 2.5 percent benefit at age 55. They will receive only 2 percent at that age.

Beginning late last year, the new contract required current employees to increase their pension contributions by 3 percent. This boost in employee retirement contributions is smaller than the 5 percent hike accepted by four other unions last summer.

### Gains Made

Although they will not be contributing as much to their pensions, employees in units represented by SEIU will have to wait until July 1, 2013, for increases to the highest steps of their pay ranges. SEIU agreed to 3 percent increases. The Union of American Physicians and Dentists, AFSCME, and California Association of Psychiatric Technicians gained 5 percent jumps for the maximum pay range steps beginning January 2012.

The new contract recycles a favorite mechanism for reducing pay when budgets are squeezed. A personal leave program reduces pay by about 4.6 percent for 12 months in exchange for 12 personal leave days. During the 12-month period, employees represented by SEIU cannot be furloughed. This protection is shorter than the two-year furlough protection negotiated by several other unions last summer.

The net effect of the pension, pay, and furlough provisions is more money in the pockets of employees, although their pay is still lower than in December 2008. Instead of three furlough days that reduce pay nearly 15 percent, the contract cuts wages only 7.6 percent. Next year, pay will increase again by 4.6 percent when the personal leave program expires.

In addition, the state will be contributing more to health benefits. The state agreed to pick up premium increases to restore its contributions to the 80 percent level. The union also gained partial restoration of pay for working on six holidays. That pay had been reduced to eight hours of

holiday credit by the legislature in February 2009.

### Elimination of Holidays

SEIU agreed to the elimination of time off for Lincoln's birthday and Columbus Day. The union has been in a legal skirmish over those days, since October 2009, when many employees refused to work on a day the collective bargaining agreement established as a holiday. SEIU, along with CAPT and the California Association of Professional Scientists, argued that the Dills

*The net effect of the provisions is more money in the pockets of employees.*

Acts maintains terms and conditions of employment of an expired contract in effect while the parties are bargaining, and a supersession statute allows collective bargaining agreements to prevail if they conflict with the law governing state holidays. The unions won at the trial court level, but the state appealed the decision.

Unit members may now take two annual floating personal development days. The days must be used each year, but employees may use them for any purpose.

### No Minimum Wages

SEIU's new contract protects employees from the threat of minimum wages if the legislature fails to



enact a budget on time. The legislation approving the MOU included a provision that appropriates funds for the economic terms of the agreement through July 1, 2013.

By that time the threat may reappear. In recent litigation, Governor Schwarzenegger could not prevail in his attempt to order minimum wages because there was a factual dispute whether the controller's payroll system could implement them. The Brown administration recently dropped the lawsuit because experts from both sides agreed that the controller's feasibility concerns were valid. A new payroll system is under development, however, and the controller may be

able to comply with such an order in the future.

### Cost Savings in the Short Term

In this fiscal year, the agreement saves the state \$382.6 million in compensation costs, including \$164 million from the general fund. Over the life of the contract, it will reduce spending by \$632.3 million.

However, the personal leave program will likely lead to higher vacation leave balances. Personal leave days must be taken before vacation or other annual leave and will expire on July 1, 2013. Some employees are still using banked furlough days, which do not expire. The vacation payouts will come due years down the road. \*

the 1999-2000 session. Section 512 requires a 30-minute meal break if an employee's work period is at least five hours. Section 226.7 requires an employer to compensate an employee an hour of pay for each missed meal period. Neither section expressly applies to public employers.

Observing that the *Johnson* court had recently rejected a water district employee's claims for overtime pay and meal breaks, the court in this case decided that Secs. 512 and 226.7 do not cover public employees. It relied heavily on the reasoning in *Johnson* when finding that the legislature did not intend to apply the meal break provisions to public employers. For that reason, it did not reach the second step of the analysis set out in *Johnson*. As the *Johnson* court explained:

[A] traditional rule of statutory construction is that, in the absence of express words to the contrary, governmental agencies are not included within the general words of a statute. (citations excluded) However, under the "sovereign powers" maxim, government agencies are excluded only if their inclusion would result in an infringement upon sovereign governmental powers. Nevertheless, "[w]hile the 'sovereign powers' principle can help resolve an unclear legislative intent, it cannot override positive indicia of a contrary legislative intent." (*Wells v. One2One Learning Foundation* [2006] 39 Cal.4th [1164], 1193.)

CCPOA pointed out that, while Sec. 512 did not expressly apply to public agencies, it did not expressly exclude them. The union contended that the legislature must have intended to include public entities because Sec. 512 did exclude other industries, such as

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## State Employees Not Entitled to Meal Breaks

LABOR CODE provisions that require employers to provide meal breaks to employees do not apply to the state employer, the First District Court of Appeal held in *California Correctional Peace Officers Assn. v. State of California*. Because the meal break provisions did not expressly cover public employers, the court affirmed the dismissal of the union's class action claims. This case, together with *Johnson v. Arvin-Edison Water Storage Dist.* (2009) 174 Cal. App.4th 729, is a huge obstacle for public employees seeking to win meal break lawsuits.

### 'Eating on the Run'

CCPOA charged that the state failed to provide meal breaks to cor-

rectional officers or pay for missed meal periods as required by the Labor Code and Industrial Wage Commission Order No. 17. The union pointed out that failure to provide breaks forces officers to choose between forgoing meals for an entire shift or "eating on the run" while working a dangerous job in "one of the State's least hygienic environments."

The trial court dismissed the class action on the grounds that the meal break provisions do not apply to public employers, and that IWC Order No. 17 does not apply to correctional officers. The union appealed.

### Excluded if Not Included

The legislature enacted two provisions relating to meal breaks in

wholesale baking and motion picture firms. The court rejected the argument, since it ran counter to the rule that public entities are excluded unless expressly included in a general provision. The legislature has acknowledged the rule, the court noted.

The union alternatively argued that the legislature must have intended to include public entities in Sec. 226.7

*Both sides agreed that  
the controller's  
feasibility concerns  
were accurate.*

because other sections of the Labor Code expressly exclude public entities. Sec. 220, which is in the same chapter as 226.7, provides that several sections relating to the timely payment of wages do not apply to state employees. But the court shot down this contention using another rule of statutory interpretation — where the legislature has expressly used a phrase in one place but not another, “it should not be implied where excluded.” Viewed in the context of this case, this reasoning falls short. However, a review of *Johnson* supplies the missing pieces. In *Johnson*, the court pointed out that Sec. 555 made several sections on maximum consecutive working days applicable to cities and counties. Because the legislature had expressly made some sections of the code applicable to public entities, the *Johnson* court reasoned, it could not infer that same intent in

Sec. 512 where there is no express application to public entities.

CCPOA also noted that the legislature had given the IWC the power to exempt public entities from some orders. If not exempted, the union argued, wage orders and Sec. 512 should be read to include public entities. But, as the court reminded the parties, this argument too was rejected in *Johnson*. Section 512.5 allows the IWC to issue a wage order that includes commercial drivers employed by public entities, but then exempts the employees from meal and rest break rules. Tellingly, the Senate committee that analyzed Sec. 512.5 implied that, under then-existing law, public employers were exempt from meal and rest period laws. Section 512.5 was passed because the IWC was considering an order applying only to commercial drivers, the *Johnson* court explained, and did “not indicate a legislative intent to automatically apply section 512 and IWC wage orders to public employers.”

#### **Not a New Industry**

The court also dismissed the argument that Wage Order No. 17, which applies to miscellaneous employees, covers correctional officers. The Cali-

fornia Code of Regulations states the order applies to “any industry or occupation not previously covered by, and all employees not specifically exempted in, the Commission’s wage orders in effect in 1997, or otherwise exempted by law.” Prior case law established that public employees historically have not been covered by wage orders, and with the exception of agricultural and household occupations, wage orders in 1997 expressly exempted public employees. Therefore, the court held that Wage Order No. 17 does not apply to correctional officers. Moreover, the court pointed out, in enacting No. 17, one of the commissioners explained that it applied to new industries not falling under the other wage orders. Corrections is not a new industry, the court announced.

The court also turned aside the union’s argument that meal periods are important to the health of public safety personnel. While the court agreed that meal breaks are beneficial to all employees, it refused to make law where the legislature had not. (*California Correctional Peace Officers Assn. v. State of California* [2010] 188 Cal.App.4th 646.) \*

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## **‘Normal Workweek’ Statute Does Not Require Overtime Pay After 40 Hours**

CORRECTIONAL OFFICERS did not gain new rights to overtime pay after the collective bargaining agreement between the state and the California Correctional Peace Officers Associa-

tion expired and the state implemented terms and conditions. A statute that makes 40 hours the “normal workweek” of state employees does not require the state to pay overtime com-

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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>

pensation after 40 hours of work in a week, the Court of Appeal held.

### **164-Hour Schedule**

Under a memorandum of understanding between the state Department of Personnel Administration and CCPOA, officers earned overtime compensation only after working more than 164 hours in a 28-day period, an arrangement allowed by Section 7(k) of the Fair Labor Standards Act. In 2007, the parties reached impasse in negotiations for a successor contract. Mediation failed to result in an agreement, and the state implemented its last, best, and final offer. The LBFO provided for overtime pay only after 164 hours of work in a 28-day period.

In the absence of an MOU, Government Code Sec. 19851 applies to state employees. It describes as a policy of the state "that the workweek of the state employee shall be 40 hours, and the workday of state employees eight hours, except that workweeks and workdays of a different number of hours may be established." It continues, "It is the policy of the state to avoid the necessity for overtime work whenever possible."

CCPOA contended that the statute required the state to pay officers overtime compensation after they worked eight hours in a day or 40 hours in a week. Officers generally worked 8 hours and 12 minutes per day for a total of 41 hours a week.

DPA argued that Sec. 19851 does not require overtime pay. The trial court dismissed the union's claims, and the union appealed.

### **No Pay Mentioned**

Looking at the "plain language" of the statute, the appellate court found nothing that requires compensation for overtime work. Although the word "overtime" is used twice in the statute, the union did not rely on those sentences. Instead it urged that the phrase, "the workweek of the state employee shall be 40 hours" is mandatory, not permissive. The court was not persuaded. The statute does not say that employees "shall be paid" for overtime, it pointed out.

The court examined the statutory scheme to determine how the section interacted with other sections of the Government Code. It found that Sec. 19844 governs compensation. That section states, “[DPA] shall provide the extent to which, and establish the method by which, ordered overtime or

*The statute does not say that employees “shall be paid” for overtime.*

overtime in times of critical emergency is compensated.” The court reasoned that this section would be superfluous if Sec. 19851 was interpreted to mandate overtime pay after 8 hours in a day or 40 hours in a week. “How could DPA ‘provide the extent to which’ overtime is compensated, if section 19851 already expresses the Legislature’s determination that overtime compensation must be provided after eight hours in a day or 40 hours in a week?” the court asked. The court found DPA’s construction of the statutory scheme consistent, as it authorizes DPA to provide for overtime as required by the FLSA.

The court rejected the union’s assertion that Sec. 19851.1 supports its interpretation that Sec. 19851 requires overtime compensation. That section, which provides for a cap of 80 hours of overtime for officers, says nothing about when overtime compensation is triggered, the court pointed out. And the following section, which allows 40

hours of work in 4 days, also is silent about compensation.

The court had no need to look at legislative history, since it believed the language of Sec. 19851 was clear on its face. But examination of the history made no difference. Section 19851 has been amended and identified by a different number over the decades. Before the FLSA applied to state employees, the section provided for different kinds of workweeks, and the next-numbered sections provided for overtime compensation. One of those sections evolved into the current Sec. 19844.

The union’s arguments contain a fundamental flaw, said the court. They assume that state law provides a trigger for overtime compensation for state employees that is more protective than the FLSA, but cite no supporting authority. While state law does require overtime pay for private sector employees who work more than 8 hours in a day or 40 hours in a week, that law does not apply to state employees, the court pointed out. (*California Correctional Peace Officers Assn. v. State of California* [2010] 189 Cal.App.4th 849, rev. den.) \*

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## Union Need Not Give New *Hudson* Notice When Temporarily Increasing Fees Midyear

WHEN SEIU Local 1000 temporarily increased fees and dues for a Political Fight Back Fund in 2005, it did not give fair share fee payers a chance to object to the new fees. However, in *Knox v. California State Employees Assn.*, the Ninth Circuit ruled that its procedure complied with the First Amendment, reversing the district court decision in *Knox v. Westly* (2008) 190 CPER 53.

### Special Dues Increase

In 2005, SEIU Local 1000 decided to assess a temporary dues increase to fight two initiative measures on the November ballot. One was Proposition 75, which would have required unions to ask their members for permission to spend dues on political campaigns.

As authorized by the Dills Act, the union’s memorandum of understand-

ing with the state has a fair share agreement that allows it to collect fees from non-members, as well as dues from members, to defray representation and negotiation costs that are incurred for members and non-members alike. The United States Supreme Court ruled in *Chicago Teachers Union v. Hudson* (1986) 475 U.S. 292, 68X CPER 1, that fee payers’ First Amendment rights are violated when the union spends fees on political candidates or causes without giving the fee payers notice and an opportunity to object to the use of their fees for political purposes.

In June 2005, Local 1000 had issued to agency fee payers its annual *Hudson* notice announcing the fee amount for the following year, which amounted to 99.1 percent of member dues. It also notified them of the likely breakdown of the union’s expendi-

tures for the coming year based on an audited review of the previous year's spending. The union advised that 56.35 percent of the fee was chargeable to fee payers for the costs of bargaining and representation of all employees in the unit. The remainder was for political or other unchargeable expenses, like the expense for members' credit union credit cards. Fee payers had 30 days to object to collection of the full agency fee, in which case only 56.35 percent of the monthly dues amount would be deducted from the objector's paycheck. Objectors could also challenge the union's calculation of chargeable expenses and have their challenges heard by an impartial decision-maker. The notice stated that dues and fees were subject to change without further notice.

On July 30, 2005, the union proposed an "Emergency Temporary Assessment to Build a Political Fight Back Fund" for a broad range of political expenses "to defend and advance the interests of members of the Union and the important public services they provide." The internal proposal asserted that the fund would not be used for routine union expenses like rent and salaries. In August, union delegates voted to impose a temporary dues increase of one-fourth of 1 percent of salary to create the fund, without including any spending limitations. In a letter to members and fee payers, the union explained the assessment would be used to fight Prop. 75, to defeat an expected attack on pensions in June 2006, and to elect officeholders in November 2006 who would support public employees and services. The

controller began deducting fees from paychecks at the end of September 2005, and continued through December 2006.

When one fee payer called to object to the extra fee, he was told that the union intended to split the increase between political actions and collective bargaining activities. Later financial documents showed that the fund was used for both chargeable and non-chargeable expenses.

### *Hudson approved the method of calculating the present year's objector fee based on the prior year's expenditures.*

The National Right to Work Legal Defense Fund filed a lawsuit against the union and the state controller for a class of objectors and a class of non-objecting fee payers. When the district court ruled that the union had violated the fee payers' rights by not giving advance notice and an opportunity to object to the special assessment, the union appealed.

#### **Accommodating Rights and Interests**

The fee-payer plaintiffs contended that the court should strictly scrutinize the union's procedure rather than use a less exacting test that balanced the First Amendment rights of fee payers with the statutory rights of the union.

But, because it is bound to follow the test set by the Supreme Court in *Hudson*, the court refused to use the strict scrutiny test. Instead of requiring a procedure that imposes the least burden on fee payers, the court examined whether the procedure reasonably accommodates the legitimate interests of the union, the public sector employer, and non-member employees.

Using this test, the court decided that the union had not violated *Hudson* requirements. The court in *Hudson* approved the method of calculating the present year's objector fee based on the prior year's expenditures. "Use of the prior year method is a practical necessity," the *Knox* court explained, because large public sector unions must base their fee-payer notice on audited financial statements. "One cannot audit anticipated future expenditures," the court pointed out. It acknowledged that whether fee payers "overpay" or "underpay" in a given year fluctuates with the prior-year method, but theorized that payments would be approximately correct over time.

The *Hudson* notice is always a prediction, said the court. It rejected the fee payers' argument that the union should have used a procedure that avoided the risk that the special assessment would be used for purely political reasons. The court saw no distinction between the usual situation when actual chargeable expenses may vary from the prior year and SEIU's mid-year decision to raise fees. In both scenarios, the actual expenses would be incorporated into calculation of the fee the following year.



The court dismissed the fee payers' characterization of SEIU's procedure as an unconstitutional rebate. The rebate procedure criticized in *Hudson* was a system in which the union collected the full fee at the beginning of the year and rebated the nonchargeable amount at the end of the year. Here, the court pointed out, SEIU had charged objectors only 56.35 percent of the special assessment, based on the chargeable percentage in the June 2005 notice.

The court disagreed with the district court's ruling that SEIU should have issued a second notice before the fee increase because the categories of spending in 2005-06 were going to be dramatically different than in the previous year. The court reasoned that chargeable expenses vary. They may increase during a collective bargaining year and decrease during a political election year. Extended to its logical conclusion, the fee payers' argument would invalidate a notice for the political election year because the union would intend that more of its expenses would be non-chargeable. But, such a system is the one prescribed by *Hudson*, the court reminded the parties. It is a system that accommodates the legitimate interests of the union and the fee payers.

The court held the notice complied with *Hudson* requirements. It found that the United States Supreme Court's decision in *Davenport v. Washington Education Assn.* (2007) 551 U.S. 177, 185 CPER 21, did not change the result. Although the high court upheld a state law that required unions to obtain affirmative prior consent before using non-objecting fee payers' money

for non-chargeable activities, it also stated that such affirmative consent was not constitutionally required. The *Knox* court reversed the district court judgment.

In a lengthy dissent, Circuit Judge Wallace disagreed with the balancing test used by the majority. Stating that the union had no "right" to an agency fee, he asserted the majority had "[put] its finger on the wrong side of the scale" and afforded the union "undue leniency" because the fee payers' rights were derived from the Constitution.

In addition, he found the increase might have prompted some non-objecting fee payers to object, since on average fees increased at least 25 percent, not a minimal amount. Judge Wallace voiced his suspicion of the temporary assessment, as it followed

the June notice so closely and was such a departure from the union's usual spending pattern. He contended that the June 2005 notice deprived fee payers of sufficient information to gauge the propriety of the fees because it did not inform fee payers of the temporary assessment that began in September. Judge Wallace found this particularly insufficient in light of the fact that the special assessment was to be used for political activities, rather than the usual union expenditures. He would have rejected the argument that the usual prior-year method of calculation validated in *Hudson* authorized the union's procedure for this unusual assessment because it did not minimize the infringement of non-members' First Amendment rights. \*

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## Court Must Uphold SPB's Decision Absent an Abuse of Discretion

REASONABLE MINDS may differ when reviewing evidence in a disciplinary case. Unless the State Personnel Board's decision is arbitrary, capricious, or "beyond the bounds of reason," a judge cannot substitute her judgment in place of the board's decision, ruled an appellate court in *Siskiyou County v. State Personnel Board*.

### Misrepresentation to a Court

Raegan Duncan was a county employee in the Department of Human Services who worked in the public assistance unit. She met a client, Timothy M., when she became his food stamps and Medi-Cal worker.

Timothy later became involved in a custody dispute with his ex-wife. At that time, he was sharing a residence with Duncan's close friend.

Duncan filed a declaration in the family court on Timothy's behalf. She explained how she met him and that she had observed his relationship with his children. She stated, "In the course of my duties, I have made home visits to [Timothy's] residence." She described him as an excellent parent and expressed her opinion that he should have sole custody of the children with supervised visits by the mother. She did not use department letterhead or her title.



In fact, Duncan's duties did not involve assessing parental fitness, and she was generally not authorized to make home visits to her clients. She had observed Timothy's relationship with his children numerous times at her office and when she visited her friend. She had dropped off aid eligibility forms on some of those visits.

When the family court awarded custody to Timothy, the mother complained. Duncan's supervisor investigated the incident. Duncan explained that she did not think it was wrong to file a declaration for a client because there was no department policy forbidding it. She realized that she had mixed personal observation and business, but did not understand it was misconduct. She stated she did not know the outcome of the custody hearing.

The county terminated her for conduct unbecoming a public employee. She appealed to the SPB.

The board adopted the decision of its ALJ, who recommended reducing her penalty to a two-month suspension. Although the county charged that she had lied in the investigation about whether she knew Timothy had been awarded child custody, the ALJ ruled that the county had not proven when Duncan became aware of the outcome of the custody dispute. Duncan had a sincere belief that Timothy was a good parent, said the ALJ, but the declaration caused discredit to her employer by implying she was rendering a judgment in her professional capacity as a DHS employee. Although the ALJ did not find that she was dishonest, he did emphasize that her conduct risked misleading the court in a matter that

related to the health and safety of the children, and exposed her department to liability. Because of her long-term unblemished employment and the fact she did not violate any explicit department policy, the ALJ found her termination excessive. But, since she did not understand the wrongfulness of her conduct, a lengthy suspension was justified.

The county filed a petition in court claiming the SPB abused its discretion when it reduced the penalty. The trial court agreed because it found Duncan's conduct dishonest and believed her long-term unblemished employment was legally insufficient to outweigh the dishonesty.

### **Penalty Within SPB's Discretion**

The appellate court acknowledged that the public is entitled to be protected from employees whose conduct may endanger public health and safety and place the government at risk of incurring liability. However, long-standing legal doctrine holds that, because the SPB is an agency with constitutional authority, its decision stands unless it abused its discretion by acting arbitrarily, capriciously, or unreasonably.

The court found that the board's factual findings were supported by substantial evidence. While the trial court reviewed the evidence and found that Duncan was dishonest, the SPB implicitly found that Duncan's false statements were unintentional. The appellate court found that the evidence, when viewed in the light most favorable to Duncan, indicated that Duncan did not violate any express

policy and did not intend to suggest she was a child protective services worker expressing her opinion in an official DHS capacity. She misrepresented that she made home visits when all she did was drop off forms for a friend, but that statement could be seen as careless use of terminology.

The court also found that reasonable minds could differ concerning the appropriate penalty for the misconduct. It distinguished cases relied on by the county. In *Kolender v. San Diego County Civil Service Comm.* (2005) 132 Cal.App.4th 716, 174 CPER 38, a police officer covered up a coworker's abuse of an inmate. In *County of Santa Cruz v. Civil Service Comm. of Santa Cruz* (2009) 171 Cal.App.4th 1577, 199 CPER 35, a police sergeant lied about creating a hostile environment for a female officer. The court found the officers' dishonesty and interference with internal investigations in those cases "starkly different" than Duncan's misconduct.

The court also rejected the argument that dishonest employees always should be terminated. "Although termination is an acceptable penalty for dishonesty by a public employee, it does not ineluctably follow that dismissal is required in all cases of dishonesty." It acknowledged that Duncan's lack of insight into her misconduct could lead her astray again, but did not find it an abuse of discretion to set her penalty at a two-month suspension, during which she could reflect on the seriousness of her misrepresentation. (*Siskiyou County v. State Personnel Board* [2010] 188 Cal. App.4th 1606, rev. den.) \*

# Discrimination

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## U.S. Supreme Court Allows Retaliation Claim Based on Fiancée's Sex Discrimination Charge

AN EMPLOYEE has standing to bring a claim under Title VII alleging that he was terminated in retaliation for his fiancée having filed a claim of sex discrimination against the same employer, held the United States Supreme Court in *Thompson v. North American Stainless, LP*.

Eric Thompson and his fiancée, Miriam Regalado, were both employed by North American Stainless. In February 2003, the Equal Employment Opportunity Commission notified the employer that Regalado had filed a charge alleging sex discrimination. NAS fired Thompson three weeks later.

Thompson filed a charge, and then a lawsuit, alleging that NAS fired him to retaliate against Regalado for having filed a charge in violation of Title VII. The district court dismissed his claim on the ground that third-party claims were not permitted under Title VII, and the Sixth Circuit affirmed.

The Supreme Court, in a unanimous decision written by Justice Antonin Scalia, overruled the lower courts. "[W]e have little difficulty finding that if the facts alleged by Thompson are true, then NAS's firing of Thompson violated Title VII," wrote Scalia. "We think it obvious that a reasonable worker might be dissuaded from en-

gaging in protected activity if she knew her fiancé would be fired," he wrote, citing the court's holding in *Burlington N. & S.F.R. Co. v. White* (2006) 548 U.S. 53, 179 CPER 68, that Title VII's anti-retaliation provision prohibits any employer action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

The court dismissed NAS's concern "that prohibiting reprisals against third parties will lead to difficult line-drawing problems concerning the types of relationships entitled to protection," stating, "[a]lthough we acknowledge the force of this point, we do not think it justifies a categorical rule that third-party reprisals do not violate Title VII."

Noting that the *Burlington* court adopted a broad standard because Title VII's anti-retaliation provision is worded broadly, the *Thompson* court concluded that "there is no textual basis for making an exception to it for third-party reprisals, and a preference for clear rules cannot justify departing from statutory text." And, the court declined to identify a fixed class of relationships for which third-party reprisals are unlawful because the significance of any given act of retaliation

will depend on the particular circumstances. "We expect that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize."

The more difficult question for the court was whether Thompson had the right to sue NAS. The court noted Title VII provides that "a civil action may be brought...by the person claiming to be aggrieved." The court

*Firing a close family member will almost always meet the Burlington standard.*

rejected its dictum in *Trafficante v. Metropolitan Life Ins. Co.* (1972) 409 U.S. 205, as too expansive and ill-considered. In that case, the court suggested that the Title VII aggrievement requirement was met by anyone with standing under Article III of the Constitution, which consists of an injury by the defendant that is remediable by the court. However, it also rejected NAS's position that "person aggrieved" refers only to the person claiming to have been discriminated against, finding no "basis in text or in prior practice" for such a limited interpretation.

Rather, the court concluded that the "zone of interests" test should be used to determine whether a person is "aggrieved" within the meaning of

Title VII. It described the test as “denying a right of review ‘if the plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit,’” quoting from *Clarke v. Securities Industry Assn.* (1987) 479 U.S. 388. “We hold that the term ‘aggrieved’ in Title VII incorporates this test, enabling suit by any plaintiff with an interest ‘arguably [sought] to be protected by the statutes,’ while excluding plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to the

statutory prohibitions in Title VII,” said the court.

Applying that test to this case, the court concluded that Thompson fell within the zone of interests protected by Title VII. “[A]ccepting the facts as alleged, Thomson is not an accidental victim of the retaliation.... To the contrary, injuring him was the employer’s intended means of harming Regalado. Hurting him was the unlawful act by which the employer punished her.”

The court reversed the Sixth Circuit and sent the case back for further proceedings. (*Thompson v. North American Stainless, LP* [2011] 131 U.S. 863.) \*

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## Employer Must Take Corrective Action Even if Sexual Harassment by Prisoners Is ‘Part of the Job’

A FEMALE EMPLOYEE alleged that the employer was liable for harassment by prisoners whom she monitored at a halfway house. She also claimed that the employer had terminated her for discriminatory reasons when it told her she could not work alone, due to a policy requiring drug tests to be conducted by someone of the same gender as the prisoner. In her complaint, she sought punitive damages. The appellate court agreed that the employer, Turning Point, was required to take corrective action to alleviate the sexual harassment. It found that the trial court correctly analyzed the discrimination allegation under the disparate impact theory. It upheld the dismissal of the punitive damages claim

because the employee had failed to allege facts showing malice.

### Harassment by Prisoners

Joyce Turman worked in a halfway house that served prisoners who were about to be released. Her duties as a resident monitor included conducting urinalysis drug testing of the prisoner-residents and citing them for disciplinary violations.

Residents complained to her supervisor, Larry Telles, that Turman gave out too many citations. He often sided with the residents and reversed the citations. Telles seldom issued disciplinary citations, even when residents were drunk.

While at work, the residents would proposition Turman for sex, make sexual gestures toward her, and call her sexual names. When she complained to Telles, he told her to be nicer to the residents and not write them up so often.

Beginning in 2001, Turman worked the overnight shift and had a different job as caregiver during the day. In December 2003, she was informed that her shift was changed to 2 until 10 p.m. She objected because it would interfere with her other job. Telles suggested she work from 4 p.m. until midnight, and said that she would have to choose between her other job and her employment at Turning Point.

On January 8, 2004, Turman asked for time off due to stress caused by the residents’ abusive behavior. Her request was denied on the ground that the halfway house was short on staff. The next day, however, it terminated her. Her notice of termination stated that a reduction in staff was necessary because of financial difficulties, and that she could not work her night shift because of a federal contract prohibiting a woman working alone at night. The notice also claimed she had declined reemployment on a day-time shift.

Turman filed a complaint alleging sex discrimination under the Fair Employment and Housing Act. In response to a motion from the employer, the trial court struck her punitive damages claim. At trial, the jury found that

she had been sexually harassed by the residents, but that the employer had taken corrective action to reduce the harassment. The trial court did not ask the jury to consider her claim that the employer had intentionally discriminated against her because of her sex, but did instruct the jury that it could find discrimination if her termination was due to a facially neutral rule that had a disparate impact on women. Turman appealed.

#### **No Corrective Action**

The appellate court found no evidence that the employer had taken any corrective action in response to Turman's complaints about sexual harassment by the residents. Instead of pointing to such evidence, the employer argued that harassment by male residents was part of the job.

The court rejected the excuse. Relying on *Freitag v. Ayers* (9th Cir. 2006) 468 F.3d 528, 81 CPER 53, the court acknowledged that enduring inappropriate behavior might be inherent in the job, but held the employer must act to preserve an employee's right to be free from a hostile work environment. It reversed the jury's verdict on the hostile environment claim and remanded it back to the trial court.

#### **Disparate Impact Appropriate**

The employer defended the sex discrimination claim with a two-part defense. First, it needed to cut the number of employees on the night shift from two to one. Second, if there was

only one employee on the night shift, it had to be a male so that he could perform urinalysis tests on male residents. The trial court treated the case as one of disparate impact. The rule that required residents to be tested by a same-sex employee applied to both

*The employer must act  
to preserve an  
employee's right to  
be free from a hostile  
work environment.*

men and women, but had a disparate impact on women because nearly all the residents were men.

The appellate court agreed with the trial court. It also rejected Turman's objection to the wording of the jury instruction on disparate impact discrimination.

The court dismissed Turman's contention that she should be allowed to try to prove the employer liable for punitive damages when the case returned to the trial court for further proceedings on her hostile environment claim. The court found no allegations in the complaint that indicated the employer acted with malice. Turman's allegations about gender discrimination were not sufficient in themselves to show malice. (*Turman v. Turning Point of Central California, Inc.* [2010] 191 Cal.App.4th 53.) \*



# The National Academy of Arbitrators

invites you to attend its 2011 Annual Meeting  
SAN DIEGO, CA. MAY 25-28, 2011

## PROGRAM THEME: VARIETIES OF THE ARBITRATION EXPERIENCE

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All Labor and Management representatives and advocates are encouraged to attend the next Annual Meeting of the National Academy of Arbitrators, the premier organization of arbitrators in the United States and Canada dedicated to the resolution of labor and employment disputes.

The meeting will take place at the beautiful San Diego Marriott Hotel and Marina, beginning Wednesday evening, May 25, and ending Saturday afternoon, May 28, 2011. Registration materials are available by late January through the Academy's website: [www.naarb.org](http://www.naarb.org), or by contacting the NAA operations center at: (607) 756-8363.

Confirmed as the distinguished speaker for the meeting is Wilma Liebman, the current chair and long time member of the National Labor Relations Board. The meeting also will feature a much anticipated "fireside" chat with Ted Jones, a former Academy president, renowned arbitrator, and UCLA law professor. Another highlight of the program will be the address by NAA President Gil Vernon.

The Annual Meeting's program theme will be: "Varieties of the Arbitration Experience." Plenary sessions will include consideration of public sector economic crises and interest arbitration, cross-national perspectives on employee privacy rights, and the duty of fair representation in arbitration.

A series of afternoon sessions will focus on special arbitration proceedings for film and television, professional football, health care, labor organizing, airline consolidation, and statutory employment claims in the union setting. The emerging issue of workplace bullying also will be examined.

The program will include speakers who are labor-management advocates and arbitrators in California, and throughout the U.S. and Canada. Final details on participants will be available early in 2011.

In addition to the program's topical issues, special skills-enhancement sessions will be offered for labor and employment advocates in advance of the formal meeting, during the day on Wednesday, May 25, and also on Saturday morning, May 28.

Please save the dates of May 25 to May 28, 2011. The Academy hopes to see you in San Diego.

**\*CLE Accreditation Pending\***



# Public Sector Arbitration

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## No Cap on District's Retiree Benefit Contributions

THE ISSUE facing Arbitrator John Wormuth was whether the Paradise Unified School District violated its contract with the Teachers Association of Paradise, CTA/NEA, when it capped its contribution to the retiree health benefit premium at the rate for active employees. The contract states that the district "shall continue to pay no more than the maximum dollar amount in effect at the time of an employee's retirement."

The district argued that its contribution is capped at the maximum rate for active employees. If, at the time of retirement, an annuitant selects a plan with a premium that exceeds the active employees' cap, the district asserted, it is the responsibility of the individual retiree to bear the premium difference. In support of its position, the district reasoned that the negotiated contribution cap prevents the absurd result of an annuitant receiving greater paid health benefits than active employees.

The association, on the other hand, pointed to a lengthy past practice where the amount of the district's contribution to a retiree's health plan is fixed at the full premium rate in effect at the time of retirement. CTA took note of the parties' bargaining history, which reveals that retiree health benefits are treated differently from

those of active employees to induce certificated employees at the high end of the salary schedule to retire early. They were allowed to select among several plans.

Moreover, the association contended, retiree benefit contributions are within the scope of bargaining and the district did not provide adequate notice that it desired to change the level it contributed for retiree health benefits.

Arbitrator Wormuth sided with the association.

First, he rejected the district's contention that the matter was not arbitrable. While retirees are not in the bargaining unit, he noted that retirement health benefits are part of the parties' contract. Alleged violations of the contract affect the rights of current employees, and are subject to the grievance and arbitration procedure.

Wormuth was persuaded by the fact that for a period of 10 years, the parties have drawn a distinction between the health insurance premiums paid for active employees and the amount available through the early retirement program. The rate has been set based on the premium when the annuitant makes his or her plan selection at the time of retirement.

The arbitrator found that the language of the contract is ambiguous, but

he cited testimony which established that retiree health insurance contributions would differ from the active employee rate. Wormuth concluded that retiree contributions are fixed at the amount of the premium at the time the plan is selected by an annuitant, are not subject to fluctuation, and are provided only until the annuitant is eligible for Medicare.

There is no evidence that the parties intended to link the maximum retirement contribution rate to the rate the annuitant received prior to retirement, the arbitrator found.

*Clearly established  
past practice was  
relied on by active  
employees considering  
early retirement.*

And, given the longevity of the early retirement provisions, logic compels that, had the parties intended to make the active employee health insurance contributions cap the maximum rate, they would have expressly done so. In addition, he explained, the clearly established past practice was relied on by active employees considering early retirement.

Although the parties had an informal conversation about retiree contribution rates, the arbitrator found the association demanded to bargain. The employer could cite to no evidence that the parties entered into a written agreement or side letter



memorializing the district's revision of its contribution rate.

Wormuth rejected the district's argument that a remedy should be prospective only. (*Teachers Association of Paradise, CTA/NEA and Paradise Unified School Dist.* [9-7-10] 18 pp.

*Representatives:* Ramon E. Romero [California Teachers Association] for the union; Christian M. Keiner [Kronick Moskovitz Tiedemann & Girard] for the district. *Arbitrator:* John F. Wormuth.)  
(*Advisory Grievance Arbitration*)

## Public Policy Against Sexual Harassment Does Not Bar Award Reinstating Alleged Harasser

THE PUBLIC policy against sexual harassment is insufficient to vacate an arbitration award reinstating an alleged harasser, where the arbitrator found that the employer failed to take disciplinary action within the period allowed by the collective bargaining agreement. In *City of Richmond v. SEIU Loc. 1021*, the Court of Appeal emphasized that the public policy exception to the general rule of arbitral finality is limited and reserved for unusual circumstances.

### Untimely Charges

Dean Vigil was a long-term employee of the City of Richmond. In September 2007, the city began an investigation into claims that he sent sexually harassing text messages to a subordinate employee, Tamika Cooper. The outside investigator also looked into allegations that Vigil verbally harassed employee Jasmine Harris. The city received the investigation report in April 2008.

Later that month, the city notified Vigil of his proposed termination. The city charged Vigil with harassing Harris and with dishonesty for lying during the investigation about

harassing Cooper. It did not charge Vigil with harassing Cooper because the collective bargaining agreement barred discipline for any misconduct known to management for more than six months.

In a grievance filed by the union, Vigil asserted he had been terminated without cause. His grievance was heard by an arbitrator. The city asserted that it had not known about Harris' allegations until December 2007, but the arbitrator found that the allegations had been reported that August. As management had known of the allegations for more than six months before it took disciplinary action, the arbitrator dismissed the Harris charge as untimely. The arbitrator also concluded that dishonesty had not been proven because Cooper never testified at the hearing to establish that harassment occurred. Because there was no just cause for the termination, the arbitrator reinstated Vigil.

The city asked the trial court to vacate the award because it violated public policy. The union moved to confirm the award. The court ruled that the award violated the public policy against sexual harassment by

ordering reinstatement on procedural grounds without making findings whether Vigil harassed the two women. The union appealed.

### Public Policy Favors Finality

On appeal, the city did not challenge the arbitrator's finding that it had known of the allegations about harassment of Harris in August 2007. It contended only that reinstatement of an alleged harasser without determining that he had not actually harassed the women was against public policy.

*Judicial review of arbitration awards is extremely limited.*

The appellate court was not persuaded. Reminding the parties of the public policy in favor of arbitration, the court stated that judicial review of arbitration awards is extremely limited, particularly in the labor-management field. The court acknowledged the public policy against sexual harassment, but explained:

The relevant question, however, is not whether there is a public policy against sexual harassment generally but whether according finality to the arbitrator's decision would be incompatible with that public policy.

The court noted that the city had agreed to the six-month limitations period for discipline in the collective bargaining agreement, and did not argue that the contract provision was unreasonable. The court rejected the

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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.

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city's contention that the arbitrator should not have enforced this procedural provision. It found no absolute public policy against reinstating proven harassers, much less a public policy against reinstating alleged harassers when the accusations against them are time-barred. It found inapplicable a case from Illinois that overturned an award reinstating an employee where there were public safety concerns. It also was not persuaded that the arbitrator's failure to adjudicate whether Vigil harassed the women weighed in favor of finding the award against public policy.

The court observed that American courts differ in their application of the public policy exception, but instructed that the California Supreme Court has established principles that require "deference to arbitration awards and limited use of the public policy exception." It reasoned:

The public policy exception would swallow the rule of arbitral finality were courts to vacate every arbitration award that relied on procedural grounds to reinstate employees accused of sexual harassment or other publicly condemned misconduct.

The court acknowledged the risk of returning a possible harasser to the workplace, but placed the responsibility for that risk on the parties, who agreed to the provision in their contract. The court suggested the risk could be reduced by supervision and training of city employees and investigation of future allegations.

The court disagreed with the suggestion that reinstatement could lead to future lawsuits claiming that the city failed to take immediate corrective action by removing Vigil from the workplace. The arbitrator's finding that the termination notice was untimely under the collective bargaining agreement was not an evaluation

of whether the city complied with its duties under anti-harassment law, the court pointed out.

In an interesting theoretical discussion, the court examined the basis of the public policy exception to the rule of arbitral finality. The city framed the exception as an instance in which the arbitrator had exceeded his or her powers, which is grounds for vacating an award under the Code of Civil Procedure. The court, however, distinguished between an arbitrator exceeding powers — straying beyond the scope of the parties' agreement to arbitrate — and an award violating public policy, an exception that stems from a court's power to refuse to enforce an illegal contract.

The trial court was directed to confirm the award. (*City of Richmond v. Service Employees International Union, Loc. 1021* [2011] 189 Cal.App.4th 663, rev. den.) \*

## LETTER FROM THE EDITOR

Dear CPER Readers:

After a brief hiatus, here is your issue of *California Public Employee Relations*. As always, it brings you up to date on the fast-moving public sector landscape. Priscilla Winslow's article shows just how far the law has moved concerning freedom of speech for public employees. And, check out Katherine Thomson's article, "California Next?", which addresses, head-on, some of the negative claims about public sector employees and the recent attacks on their collective bargaining rights.

Recent developments include articles explaining court rulings on furloughs, PERB remedies, and wage and hour issues. The call for pension reform continues to underlie developments across the public sector.

As many of you know, after 23 years, I am retiring from my position at CPER. My very first articles appeared in issue No. 77 (June 1988), when *CPER's* pages provided the vehicle for a vigorous debate over PERB's workload and the timeliness of their decisions. And, there were lots of articles about collapsed bargaining talks, unilaterally imposed contract terms, strikes, sickouts, and work-to-rule.

In each issue since then, I have tried to keep you informed about the developments in the public sector by presenting accurate and balanced reporting. I am especially proud of the fact that, since I came to CPER, the pocket guide series has grown from 3 titles to 18, and a *Pocket Guide to Workers' Compensation* is next. Through the Journal as well as the pocket guides, CPER has had an important voice in the public sector dialogue. And, it will continue to do so.

With the next issue, *CPER* will change to an online format, which may take a little getting used to. But, it will continue to share in-depth analyses of important, emerging topics. It will devote its resources to covering all of the public sectors, from the schools to the state, from higher ed to local government. *CPER* will bring you summaries of every PERB decision and useful reviews of arbitrators' awards. Putting a slight spin on the old adage, we hope that, the more things at CPER change, the more they will stay the same...by continuing to be a source of reliable information directed specifically to you, public sector practitioners.

As I leave the CPER program behind and embark on a full-time arbitration practice, I look back at all the twists and turns the California public sector has taken in the last two decades. Over the years, we've met at conferences and shared ideas, we've talked on the phone about our impressions of cases, and, more recently, we exchanged our views via email. Through these interactions, my job at CPER has enabled me to develop close professional relationships with so many of you. Looking back, that's what's most important.



Carol Vendrillo

# Arbitration Log

## • Denial of Tenure

*San Mateo Community College Federation of Teachers, Loc. 1493, AFT, AFL-CIO and San Mateo Community College Dist.* (3-2-09; 21 pp.). *Representatives:* Robert J. Bezemek, for the union; Eugene Whitlock, deputy county counsel, for the district. *Arbitrator:* William E. Riker (CSMCS Case No. ARB-07-0558).

*Issue:* Did the district violate the contract when it denied the grievant her full four-year probationary period?

*Union's position:* (1) The district denied the grievant an opportunity to complete her four-year probationary period based on six secret memos that were not shared with her until after the tenure review committee made its recommendation.

(2) The district did not give the grievant an opportunity to rebut the alleged performance deficiencies or rectify those criticisms found to be valid.

(3) Negative comments contained in the memos do not pertain to the negotiated criteria for continued probationary service.

(4) The district's decision to prematurely dismiss the grievant was because she exercised her protected right to complain about her working conditions.

(5) The grievant should be reinstated for two additional probationary years.

*District's position:* (1) The district did not misapply the terms of the collective bargaining agreement or the Education Code. Acceptance of the tenure review committee's recommendation was consistent with the college's policies and procedures.

(2) The grievant was not denied tenure as a result of anti-union animus. Each member of the committee testified that going to the union to have her hours reduced did not influence the decision not to renew her contract.

(3) The grievant's presence in the workplace caused conflict. She did not tolerate criticism, blamed others for her poor performance, and did not demonstrate a commitment to the profession.

*Arbitrator's recommendation:* Grievance affirmed.

*Arbitrator's reasoning:* (1) Although the grievant's prior evaluations were positive, and the recommendation to deny further employment as a probationary learning specialist was made shortly after she vigorously protested her work schedule, the evidence does not support the claim that there was a concerted effort on the district's part to deny her tenure because of her protest.

(2) The district violated the tenure review policies when it assigned an employee with no relevant training or expertise as the grievant's mentor. Rather than provide advice, feedback, and support, the mentor was overly critical. The grievant was not given adequate notice of her deficiencies or a reasonable opportunity to improve.

(3) The grievant was denied the opportunity to view the critical memos or rebut the criticisms. The review process was not fair or unbiased. The recommendation of the tenure review committee was inconsistent with the tenure policy.

(4) The grievant bears some responsibility for the negative dynamics that developed between her and the administration. However, her shortcomings do not outweigh the right to a fair probationary process, including the support needed to succeed.

(5) The grievant should be reimbursed for extra hours worked and reinstated to her probationary position.

*(Advisory Grievance Arbitration)*

## • Discharge

*City of San Carlos* (6-21-10; 28 pp.). *Representatives:* William R. Rapoport, for the appellant; Cynthia O'Neill (Liebert Cassidy Whitmore), for the city. *Arbitrator:* Paul D. Staudohar (CSMCS Case No. ARB-09-0060).

*Issue:* Did the city have just cause to discharge the appellant?

*City's position:* (1) The appellant police officer failed to prepare accurate police reports on several occasions. She left evidence related to stolen property in an unsecured locker.

(2) The appellant failed to keep a suicide note as evidence as directed by her supervisor. She disregarded an order not to log in on a particular computer

## 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](mailto:cvendrill@uclink.berkeley.edu). Visit our website at <http://cper.berkeley.edu>.

and failed to attend mandatory firearms training. She did not contact a crime victim, but untruthfully told the commander that she had.

(3) Disparate treatment is not demonstrated as the appellant admitted to all of the charged misconduct. Although she received repeated training, and was coached, mentored, and counseled, her poor performance persisted.

(4) Her continued employment poses a threat to public safety, and her dishonesty precludes her from testifying in court in support of criminal prosecutions.

*Appellant's position:* (1) The appellant's monthly and semi-annual reviews reflect her good qualities, and include numerous complimentary remarks about her positive attitude, willingness to try new assignments, special ability to interact with people, and enthusiasm.

(2) Testimony from the chief, a commander, and another officer cite her compassion, "people skills," personal courage, and ability to relate to people.

(3) The appellant's job deficiencies were a direct result of her depression. The department overreacted to situations and lodged invented charges against her.

(4) The appellant was treated differently than other officers and was "micro-managed" by a sergeant.

*Arbitrator's holding:* Grievance denied.

*Arbitrator's reasoning:* (1) The appellant exhibited report writing problems throughout her employment. She failed to properly handle evidence, and stored evidence in an unsecured locker.

(2) The appellant forgot she placed the suicide note under the visor in her patrol car and failed to respond to inquiries made by the victim of a hit-and-run

accident. She made a false and misleading statement to her commander.

(3) After she was placed on administrative leave for a remark made about a female coworker, she experienced depression.

(4) The department took many steps to assist the appellant in becoming a competent police officer. However, at the time of discharge, she was not functioning in a consistent manner. Despite certain admirable qualities, she was unsatisfactory in report writing, self-initiated activities, multi-tasking, handling of evidence, and following safety rules.

(5) While the appellant's mental health has improved, the conduct she exhibited at the time of discharge is just cause for termination.

*(Binding Grievance Arbitration)*

#### • Discharge — Dishonesty

*Stanislaus Sworn Deputies Assn., Loc. Union No. 315, and County of Stanislaus (10-7-10; 10 pp.). Representatives:* Daniel T. McNamara (Mastagni, Holstedt, Amick, Miller & Johnsen) for the union; Edward R. Burroughs (assistant county counsel) for the county. *Arbitrator:* C. Allen Pool (CSMCS Case No. ARB-09-0478).

*Issue:* Was there just cause for the termination of the grievant?

*County's position:* (1) During a vehicle stop, the grievant lied to other officers, failed to book found evidence, and attempted to use a ruse to arrest a suspect. He was untruthful in the criminal investigation and the internal affairs interview.

(2) The grievant's behavior brought discredit to himself, the sheriff's department, and all law enforcement officers.

*Union's position:* (1) The grievant's attempt to use a ruse to gain information

is an acceptable law enforcement technique. He acted proactively in trying to get information on a drug house.

(2) When he realized the ruse could not continue, he was truthful with the other officer. He had no intention of arresting the female passenger.

(3) The grievant was fully cooperative and truthful during the investigative interviews. His actions were misconstrued.

(4) He is an outstanding peace officer.

*Arbitrator's decision:* Grievance sustained.

*Arbitrator's reasoning:* (1) Termination of the grievant was partially based on the grievant's attempt to use a ruse. However, this is an acceptable law enforcement tactic during which an officer lies to a suspect and, momentarily, to another officer.

(2) The district attorney did not appropriately determine that the grievant lied or planted drugs.

(3) The grievant's failure to book the evidence is not proof of incompetence.

(4) The record does not establish that the grievant lied during the investigative interviews. An officer who participated in the interview testified that the grievant was fully cooperative.

(5) The grievant is an outstanding and respected officer who received good evaluations and commendations, including "officer of the year."

(6) As just cause for termination is lacking, the county is directed to restore the grievant to his position as deputy sheriff and make him whole for all lost rights, benefits, and income.

*(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

**No change in circumstances required return to bargaining after implementation of last, best, and final offer: DPA.**

*(California Correctional Peace Officers Assn v. State of California [Dept. of Personnel Administration], No. 2102-S, 3-26-10; 2 pp. + 12 pp. ALJ dec. By Acting Chair Dowdin Calvillo, with Members Wesley and McKeag.)*

**Holding:** Legislative rejection of raises in a last, best, and final offer, worsening state fiscal conditions, and DPA's withdrawal of raises in future years did not constitute changed circumstances requiring DPA to reopen bargaining at CCPOA's request, particularly since the union demanded return to the terms and conditions of bargaining that existed before implementation of the LBFO.

**Case summary:** The MOU between the state and CCPOA expired, and the parties reached impasse in bargaining. In September 2007, DPA sent the union a last, best, and final offer that eliminated bidding on positions and other conditions of employment favorable to the union, but offered annual 5 percent raises for three years. The union rejected the offer, and the state imposed it. In December, after PERB issued a complaint in a case that challenged DPA's implementation of a three-year offer, DPA withdrew the second two years of the offer. In January 2008, the

governor declared a fiscal emergency. DPA was not able to garner legislative support for the pay raise.

After each of these events, CCPOA wrote DPA and requested to bargain, citing changed circumstances. In each letter, CCPOA demanded that DPA rescind the LBFO and restore the status quo as it existed prior to implementation. In a January letter, the union's legal counsel also inquired what terms the state would require to bargain if CCPOA's terms were not acceptable. DPA repeatedly refused to return to the table, in part because the union conditioned bargaining upon reinstatement of the expired terms of the MOU. In one letter, DPA's deputy director noted that DPA could see no change in the union's bargaining position.

The board adopted the ALJ's decision finding that impasse had not been broken by changed circumstances. The ALJ followed *Rowland Unified School Dist.* (1994) No. 1053, 109 CPER 61, which held that a party's duty to resume negotiations following impasse arises only if the other party's proposals contain a concession from its earlier position that indicates agreement may be possible. The union's speculation that legislative rejection of a pay increase could change the concessions DPA might offer was not "substantial evidence" that DPA was committed to a new bargaining position. Worsening financial circumstances were also not a change that the ALJ believed could lead to an agreement. Even PERB's issuance of a complaint on the implementation of terms and conditions for three years would not necessarily lead to a change in bargaining position, since the complaint would not prevent DPA from going back to the bargaining table and insisting on the same terms.

CCPOA's requests to bargain did not require DPA to resume bargaining, the ALJ found, since there was no indication where the union might offer concessions. In addition, the ALJ rejected the union's assertion that it was only requesting a return to the pre-implementation status quo. The union's conditioning of a return to the table on rescission of the LBFO further indicated that impasse had not been broken and the required change in circumstances had not occurred. The union never withdrew the condition despite ongoing correspondence.



**Furlough of employee physicians, but not contract physicians, not unfair practice: DPA.**

(*Union of American Physicians & Dentists v. State of California [Dept of Personnel Administration]*, No. 2123-S, 7-28-10; 9 pp. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

**Holding:** The union's allegations of retaliation and discrimination were not sufficient because they did not identify members' protected activity or show a nexus to the department's decision to furlough employees and not contract physicians. The union also did not sufficiently allege interference with employee rights.

**Case summary:** In December 2008, the governor issued an executive order directing that state employees be furloughed two days a month. DPA developed and implemented the plan. UAPD alleged that the decision to furlough physicians and dentists in its unit, but not contractor physicians, was discriminatory and in retaliation for the union's opposition to the governor's initiative proposals, to his reelection, and to the practice of contracting out. It also alleged that the furlough policy interfered with employee rights by discouraging physicians from becoming employees and joining the union.

The board found the charge did not allege any protected activity other than union membership. General allegations asserting UAPD was among the public employee unions that engaged in visible actions in opposition to the governor's election and in support of his opponents in the legislature, including campaign donations, precinct walking, and demonstrations, did not sufficiently identify specific protected activity taken by UAPD members, the board said. Even if UAPD had identified protected activity, it occurred more than two years before the furlough order. Because the order was not close in time to the alleged protected activity, the board did not consider other factors that could demonstrate a nexus, such as the governor's comments criticizing state employee unions.

The board also found that UAPD's assertion that physicians would be motivated to become contractors rather than employees was insufficient to establish interference

with employee rights. The board noted the statutory limits on personal services contracts and a later executive order to limit contract expenditures by 15 percent.

**Ordering a single employee to complete training off-duty is isolated event, not unilateral change: CDCR, Ventura Youth Correctional Facility.**

(*California Correctional Peace Officers Assn. v. State of California [Dept. of Corrections and Rehabilitation, Ventura Youth Correctional Facility]*, No. 2131-S, 9-21-10; 7 pp. dec. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

**Holding:** For a charge to be timely, the charging party need allege only when it learned of a unilateral change, not when the change was implemented. Assertions that only one employee was instructed to complete training at home does not show a change in training policy.

**Case summary:** In August 2008, a supervisor sent employees an email reminding them to complete an online training module within 60 days. On November 14, 2008, a union chapter president learned that one employee had been instructed to complete the training module at home. Within a week, he filed a grievance.

On May 12, 2009, CCPOA filed an unfair practice charge, which the board agent dismissed as untimely. The board found the charge timely because it was filed within six months of when the union obtained knowledge of the home training instruction. PERB stated that the B.A. erred by requiring that the union also establish when the state employer implemented the change.

There was no dispute that the state did not provide CCPOA with notice and an opportunity to bargain a change in the training policy. Evidence existed that showed a practice of completing training at work. However, there were no facts showing that the instruction to train off-duty was more than an isolated incident. The charge mentioned only a single employee. The email to all employees reminding them of the training requirement did not state where the training was to be done. The board found the charge simply speculated that the instruction to train at home was given to other employees. There was no allegation that the supervi-

sor continued to apply the off-duty training requirement. The charge was dismissed for failure to state a prima facie case of a unilateral change in policy.

**Unit member must exhaust internal union procedures for challenging agency fees before filing charge: SEIU Loc. 1000.**

(*Slotterbeck v. SEIU Loc. 1000*, No. 2135-S, 10-6-10; 6 pp. dec. By Chair Dowdin Calvillo, with Members McKeag and Wesley).

**Holding:** The unfair practice charge was untimely because it was filed more than six months after the charging party knew or should have known that full dues, rather than reduced agency fees, were being deducted from his paycheck. He failed to exhaust internal procedures for challenging the fee calculations before filing his charge.

**Case summary:** The charging party wrote a letter to his representative, SEIU Local 1000, in June 2007, objecting to the use of fees collected from him in 2007-08 for activities not germane to collective bargaining. He sent another letter the following year, stating he did not want to be a member or have dues deducted from his paycheck. He claimed in that letter that SEIU failed to send him the required agency fee notice. On June 25, 2009, he mailed a third letter repeating that he did not want to be a union member and objecting to any use of his funds for political purposes.

The charging party filed the charge on June 30, 2009, stating that the union had been deducting a higher amount of money from his paycheck than allowed for a fair share feepayer. It was unclear to the board whether the charging party objected to paying the full dues amount as a fee or sought to challenge the fair share fee calculation.

The board found that he should have known that SEIU was not honoring his request to pay a reduced fee when he received his paychecks for July 2007 and July 2008. Since he did not file his charge within six months of either paycheck, the charge was untimely. Although an allegation that the union did not honor his June 2009 request was timely, the charging party did not allege facts showing that the union deducted more than the reduced fee. The charge

was filed before he received his first paycheck of the fiscal year, and was not amended after he received a warning letter about the deficiency in October 2009.

In addition, the board considered the claim that the union denied his challenge to the fee calculation. A fee payer may not file a charge challenging the amount of the fee unless he has exhausted the union's internal appeal procedure. The charge did not allege exhaustion of the internal procedure for any of the three years at issue. The board dismissed the charge without leave to amend.

**Procedural exceptions to ALJ's proposed decision dismissing retaliation claim have no merit: CDCR.**

(*Woods v. State of California [Dept. of Corrections & Rehabilitation]*, No. 2136-S, 10-12-10; 15 pp. + 24 pp. ALJ dec. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

**Holding:** The charging party did not show a nexus between her involvement of the union in her workplace complaints and her rejection from probation. Her failure to file an appeal on the ALJ's evidentiary rulings during the hearing did not foreclose her right to file exceptions to those rulings after she received the proposed decision.

**Case summary:** Soon after Woods was hired on September 10, 2007, she and her supervisor disagreed about her role in the unit. Woods voiced concerns that training she was receiving was wrong. She became upset with her salary. On October 4, she emailed her unit that she was resigning in November.

A few days later, a new supervisor began to issue Woods her assignments. Woods claimed that the work was outside her duty statement and consulted the union representative, Kugelmass. Kugelmass wrote a letter to Woods' manager, Norris, claiming that her work assignments were not within her class and expressing concern that Woods was not being treated fairly. Norris attempted to talk about the letter with Kugelmass after he investigated the complaints, but they never met. As requested in the letter, Norris met with Woods about her concerns and worked with her to find her another work location. Norris may have mentioned addressing concerns with a supervisor before contacting the union.

On October 26, Woods withdrew her resignation. Norris continued to work to transfer her out of her unit, but also investigated reports that she was acting in an aggressive, demanding way with staff. In November, Woods had a confrontation with her new supervisor.

Woods did not receive a performance report before she was rejected from probation on November 27. Norris testified she was rejected because of her resistance to and failure to complete work assignments, and because of interpersonal communication problems. She claimed she was never informed of work deficiencies and was rejected because she went to the union with her grievance.

The ALJ found that Woods engaged in protected activity, that management knew of the protected activity, and that she suffered an adverse action. But, Woods did not establish that the adverse action was due to her protected activity, even though she was rejected soon after the union wrote a letter on her behalf. Woods argued that the failure to issue a required performance report or otherwise counsel her showed disparate treatment, but the evidence showed that probationary reports were not issued regularly in her unit, and Woods' manager and first supervisor testified they had orally counseled Woods. In addition, the department's employee discipline unit had advised them not to issue a performance report. Woods also did not show union animus. The ALJ found Norris was not critical of Woods' contact with her union and had complied with the union's demands in the letter. Even if Woods had shown a nexus between her protected activity and her rejection from probation, the ALJ found that she would have been rejected anyway. Woods' conduct representing herself at the hearing showed that she could not take direction.

Woods claimed in exceptions that the ALJ's decision to quash two subpoenas resulted in the exclusion of critical evidence. The department contended that Woods should have appealed the evidentiary rulings earlier by asking the B.A. to join in the appeal. The board found, however, that the department's argument would mean that many rulings would never be subject to appeal if the B.A. did not agree to join in the appeal. The board held that failing to appeal a ruling on a motion during a hearing does not preclude

filing exceptions to evidentiary rulings after a decision by the ALJ. It therefore considered, but rejected, Woods' contentions that the witnesses she subpoenaed had relevant evidence to offer.

The board also rejected Woods' attempt to call an expert witness on the practice of issuing probationary performance reports. The witness was not from the State Personnel Board or CDCR, but had worked in other state agencies. The board held that the practice in the specific workplace, not statewide, is the relevant practice when determining whether there has been disparate treatment of an employee alleging retaliation.

The board rejected challenges to an increase in the transcription fee, the accuracy of the transcript, and the ALJ's conduct during the hearing. The board also found that the ALJ's credibility determination, based in part on Woods' conduct during the hearing, was supported by the record. It dismissed the complaint.

### **Legislature has authority to unilaterally implement furloughs: DPA.**

*(International Union of Operating Engineers, Unit 12 v. State of California [Dept. of Personnel Administration], No. 2152-S, 12-16-10; 7 pp. By Member Wesley, with Chair Dowdin Calvillo and Member McKeag.)*

**Holding:** Since the legislature retained authority to modify terms and conditions of employment without collective bargaining, it had the power to ratify the unilateral implementation of state employee furloughs.

**Case summary:** In December 2008, citing the Emergency Services Act, the governor ordered a two-day a-month furlough of nearly all state employees, including those represented by IUOE Unit 12. The union charged that the furlough was implemented without bargaining to impasse. The charge was amended when the governor ordered a third furlough day in July 2009. The board agent dismissed the charge on the basis that unilateral implementation of furloughs was justified under the emergency exception of the Dills Act due to a \$42 billion state budget deficit. After appealing the dismissal of the charge, the union attempted to withdraw it, but the state objected.

PERB refused to grant the union's request to withdraw the appeal because it found a need to provide guidance on the significant legal issue involved. Its guidance relied heavily on the California Supreme Court's decision in *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989. (See discussion on pp. 47-50 of this issue of *CPER*.)

The Supreme Court rejected the state's contention that the unilateral implementation of furloughs was justified by the fiscal emergency. But, the court held that the legislature retained ultimate control over employment conditions through the budget process and could adopt a furlough plan without bargaining. It found that the legislature had ratified the governor's furlough order when it adopted the budget. The court's holding buttressed prior rulings of PERB that held the legislature retained authority to modify terms and conditions of employment without bargaining.

PERB declined to decide whether the furlough plan violated the Emergency Services Act, a question outside its jurisdiction. Because the contention was raised for the first time on appeal, the board also refused to consider the union's argument that the state failed to bargain over the furloughs at the earliest practical time.

## ***Representation Rulings***

### **Retired annuitants were not automatically included in bargaining unit 6 in 1979 determination: CDCR.**

(*California Correctional Peace Officers Assn. v. State of California [Dept. of Corrections and Rehabilitation]*, No. 2154-S, 12-30-10; 17 pp. dec. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

**Holding:** Retired annuitants working in state service are not automatically included in the same bargaining unit as full-time employees performing similar tasks. The state did not make a unilateral change when it did not withhold fair share fees from retired annuitants.

**Case summary:** In 1979, the board determined that correctional officers, parole agents, and correctional counselors would be in bargaining unit 6. CCPOA negotiated a provision requiring the state to collect fair share fees

from the paychecks of unit members who do not join the union.

As far back as 1994, the state used retired annuitants to work temporarily as parole agents. Recently, retired annuitants have been used as correctional officers. In 2001, a union negotiator mentioned including retired annuitants in the unit and collecting fair share fees. The state negotiator responded that retired annuitants were not in the unit, but invited CCPOA to submit a proposal on the subject. Despite the position of state negotiators, retired annuitant employees of CDCR have been receiving notices of appointment that designate them as unit employees.

The state controller's office collects fair share fees from retired annuitants in only four bargaining units. Since 1994, the office has had a form for unions to complete if requesting collection of fees from retired annuitants, but CCPOA has never completed the form.

In 2007, CCPOA filed a grievance claiming that the union had recently become aware of the use of retired annuitants as correctional officers and demanding collection of fair share fees. The grievance was denied, and no fees were withheld. At the board, the union charged that the state had unilaterally removed retired annuitants from the unit and refused to comply with contractual obligations to withhold fees from their paychecks.

The board found that it had never considered in 1979 whether annuitants were part of the unit. It construed its prior decision in a University of California case as standing for the proposition that retired annuitants are not automatically included in the same unit as full-time employees performing similar tasks, but may be placed in the unit after an evidentiary hearing shows their placement is appropriate. Since the CDCR retired annuitants were not placed in the unit either automatically or by board decision, the board found the state did not breach its duty to collect fair share fees from them.

The board rejected the argument that the notices of appointment and actions of the controller had made the retired annuitants unit members. As PERB has exclusive jurisdiction over the unit determinations, its decisions prevail over conflicting interpretations of the parties.

Even if the board had found that retired annuitants were in the bargaining unit, it would not have found a unilateral change because the union never completed the controller's form requesting deductions. Member Wesley concurred in this point, but dissented from the majority's decision that the board had not included annuitants in the unit in 1979. She pointed to the fact that the board decided to include all state employees except those who were managerial, confidential, or supervisory. It specifically included intermittent employees in the unit. She pointed out that the board has included intermittent and seasonal employees in units since that time.

## EERA Cases

### *Unfair Practice Rulings*

#### **Decision to deny charging party an appointment to coordinator position not connected to protected activities: LAUSD.**

(*Isenberg v. Los Angeles Unified School Dist.*, No. 2124, 8-4-10, 2 pp. + 12 pp. ALJ dec. By Member McKeag, with Chair Dowdin Calvillo and Member Wesley.)

**Holding:** The decision not to select the charging party for a technical services coordinator position was not in retaliation for his protected activities.

**Case summary:** The charging party is a classroom teacher at Central High School. He applied for a position as a technical services coordinator but was not selected either during the original process or after the position was reopened. He met with the high school principal to protest the district's selection of another candidate during the second selection process and filed a form with United Teachers of Los Angeles regarding a dispute resolution process. The charging party questioned the successful candidate's credentials and lodged complaints with the district adult education office, CSU Los Angeles, and the Commission on Teacher Credentialing.

The charging party alleged that he was not selected for the position in retaliation for his protected activities.

An administrative law judge found that the charging party's meeting with the principal and his contact with UTLA regarding the dispute resolution process were protected activities. She found the charging party's effort to get the incumbent removed from the coordinator position, not to advance his own candidacy, was not protected. The ALJ found the charging party suffered an adverse action, but found no nexus between his protected activity and the decisions denying his appointment. Earlier decisions of the selection committee and the appointment panel occurred before the charging party engaged in protected activity. The third rejection of the charging party followed his protected activity, but the ALJ found insufficient evidence linking that decision to his protected conduct. He failed to demonstrate that he would have received the appointment but for his protected activities. On appeal, the board affirmed the ALJ's proposed decision.

#### **Rejection during probation not because of protected activity: Grossmont Union HSD.**

(*Meredith v. Grossmont Union High School Dist.*, No. 2126, 8-13-10, 4 pp. + 7 pp. ALJ dec. By Chair Dowdin Calvillo, with Members McKeag and Member Wesley.)

**Holding:** The charging party failed to demonstrate he was given a negative performance evaluation and rejected during his probation in retaliation for sending a letter accusing the principal of violating the collective bargaining agreement and asking for union representation during a meeting with his supervisors and the director of human resources.

**Case summary:** The charging party alleged that he was rejected during his probationary period because he wrote a letter to the principal and requested union representation during a meeting with the principal and other representatives. Relying on the findings of fact outlined in *SEIU Loc. 221 (Meredith)* (2008) No. 1982, 193 CPER 79, the administrative law judge concluded that the district had decided to take action against the charging party before he engaged in any protected activity. The ALJ also found the charging party and the principal had not reached a verbal



agreement that extended the charging party's options to resign or be rejected on probation.

On appeal, the board affirmed the ALJ's dismissal of the complaint. It agreed with the factual finding that there was no agreement to defer the district's decision on the charging party's probation.

The board instructed that, under the doctrines of res judicata and collateral estoppel, it will give preclusive effect to issues decided based on the presentation of evidence at a hearing. The board overruled *City of Porterville* (2007) No. 1905-M, 185 CPER 102, to the extent that it had given preclusive effect to a board agent's dismissal of identical allegations in a separate unfair practice charge. A board agent's review of a charge to determine if it establishes a prima facie case is not a matter "actually litigated" and, thus, not a resolution on the merits that is entitled to collateral estoppel.

In this case, the board acknowledged that the ALJ had extensively quoted the board's decision in *SEIU (Meredith)*, which upheld a board agent's dismissal of the charge against the union. However, PERB noted, here the ALJ addressed the allegations in the complaint in light of the board's findings in the prior decision while leaving open the possibility that the allegations, some not made in the prior related charge, could establish a prima facie case.

### **Finding sufficient allegations of nexus, dismissal of retaliation charge reversed: Sacramento City USD.**

(*Sacramento Teachers Assn. v. Sacramento City Unified School Dist.*, No. 2129, 9-3-10, 13 pp. dec. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

**Holding:** Timing of the adverse action relative to the successful resolution of his grievance plus the district's exaggerated reaction to the charging party's tardiness is sufficient to establish a prima facie case of retaliation.

**Case summary:** The charging party, a substitute teacher, filed six grievances within a one-year period; all were resolved in his favor. The last grievance was settled on October 8, 2008.

On October 17, 2008, the charging party reported for his assignment at 8:35 a.m. rather than at 7:45 a.m. because,

he said, he had been told he was not needed for the earlier period. The district representative who filled out a form reporting his tardiness did not check the box labeled, "I request that this substitute NOT be assigned to this school again this school year...."

On November 13, 2008, the district informed the charging party that he had been removed from the substitute list. The letter did not provide a reason. The charging party alleged that it was in retaliation for having filed the six grievances.

The board agent dismissed the charge for failure to state a prima facie case. The B.A. found that the charging party engaged in protected activity by filing the grievances and that his removal from the substitute list was an adverse action. However, the B.A. found no nexus between the grievances and the adverse action because the last grievance was filed more than seven months before the adverse action and the charge failed to allege any other indicia of unlawful motive.

On appeal, the association argued that timing as an element of unlawful motivation was established because the district removed the charging party's name from the list approximately five weeks after the successful resolution of the last grievance. It also argued that nexus was shown because the charging party received disparate treatment, the district failed to justify its actions at the time he was removed from the list, and the district exaggerated its reason for doing so.

The district argued there was no ongoing protected activity because the charge did not allege that the charging party personally participated in the settlement of his grievances. It also contended that the charge failed to allege facts showing disparate treatment, and asserted that the district is not required to give a justification for removing a substitute teacher from the active list. It also argued that its reason for removal was not exaggerated and it would have done so regardless of his protected activity.

The board found no support for the proposition that a grievance ceases to be protected activity at any point before the end of the process, regardless of the extent of the grievant's participation in the process. The fact that the district

removed the charging party's name from the substitute list five weeks after resolution of the last grievance is of sufficient temporal proximity to establish an inference of unlawful motive, the board said, while recognizing that timing alone is not sufficient to establish nexus.

The board agreed with the district that the alleged facts did not support a finding of disparate treatment. It also found that the district was not required to provide a justification at the time the charging party's name was removed from the list and that there was no showing of shifting justifications.

However, the board did find that the district exaggerated the facts of the October tardiness incident. It noted that the charging party spoke with district representatives that day, explained that he thought the teacher had listed the wrong time, apologized, and promised it would not happen again. The representatives did not indicate on the form that he should not be assigned to the school again. The district did not counsel, reprimand, or discipline the charging party at any time prior to the removal of his name from the list. Yet, despite its lack of concern about the charging party's tardiness when it occurred, it later characterized his behavior as intentionally defiant and asserted that it was serious enough to justify his removal. "The District's inflation of the seriousness of the incident suggests the justification is pretextual and that the District is 'attempting to legitimize its decision after the fact,'" said the board, citing *Novato Unified School Dist.* (1982) No. 210, 54 CPER 43, and *San Diego Community College Dist.* (1983) No. 368, 60 CPER 77.

While the board concluded that the district's exaggeration of the seriousness of the incident supported an inference that the charging party's protected activity was a motivating factor in its decision to remove him from the list, the district will have the opportunity to prove it would have removed him absent his protected activity when the complaint proceeds to hearing.

**No basis for charge that district breached verbal settlement agreement in retaliation for protected activity: Fontana USD.**

(*Martinez v. Fontana Unified School Dist.*, No. 2147, 12-

10-10, 3 pp. + 12 pp. B.A. dec. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

**Holding:** The charging party failed to allege sufficient facts to demonstrate that the district retaliated against him for engaging in protected activity.

**Case summary:** In 2001, the charging party was transferred to another school site. He filed a grievance and, in August 2001, an arbitrator sustained the grievance and ordered him reinstated to his former position and compensated for lost wages, including a site monitor stipend. In 2007, the charging party filed a second grievance when the district transferred him a second time. In his unfair practice charge, he alleged that the district retaliated against him for engaging in protected activity when it failed to adhere to a verbal agreement reached with the superintendent to compensate him for the 2007 school-site transfer in the same manner as directed by the arbitrator in 2001.

A board agent found that the charged conduct did not constitute an adverse action because the allegations did not establish that he and the superintendent had reached an agreement on a financial remedy for the transfer. Nor did the charging party demonstrate any reason why the district was obliged to fashion a remedy consistent with arbitrator's award.

On appeal, the board affirmed the B.A.'s dismissal of the charge. It acknowledged that, while the alleged settlement agreement and discontinuance of backpay benefits occurred in close proximity, no additional evidence of a nexus was alleged. It found that the charging party failed to demonstrate the district departed from established procedures.

**No good cause to excuse late filing of appeal: National School Dist.**

(*Villasenor v. National School Dist.*, Ad-No. 389, 12-21-10, 3 pp. By Member McKeag, with Chair Dowdin Calvillo and Member Wesley.)

**Holding:** Good cause to excuse the late filing was not demonstrated.

**Case summary:** The charging party filed an unfair practice charge alleging that the district retaliated against

her for filing a grievance. She received a warning letter informing her that her charge did not state a prima facie case. The charging party requested and was granted an extension of time to file an amended charge, which she did. The board agent dismissed the charge for failure to state a prima facie case. She again requested and was granted an extension of time to file an appeal; however, the appeal was not timely filed.

The charging party requested that the board find good cause to accept and consider her late-filed appeal. She asserted that, although she lives in Tijuana, Mexico, she maintains a post office box in San Diego because she does not believe mail delivery to Mexico is reliable. Due to safety concerns, she does not regularly check her post office box and, therefore, was unable to file a timely appeal.

The board found that the charging party failed to explain how her unspecified safety concerns prevented her from timely filing her appeal, even with the additional time granted, and found good cause to excuse her late-filed appeal not demonstrated.

## ***Representation Rulings***

### **Severance petition not filed during ‘window period’ is dismissed: Compton USD.**

*(Compton Unified School Dist., Compton Unified School District Police Management Police Officers Assn., and Service Employees International Union, Loc. 99, Ad-No. 385, 10-18-10, 2 pp. + 3 pp. R.A. dec. By Member McKeag, with Chair Dowdin Calvillo and Member Wesley).*

**Holding:** A petition to sever police department supervisors from the bargaining unit was not filed within the 29-day window period and was dismissed as untimely.

**Case summary:** The management police officers association filed a petition seeking to sever a group of six supervisors from the existing bargaining unit represented by SEIU Local 99. The local informed the regional attorney that the employees at issue in the severance petition are included in a unit of classified supervisors represented by Local 99 and that it is party to an existing written agreement with the Compton Unified School District.

Citing Gov. Code Secs. 3544.1(c) and 3544.7(b)(1) and PERB Regs. 33020 and 33700, the R.A. explained that a severance petition only may be filed within a 29-day window period that is less than 120 days but more than 90 days prior to the expiration of a lawful written agreement. The R.A. informed the management police officers association that the severance petition would be dismissed as it was filed outside the window period.

In support of its petition, the association asserted that Local 99 had not negotiated effectively on behalf of police supervisors, and contended that the association would be a more effective representative.

The R.A. dismissed the severance request as untimely, and the board affirmed that decision.

### **Severance petition dismissed where employees share community of interest with those in existing unit: Victor Valley CCD.**

*(Victor Valley Community College Dist., Police Officers Assn., Victor Valley Community College Dist.-Police Dept., and California School Employees Assn. and its Chap. 584, No. Ad-388, 11-18-10, 2 pp. + 7 pp. R.A. dec. By Chair Dowdin Calvillo, with Members McKeag and Wesley).*

**Holding:** The bargaining unit sought by the association is not an appropriate unit, and the severance petition is dismissed.

**Case summary:** The police officers association filed a severance petition seeking to create a bargaining unit comprised of most, but not all, of the campus police officers and reserve police officers included in the bargaining unit represented by CSEA.

The board agent dismissed the petition, finding that the proposed unit was not appropriate. The B.A. determined that the employees proposed to be included in the new unit had a community of interest with employees in the existing unit, and the proposed unit would adversely affect the efficiency of the district’s operations.

On appeal, the board adopted the B.A.’s decision as its own.

## *Duty of Fair Representation Rulings*

**No showing that association acted in bad faith, or in an arbitrary or discriminatory manner; pattern was one of assistance: Mount Diablo Education Assn.**

(*Scott v. Mount Diablo Education Assn.*, No. 2127, 8-17-10, 16 pp. dec. By Chair Dowdin Cavillo, with Members McKeag and Wesley.)

**Holding:** A DFR violation may be established based on inaction that occurred more than six months before the charge was filed, provided the inaction was part of the same course of conduct as occurred within the prior six months. The association's overall pattern of conduct toward the charging party was one of assistance, and the charging party failed to show that it acted in bad faith, or in an arbitrary or discriminatory manner.

**Case summary:** The charging party alleged eight separate failures to act by the association over many months that cumulatively constituted a breach of its duty of fair representation. The board found that, while, in general, alleged violations occurring more than six months before the filing of the charge are untimely, "when the 'conduct' in dispute consists of a lengthy period of silence and inaction, the Board must be able to consider the entire course of processing a grievance to discern whether a pattern exists." "Accordingly,...a violation may be established based on inaction that occurred more than six months before the charge was filed, provided the inaction was part of the same course of conduct as the inaction within the statutory period." The board's contrary holding in *American Federation of State, County and Municipal Employees, International, Council 57 (Debler)* (1996) No.1152-H, 118 CPER 85, is overruled.

The charging party alleged that the association failed to file grievances over an incident where he was alleged to have dropped a box of razor blades in a student's lap and to have written a profane note about a student. The board dismissed the allegation, finding that the association did file the grievances.

While the board agreed with the charging party that the association did not provide him with copies of documentation regarding the grievances in a timely manner, it found no evidence that it intentionally had withheld the documents. The association's negligence did not constitute a breach of the duty of fair representation because the charging party's interest in the grievances was not "strong" and the inaction did not prevent him from challenging the allegations in a future disciplinary action.

The charging party alleged that the association did not file the grievance in accord with the procedures required by the CBA. First, the association filed the grievance not only with his immediate supervisor as required but also with the assistant superintendent, which was not required. This caused the assistant superintendent, who usually resolved issues against the charging party, to become involved in the grievance. The board found no evidence that a different outcome would have resulted if the association had not given a copy of the grievance to the assistant superintendent. Second, the association failed to timely appeal the step I denial of the grievance. The board found that the association's representative made an honest judgment that the grievance could not achieve the desired results.

The board likewise dismissed the allegation that the association misrepresented the status of the grievance when it told the charging party it was still in progress, though no appeal was filed after the step 1 denial. There was no evidence as to when the statement was made.

There was no dispute that the association failed to timely appeal the denial of the charging party's November 2, 2007, grievance regarding his inability to access his personnel file. However, the failure to appeal the denial did not prejudice his rights in any way, said the board.

And, as there is no evidence that the charging party ever asked the association to file a grievance concerning the district's redactions to his response to a disciplinary document or the absence of his response to a performance evaluation, which should have been in his file, the association did not breach its duty by failing to file the grievances.

**Settling PERB complaint and withdrawing charging party's grievance did not violate duty of fair representation: CSEA.**

(*Gibson v. California School Employees Assn. Chap. 168*, No. 2128, 8-25-10, 2 pp. + 10 pp. R.A. dec. By Member McKeag, with Chair Dowdin Cavillo and Member Wesley.)

**Holding:** The charging party failed to show that the association's conduct was arbitrary, in bad faith, or discriminatory.

**Case summary:** The district laid off 12 classified employees and reduced the charging party's hours due to lack of funds and lack of work. The association filed grievances on the charging party's behalf. It also filed an unfair practice charge alleging that the district took unilateral action with regard to layoffs and reduced hours of bargaining unit employees and subcontracted out services traditionally preformed by employees in the charging party's job classification. PERB issued a complaint against the district.

The district and the association negotiated a proposed settlement agreement that provided, in part, for the charging party to be laid off after seven months with back pay and other benefits in exchange for the withdrawal of her grievances and the unfair practice charge. The district and the association also drafted a "Tentative Agreement to Settle 2007-2008 Negotiations," which provided, in part, that the district would increase the classified unit salary schedule by 4.53 percent.

The association's executive board met to vote on the proposed agreement settling the unfair practice charge, and the charging party was invited to attend. The association president told her that she was not allowed to vote because of the conflict of interest. After a secret ballot, the president announced that the settlement agreement had passed. He refused to read out the ballots or to have them verified, in spite of the charging party's request that he do so. At the meeting the charging party stated her concerns that the settlement was unfair, that she wanted the association to continue to litigate her grievances, and that she did not want to be laid off.

The district and the association also executed the tentative agreement.

The charging party alleged that the association and the district agreed that the terms of the tentative agreement were made contingent on the parties' settlement of the PERB complaint. The board agent concluded that the two agreements were negotiated separately, but reasoned that, even if they had been linked, there would be no breach of the duty of fair representation. An exclusive representative enjoys a wide range of bargaining discretion. It is not required to satisfy all union members, is not barred from making an agreement that has an unfavorable effect on some union members, and is not obligated to bargain an item that will benefit certain unit members only. Relying on *Union of American Physicians & Dentists* (2006) No. 1846-S, 180 CPER 98, the B.A. said, "The argument that CSEA 'sacrificed' [the charging party] in order to obtain better terms for other bargaining units is insufficient to demonstrate a breach of the duty of fair representation."

The charging party alleged that the association hid the existence of the settlement agreement from its membership and engaged in "back room dealing" with the district. She also alleged that the president unlawfully refused to reveal the board members' votes or verify the result at the executive board meeting. This conduct did not constitute a violation of the duty of fair representation, determined the B.A. because a union is allowed substantial leeway in its internal procedures.

The association's withdrawal of the charging party's grievances was not a breach of its representational duty because it appeared from the record that the decision to withdraw the grievances was reasonable and based on a rational basis. In consideration for the withdrawal, the association reached a settlement agreement with favorable terms for the charging party, and the charging party did not demonstrate that pursuing the grievances would have resulted in a more favorable result.

The board adopted the B.A.'s decision dismissing the unfair practice charge as its own.



**No DFR allegation stated in charge: United Faculty of Grossmont-Cuyamaca CCD.**

(*Tarvin v. United Faculty of Grossmont-Cuyamaca Community College Dist.*, No. 2133, 9-21-10, 4 pp. + 8 pp. B.A. dec. By Member McKeag, with Chair Dowdin Calvillo and Member Wesley.)

**Holding:** The charging party failed to allege sufficient facts demonstrating that the union breached its duty of fair representation.

**Case summary:** The charging party is a faculty member at the community college district. He alleged that the union breached its duty of fair representation by refraining from participating in an interactive process concerning an accommodation of his disability under the Fair Employment and Housing Act. A board agent dismissed this allegation, finding that the duty of fair representation extends to grievance handling, not to proceedings before the Department of Fair Employment and Housing. The charging party failed to demonstrate whether the collective bargaining agreement addresses FEHA violations or references the interactive process.

The charging party also alleged that the union denied him access to the grievance process. However, the B.A., explained, no other facts were alleged in support of this legal conclusion.

The charging party claimed that the union denied him access to lawyers. But he did not allege that he made a request for a lawyer or that the union denied his request.

On appeal, the board affirmed the B.A.'s dismissal of the charge. It rejected the charging party's request to submit new evidence that had been available prior to dismissal of the charge. The board also denied his request to be excused from failing to file an amended charge because he is not a lawyer and unfamiliar with the PERB process. This is insufficient to warrant a finding of good cause, the board said. Also disregarded was the charging party's claim that he failed to timely respond to the warning letter because it was issued during the holiday season. No good cause was shown to support this assertion.

**Union's conduct did not amount to DFR breach: UTLA.**

(*Strygin v. United Teachers of Los Angeles*, No. 2149, 12-13-10, 2 pp. + 13 pp. Deputy General Counsel dec. By Member Wesley, with Chair Dowdin Calvillo and Member McKeag.)

**Holding:** The charge failed to allege sufficient facts to demonstrate that the union breached its duty of fair representation.

**Case summary:** The charging party alleged that the union breached its duty of fair representation when it failed to immediately address his complaints regarding the unhealthy and unsanitary conditions in the classroom. The deputy general counsel dismissed the charge. She found the union is not required to immediately file a grievance. And, she noted, the union did file a grievance two months after the charging party conveyed his concerns. The deputy general counsel also observed that, while the contract includes a special grievance procedure for alleged health and safety violations, there was no evidence that the charging party attempted to file a grievance on his own behalf. The union's delay in taking action was, at best, mere negligence. The union's conduct did not foreclose any remedy available to the charging party.

On appeal, the board affirmed the dismissal.

**Dismissal of charge as untimely filed upheld: UTLA.**

(*Thomas v. United Teachers of Los Angeles*, No. 2150, 12-13-10; 4 pp. + 12 pp. Regional Attorney decision. By Member Wesley, with Chair Dowdin Calvillo and Member McKeag.)

**Holding:** The charging party failed to show that the allegations occurred within the six-month statute of limitations period, or that the union's refusal to file a grievance was arbitrary, discriminatory, or made in bad faith. PERB has no duty to provide legal assistance to the charging party or to advise her to file a charge against the union. PERB has no authority to extend a statute of limitations. Whether PERB should have joined the union as a necessary party in the charging party's charge against the district is not an issue that can be raised in this case.

**Case summary:** Between March 2005 and August 2008, the charging party was involved in a series of disputes with the district regarding her desire to transfer to new school sites. The charging party knew or should have known as of October 2008 that the union would not assist her with her complaints. The unfair practice charge was not filed until January 2010. The board agent dismissed the charge as untimely filed and found that, even if timely, the charge did not state a prima facie violation of the duty of fair representation. The board adopted the B.A.'s decision as its own.

In January 2009, the charging party spoke to a B.A. about her complaints against the district. The agent did not advise her to seek legal counsel or inform her that she could file a charge against both the district and the union. On February 29, 2009, the charging party filed a charge against the district only. On appeal, the charging party contended that PERB should have extended the six-month period within which she should have filed a charge against the union due to its prejudicial error or, in the alternative, should have joined the union as a necessary party to her charge against the district. The board rejected her argument because while PERB agents are authorized to provide technical assistance, they do not provide legal assistance, citing *Los Angeles Community College Dist.* (1981) No. 186. PERB has no authority to "extend" a statute of limitations period.

## HEERA Cases

### *Unfair Practice Rulings*

#### **Board may award damages for strike preparations: U.C.**

(*California Nurses Assn. v. Regents of the University of California*, No. 2094-H, 2-2-10; 50 pp. + 1 p. concurring dec. By Acting Chair Dowdin Calvillo, with Members McKeag and Neuwald.)

**Holding:** Unfair practice strikes are legal under HEERA, even if they occur prior to the completion of impasse procedures. Under a new two-prong test, CNA's

strike threat was an illegal economic action because U.C. did not engage in unfair practices. As part of a make-whole order, the board has authority to award monetary damages for an employer's direct economic losses resulting from a union's strike preparations. (See story on pp. 39-43 in this issue of *CPER*.)

#### **University did not interfere with employee rights by denying grievance as untimely: CSU (San Marcos).**

(*Delgado v. Trustees of the California State University [San Marcos]*), No. 2134-H, 10-1-10; 7 pp. dec. By Member McKeag, with Member Wesley and Chair Dowdin Calvillo.)

**Holding:** The university did not interfere with employee rights when it refused to meet at level 1 of the grievance process on the grounds that the grievance was untimely. The employees did not have standing to assert a breach of a settlement agreement between their union and CSU.

**Case summary:** The charging parties were employed in the facilities services department of the university. They are in a unit represented by SETC-United. The MOU between SETC and CSU provides that an employee may commence the grievance process by having an informal conference with his supervisor within 30 days of the event giving rise to the problem, or within 30 days of when the employee knew or should have known of the event.

SETC and the university are parties to a settlement agreement that requires CSU to notify the union if it decides to use independent contractors. In 2005, the university entered an agreement with the CSU San Marcos Foundation to finance, construct, and operate a child care center for university employees. In July 2007, the university contracted with Children's Creative Learning Centers to operate and manage the center, including facilities maintenance. The university did not notify SETC that it was contracting out maintenance.

In February 2008, one employee asked whether the department would maintain the child care center. A meeting was held with employees to answer questions. Four days later, the charging parties asked the assistant director

of facilities services for a level 1 conference and requested released time to prepare. The assistant director rejected the requests on the grounds of untimeliness. He asserted the employees should have been aware of the plans at the child care center since August 2007.

The board found that CSU's denial of the grievance and request for released time on the grounds of untimeliness satisfied its obligations under the grievance process. The employees could have, but did not, elevate the grievance to the next level. The board concluded CSU did not deny the charging parties access to the grievance procedure.

The employees also charged that the university breached the settlement agreement when it failed to inform the union of the decision to contract out facilities maintenance work. The board held that the employees lacked standing to make this claim, since the agreement required notification to the union, not to the employees. In addition, the board found that Children's Creative Learning Centers contracted out maintenance services, not the university. Therefore, the university did not breach its duty to inform the union of the decision.

More than a year after the charge was dismissed for failure to state an unfair practice claim, one charging party was laid off. He informed PERB of the layoff and claimed retaliation. The board found his attempt to amend a dismissed unfair practice charge was not timely filed.

**Unit member who pays no fee has no standing to file charge challenging fair share fee calculation: CSUEU.**

(*Sarca v. CSU Employees Union, SEIU Loc. 2579*, No. 2137-H, 10-20-10; 5 pp. dec. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

**Holding:** The charging party, whom the union exempted from paying fair share fees, has no standing to file a charge challenging the amount of the fee. The union's decision to exempt him from paying is not an unfair practice.

**Case summary:** CSUEU ceased charging Sarca for dues or fair share fees in 2004. In August 2006, Sarca represented three other unit members in a fair share fee arbitration. They challenged the calculation of the fee and

the union's accounting procedures. The arbitrator upheld the fee calculation.

Sarca filed the unfair practice charge without naming the other three unit members as charging parties. The board agent warned him that he lacked standing to file the charge because he personally did not pay any fee to the union. Although he amended the charge, Sarca did not assert that he paid any fee. The board concluded he did not have standing to file the charge.

Sarca argued that he had standing because he represented himself as well as the other three employees, but the board found that both the arbitration transcript and award indicated he participated only as a representative of the others. Since the PERB charge did not name the others as charging parties, the board held it had no jurisdiction over the charge.

Sarca also contended that CSUEU committed an unfair practice by ceasing to collect fair share fees from him in order to prevent him from challenging the fee calculations. The board noted that it has held lawful a union's decision to refund fees to an objector even though it renders the objector unable to participate in an agency fee arbitration. It found no reason to view the decision differently. In addition, the allegation was untimely since the union ceased collecting fees from Sarca three years before the charge was filed. The charge was dismissed.

**Unit members do not have standing to challenge unilateral changes and fail to state retaliation claim: CSU (San Marcos).**

(*Williams & Pelonero v. Trustees of the California State University [San Marcos]*, No. 2140-H, 11-2-10; 3 pp. + 6 pp. Division Chief dec. and 5 pp. R.A. dec. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

**Holding:** The university did not engage in retaliation by settling the employees' grievances with their union. The charging parties did not have standing to challenge unilateral changes.

**Case summary:** Williams' and Pelonero's original charge alleged that two unit members were promoted into management and then allowed to return to unposted vacant

positions within the unit. They filed a grievance at the informal level, but received no response. The charging parties alleged CSU committed an unlawful unilateral change by violating the collective bargaining agreement. The R.A.'s warning letter explained that individual employees do not have standing to file a charge of unilateral change or failure to bargain or participate in the impasse procedure in good faith.

In a first amended charge, the charging parties alleged they had been harassed and retaliated against for filing the charge. The amendment alleged retaliation when the university settled five grievances during a PERB settlement conference on an earlier unfair practice charge filed by their union. It also alleged that a lead carpenter, Fisher, had retaliated against them. When they filed a grievance over Fisher's conduct, the university did not file timely responses at either level 1 or level 2 of the grievance process. Williams and Pelonero alleged the untimely action was retaliation, and that the grievance procedure "does not work."

The division chief found the charge did not state a retaliation claim because it did not show that resolution of the grievances adversely affected the charging parties or that the university had any unlawful motive in reaching the settlement. In addition, the allegation about the settlement was the second unfair practice charge about the same matter. Because the first charge had been dismissed by a board agent and never appealed, the division chief held it was barred by *res judicata*.

The division chief noted that Fisher was a member of the bargaining unit. Because there were no facts to show that he acted as a supervisor or agent of the university, the allegations about his confrontations with the charging parties did not show retaliatory conduct by the university.

The division chief considered the repeated failure to timely respond to grievances as a charge of repudiation of the grievance procedure and a charge of interference with employee rights. Since repudiation of a grievance procedure is an unlawful unilateral change, the employees did not have standing to challenge it. The division chief found no harm had occurred to the employees' right to pursue grievances. The charge was dismissed.

The board agreed with the division chief's and regional attorney's letters except for dismissal of the charge on the basis of *res judicata*. Since it had decided in *Grossmont Union High School Dist.* (2010) No. 2126, that a board agent's dismissal of a charge does not preclude a later PERB proceeding on the same dispute, it rejected that reason for dismissing the charge concerning the settlement agreement. However, it upheld the dismissal on the grounds that there was no showing that the settlement was adverse to the charging parties or in retaliation for their protected activity. Like the union, the university has no obligation to obtain consent before settling a grievance.

**Alleged misrepresentation to factfinding panel was insufficient to show bad faith participation in the impasse procedure: CSU.**

(*United Automobile Workers, Loc. 4123 v. Trustees of the California State Univ.*, No. 2151-H, 12-14-10; 2 pp. + 13 pp. Div. Chief dec. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

**Holding:** The union did not allege facts showing that the university's inaccurate statement to a factfinding panel was an indication of bad faith participation in impasse proceedings. An amendment to the charge based on facts not alleged in the original charge was untimely filed.

**Case summary:** The agreement between the union and CSU required the university to bargain over waiver of student fees for academic student employees in 2006-07, if the university believed it had not received sufficient funding to implement fee waivers that year. When CSU decided it did not have enough funding, the parties bargained to impasse over the issue and proceeded to factfinding. CSU told the panel that the compensation base for the unit for 2006-07 was \$34.8 million. Based on this amount the panel found that the cost of the fee waiver would have increased base compensation 42 percent, far more than other bargaining units received. The panel did not recommend that CSU agree to a fee waiver provision in the contract.

Only after the panel had issued its recommendation, the union learned the university had not spent \$4 million

that it had initially assumed it would allocate to the unit's compensation in 2005-06. The union charged that the misrepresentation was material to the panel's decision because \$4 million would have paid for nearly one-half of the fee waiver benefit. CSU admitted that it had made a mistake, but asserted that the error did not affect the panel's decision.

The division chief warned that allegations that one party omitted information or put its "spin" on the data were not sufficient to show bad faith participation in impasse proceedings because both parties had the opportunity to introduce evidence and arguments to the panel. Even if the misrepresentations were indicia of bad faith bargaining, they would not be sufficient to prove a violation of the duty to participate in good faith in impasse procedures, but would be only one indication to be considered using a test that examined the totality of CSU's conduct.

The union's amended charge claimed that it requested information relating to the fee waiver benefit and its funding in 2006, and that it learned in May 2007, that some information had been withheld. The division chief found that the new charge was untimely because the allegations about the request and withholding of information had not been added to the charge until 18 months after the union learned about the undisclosed information. The board adopted the decision to dismiss the charges.

### **Charging party did not allege claims within the jurisdiction of PERB: U.C.**

(*Yi-Kuang Liu v. Regents of the University of California*, No. 2153-H, 12-30-10; 2 pp. + 17 pp. R.A. dec. By Member Wesley, with Chair Dowdin and Member McKeag Calvillo.)

**Holding:** Claims that U.C. breached an employee's contract, defamed his character, and misrepresented his scholarly/academic efforts are not within PERB's jurisdiction. The charge that U.C. discriminated against him because of protected activity did not allege facts showing that his grievances were filed in furtherance of concerted action.

**Case summary:** Yi-Kuang Liu was hired as a post-doctoral scholar in 2006, in a classification not represented

by an exclusive representative. After a couple months, he was asked to explain his work to two junior employees. Believing they would be performing his work, he resisted. He received a counseling letter in November, warning him about his failure to share information and train new employees. He filed a case with the ombudsman and was told the counseling letter had been removed from his file. After a disagreement about changing his title to a non-academic classification, he filed a grievance. A few weeks later, he became angry at the two new employees and demanded that they stop working on his project. He was placed on leave and then terminated. The termination letter included a copy of the November counseling letter.

Liu charged that U.C. discriminated against him, wrongfully terminated his employment, breached his contract, defamed his character, and misrepresented his scholarly/academic efforts. The R.A. dismissed the breach of contract, defamation, and misrepresentation claims because the board has no jurisdiction over those charges.

The R.A. considered whether any of Liu's grievances and communications with his supervisors were protected activity under the act. He found that the communications and grievances concerned personal matters, not concerted action. As his grievances were filed under personnel policies rather than a collective bargaining agreement, the grievances were not an extension of concerted action.

In an amended charge, Liu alleged that U.C. intentionally had sneaked him into an unrepresented classification. The R.A. dismissed this claim because it was unsupported by any factual allegations. Liu also asserted that he had made safety claims and other allegations about wrongful conduct at the university when he met with the ombudsman. The R.A. found no facts that indicated these complaints to the ombudsman were a result of coworker concerns or other group activity. Therefore, the R.A. dismissed Liu's discrimination and wrongful termination claims for failure to demonstrate that he engaged in protected activity. The board adopted the decision to dismiss the charges.



## MMBA Cases

### *Unfair Practice Rulings*

#### **County did not change furlough policy: County of Fresno.**

(*SEIU Loc. 521 v. County of Fresno*, No. 2125-M, 8-11-10; 5 pp. + 11 B.A. dec. By Member Wesley, with Chair Dowdin Calvillo and Members McKeag.)

**Holding:** The county did not unilaterally change the mandatory furlough policy when it implemented furloughs in 2009. It acted consistent with a 1993 personnel rule regarding mandatory furloughs, and negotiations between the parties over furloughs during intervening years did not permanently change the policy or instill a duty to bargain on other occasions.

**Case summary:** SEIU filed a charge alleging that the county unilaterally changed the furlough policy when it implemented mandatory furloughs for employees in Bargaining Unit 31. It argued that while Rule 12 enacted by the board of supervisors in 1993 permits the county to impose furloughs as an alternative or adjunct to layoffs, there is a clear past practice of negotiating with SEIU over Unit 31. The B.A. found that on two occasions when the parties negotiated regarding furloughs, they did not agree to permanently change the rule or agree to negotiate each time the need for furloughs arose.

On appeal to the board, SEIU argued the B.A. erroneously determined material issues of fact that should be resolved at a hearing. It claimed that, in light of a personnel rule published in 1996, which mistakenly listed Unit 31 as being exempt from Rule 12, the parties' MOU is plagued by a mutual or unilateral mistake of fact. Further, SEIU argued, the "full understanding," or zipper clause, of the MOU cannot represent a valid waiver of the right to bargaining regarding furloughs because of the parties' misunderstanding as to the application of Rule 12.

The board rejected this argument, finding that the alleged mistake reflected in the MOU is not at issue. It found that the furloughs were implemented consistent with the county's rule and no duty to bargain existed.

#### **Allegation that county changed overtime policy is untimely: County of Riverside.**

(*SEIU Loc. 721 v. County of Riverside*, No. 2132-M, 9-21-10, pp. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

**Holding:** The charge alleging that the county unilaterally changed the manner of calculating overtime benefits for employees exempt from the Fair Labor Standards Act was untimely. The allegation that the county failed to bargain over the impact of that decision also was untimely.

**Case summary:** In a series of MOUs, employees represented by SEIU who were not exempt from the FLSA received overtime benefits beyond those mandated by federal law. Although the MOUs were silent as to FLSA-exempt employees, they were paid overtime pursuant to applicable contract provisions from 1997 through 2005.

A successor agreement eliminated the more-generous overtime compensation with regard to non-exempt employees, but did not address overtime compensation for FLSA-exempt employees.

In advance of implementing the change in overtime policy, the county undertook a complete review of the FLSA classifications of all county employees. The parties executed a side letter dated August 26, 2007, advising the union that the county would pay overtime compensation under the FLSA rules. Thereafter, the county informed the union that no FLSA-exempt classification would receive overtime compensation under the new policy.

The union filed an unfair practice charge in May 2008, alleging that the county unilaterally changed its overtime policy.

In agreement with the ALJ's proposed decision, the board found that SEIU had notice no later than August 26, 2007, of the county's intent to cease paying overtime to FLSA-exempt employees. The side letter signed on that date informed the union that the county was reviewing all classifications to determine which were exempt from the FLSA overtime provisions. The board reasoned that if the county intended to continue to pay the same overtime benefits to exempt and non-exempt employees, it would

not have undertaken a costly and time-consuming classification review. Therefore, PERB concluded that the charge was untimely as it referred to the county's decision to change the overtime policy. The board found no basis for the ALJ's conclusion that the charge alleging the county failed to bargain over the effects of the change in overtime policy was timely. Whether it is the decision or the effects of an intended change that is subject to bargaining, it is the charging party's knowledge of the respondent's intent to unilaterally implement the change that starts the six-month statute of limitations period, the board said.

**Revision of fire captain qualifications not subject to bargaining: City of Alhambra.**

(*Alhambra Firefighters Assn., Loc. 1578 v. City of Alhambra*, No. 2139-M, 10-26-10, 21 pp. By Member Wesley, with Chair Dowdin Calvillo and Member McKeag.)

**Holding:** The decision to change the minimum qualifications for the fire captain classification did not have a significant or adverse impact on working conditions of bargaining unit employees. Broadening the pool of applicants and thereby increasing competition is not an adverse impact. The determination of minimum job qualifications is a fundamental managerial decision outside the scope of bargaining.

**Case summary:** Without bargaining with the association, the city eliminated the requirement that candidates for the fire captain position possess a fire engineer certification. As a result, certain fire engineers became eligible to compete for fire captain positions. The association charged that this was an unlawful unilateral change implemented by the city without providing an opportunity to bargain.

To determine whether this matter fell within the scope of representation under the MMBA, the board applied the three-part test established by *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 180 CPER 21.

The board found that the modified class specification for fire captain did not have a significant or adverse impact on the working conditions of bargaining unit employees. The modification merely expanded the pool of eligible candidates to include current employees performing the duties

of certain classifications. The modification did not impose new eligibility requirements, give preference to current fire engineers, or affect the opportunity of candidates with the necessary certificates to compete. The board said that the expansion of the minimum qualifications to allow additional candidates to complete is not an adverse action.

PERB held that not any change in the job qualifications set forth in a class specification is necessarily within the scope of bargaining, narrowly reading its ruling in *Alum Rock Union Elementary S.D.* (1983) No. 322, 58 CPER 64. It announced that "a change in job qualifications *may* be within scope if it has a significant and adverse effect on wages, hours, and working conditions, and also meets the remaining two elements of the *Claremont* test."

In this case, the board said, the revised qualifications take into account the duties actually being performed by current fire engineers that are covered by the certification. The board also said that a change in minimum qualifications to expand the pool of eligible candidates does not affect the promotional opportunity of bargaining unit employees.

Even if the revised qualifications did impact working conditions, the board said it would find the matter excused from the bargaining obligation as a fundamental managerial or policy decision. Drawing on California precedent and case law from other states, the board distinguished promotional procedures, which are bargainable, and job qualifications, which are not.

Here, PERB found the minimum qualifications for the fire captain position affect the health and safety services provided to the public and the issue is a fundamental managerial or policy decision. Applying the third prong of the *Claremont* test, the board found no evidence that bargaining over the expansion of the applicant pool for fire captains would outweigh the city's need to determine the qualifications necessary to provide public fire protection.

**Formation of focus group that made changes to drivers' bidding procedures bypassed the exclusive representative: Omnitrans.**

(*Amalgamated Transit Union, Loc. 1704 v. Omnitrans*, No. 2143-M, 11-18-10, 11 pp. + 22 pp. ALJ dec. By Mem-

ber Wesley, with Chair Dowdin Calvillo and Member McKeag.)

**Holding:** Omnitrans unlawfully bypassed the union when it formed a focus group that formulated new bidding procedures for drivers. Its failure to permit the union to file a grievance on its own behalf was a unilateral change.

**Case summary:** Omnitrans formed a focus group to explore possible changes to the procedures used to distribute bus drivers' "extra board" assignments. The group consisted of Omnitrans management, senior and junior drivers, including a member of the union's executive board, a dispatcher, and an outside facilitator. After conducting three meetings, the focus group made a recommendation to the Cultural Design Team that extra board assignments be made pursuant to a seniority-based bidding procedure.

Omnitrans offered to meet and confer with ATU regarding any negotiable aspects of the proposed revisions to the bidding procedures, but the union sought to negotiate the entire scope of the extra board matter. When Omnitrans issued the extra board procedures without negotiating, the union filed a grievance contesting the formation of the focus group and other alleged violations of the parties' MOU.

An administrative law judge concluded that Omnitrans bypassed ATU when it dealt directly with employees through the focus group, surveyed employees on their preferences for proposed bidding procedures, and made a recommendation to the Cultural Design Team. The ALJ distinguished this case from *County of Fresno* (2004) No. 1731-M, 173 CPER 96, where the parties agreed that any recommendations initiated by the working group would be subject to bargaining if the county intended to make changes based on the group's recommendations. Here, there was no prior agreement between Omnitrans and ATU regarding the formation of the focus group or a promise that changes arising out of a focus group recommendation would be bargained. On appeal, the board affirmed the ALJ's ruling.

In its exceptions, ATU challenged the ALJ's dismissal of its allegation that Omnitrans unilaterally changed the grievance procedure when it asserted that ATU was not authorized to file a grievance on its own behalf. The board reversed the ALJ's dismissal in reliance on *Omnitrans* (2009)

No. 2010-M, 196 CPER 87. In that case, which involved the same parties and the same contract language, the board held that under the MMBA, a union has a statutory right to file a grievance in its own name that can be limited only by a clear and unmistakable waiver which does not appear in the MOU. To restrict grievance filings only to aggrieved employees would render meaningless the provisions in the MOU that address rights granted to ATU. Consistent with that ruling, the board found that Omnitrans unilaterally changed the grievance procedure when it refused to process ATU's grievance challenging formation of the focus group.

The board upheld the ALJ's decision denying ATU's request for attorney's fees.

**Factual allegations fall short of support for unilateral change, surface bargaining charge: West Side Healthcare Dist.**

(*Turlock Emergency Medical Services Assn. v. West Side Healthcare Dist.*, No. 2144-M, 11-30-10, 4 pp. + 12 pp. B.A. dec. By Member Wesley, with Chair Dowdin Calvillo and Member McKeag.)

**Holding:** The association failed to assert sufficient factual allegations in support of its claim that the district made unilateral changes without bargaining or that it engaged in surface bargaining.

**Case summary:** The association alleged in its unfair practice charge that, during the course of bargaining for its contract, the district unilaterally changed health benefits, disciplinary procedures, and the merit pay policy. The association also alleged that the district engaged in surface bargaining by reneging on the tentative agreement, refusing to consider its package proposals, refusing to discuss any wage proposal, and rejecting proposals without explanation.

A board agent dismissed both allegations. He found specific indicia of surface bargaining lacking and determined that the charge failed to include specific factual allegations to support it.

Upholding the B.A.'s dismissal of the unilateral change charge, the board found the association failed to allege facts demonstrating how the new point system changed the disci-

plinary policy. “Presumably,” said the board, “employees are currently disciplined for excessive absences, late calls, and tardiness. The mere allegation that employees now receive a ‘point’ for this conduct does not establish that the District changed the level of discipline imposed or the procedure for when discipline is imposed.”

Failure to describe the original health care policy undermines the association’s claim that the district unilaterally changed health benefits by reducing the level that employees would receive. Without essential facts, the board said, it cannot determine whether there has been an actual change in policy.

The board affirmed the B.A.’s determination that the charge failed to describe the merit pay policy and was unclear whether the policy required or permitted the district to grant merit raises.

#### **Request to withdraw appeal granted: Santa Clara Valley Water Dist.**

(*Engineers Society v. Santa Clara Valley Water Dist.*, No. 2148-M, 12-13-10, 2 pp. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

**Holding:** In light of the parties’ settlement agreement, granting the charging party’s request to withdraw its appeal is consistent with the purposes of the act and within the parties’ best interests.

**Case summary:** The charging party alleged that the district violated the act when it refused to arbitrate a grievance. The board agent dismissed the charge, finding that it failed to establish a prima facie case of an unlawful unilateral change of the parties’ grievance procedure.

The charging party appealed the B.A.’s dismissal but thereafter notified the board that it wished to withdraw its appeal because the parties had reached a settlement agreement. The board granted the charging party’s request, finding that withdrawal of the appeal was in the best interests of the parties and consistent with the purposes of the MMBA.

### ***Representation Rulings***

#### **County’s local representation rule is reasonable: County of Orange.**

(*Union of American Physicians & Dentists v. County of Orange*, No. 2138-M, 10-25-10; 16 pp. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

**Holding:** The county’s local rule requiring majority support to seek severance of classifications from an existing bargaining unit is not unreasonable.

**Case summary:** When the county rejected the union’s petition to sever five classifications from the county’s health-care professionals unit, the union filed an unfair practice charge alleging that the local rule was unreasonable under Sec. 3507(a) of the MMBA.

First, the board clarified that a local entity’s failure to enact an explicit severance provision is not a violation of the MMBA. Where an agency has no applicable rule, PERB’s regulations will apply but only when the agency’s local rules contain no provision that will accomplish what the petitioner is seeking without placing an undue burden on the petitioner. In *County of Siskiyou* (2010) No. 2113-M, 200 CPER 88, the board found that the county’s decertification rules were much more onerous than PERB rules regulating amendments to certification.

Here, the board found that the county rule addressing unit modification and PERB’s procedure for filing a severance petition are largely identical and serve the similar purpose of reconfiguring an existing unit. However, while PERB regulations only require a showing of 30 percent support within the unit to be established, the county rule requires a showing of majority support “within the requested modified representation unit.” The board first noted that the county had not interpreted this language to mean majority support within the entire bargaining unit from which the classifications would be severed, and declined to consider whether a local rule imposing such a requirement would violate the MMBA.

Addressing the union’s assertion that the local rule is unreasonable because it requires a showing of majority



support, the board focused on whether the local rule is consistent with, and effectuates the purposes of, express provisions of the MMBA. The board distinguished cases where local rules required a showing of majority support to hold an election. In this case, the county's majority support requirement is not a prerequisite to an election, but is the sole means of determining employee support of a unit modification. The board concluded that the different proof of support requirements did not place an unreasonable burden on employee organizations seeking to sever classifications from an established county bargaining unit. It noted that PERB regulations for severance under EERA, HEERA, and the Dills Act all require a showing of majority support among employees in the proposed bargaining unit.

The board dismissed the union's assertion that the rule is unreasonable because the ultimate decision to grant or deny a severance petition rests with the board of supervisors. In agencies subject to the MMBA, the board commented, it is common for the final decision on representation petitions to be made by the local agency's governing board. The board found nothing in the record to demonstrate that the board of supervisors lacked the ability to make a reasoned decision.

Looking to the county's application of its local rule, the board found that the county properly denied the union's petition because the union failed to seek verification from the county of its status as an "employee organization," as required by local rules, before filing the petition.

The union lacked standing to challenge the county's decertification rule because it was not seeking to decertify the incumbent exclusive representative. To promote stable labor-management relations, the rule must be applied or enforced against a party to have standing to challenge the local rule.

#### **Local rule governs filing of severance petition: County of Orange.**

(*County of Orange, Union of American Physicians & Dentists, and Orange County Employees Assn.*, No. Ad-386-M, 10-25-10, 3 pp. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

**Holding:** The board lacks jurisdiction over the union's representation petition because the county's local rule provides for severance petitions.

**Case summary:** The Union of American Physicians & Dentists filed a petition seeking to sever five classifications from the county's healthcare professionals bargaining unit exclusively represented by the Orange County Employees Association. A board agent dismissed the petition because the county has a local rule that governs severance petitions. The union argued that PERB had jurisdiction and therefore could hear its unfair practice charge alleging that the county violated the MMBA by denying its petition.

In a proposed decision, an ALJ determined that severance could be achieved under the county's local rules and dismissed the unfair practice charge for lack of jurisdiction.

Affirming the dismissal, the board explained that, pursuant to PERB Reg. 61000, a party may file a representation petition with the board when a local agency has no applicable rule. Citing *County of Siskiyou* (2010) No. 2113-M, 200 CPER 88, the board said that PERB will assert jurisdiction over a representation petition when the agency's local rules contain no provision that can accomplish what the petitioner is seeking without imposing an undue burden. In this case, the board concluded the county has a local rule that provides for severance and affirmed the board agent's dismissal of the petition for lack of jurisdiction.

#### **Election objections dismissed, but no preclusive effect on pending unfair practice charge: Salinas Valley Memorial Healthcare System.**

(*Salinas Valley Memorial Healthcare System, National Union of Healthcare Workers, and SEIU-Healthcare Workers West Loc.* 2005, No. Ad-387-M, 10-25-10, 4 pp. + 30 pp. regional director dec. By Chair Dowdin Calvillo, with Members McKeag and Wesley).

**Holding:** The election objections asserted by SEIU failed to establish that the employer's conduct interfered with employees' free choice in the decertification election. That conclusion has no preclusive effect on the pending unfair practice charge based on the same factual allegations.



**Case summary:** SEIU alleged that the Salinas Valley Memorial Healthcare System interfered with employees' free choice in a decertification election by changing access rules for non-employee SEIU representatives, allowing a management employee's photograph to be used on a flyer supporting the National Union of Healthcare Workers, and discriminating against employees who supported SEIU.

The PERB regional director dismissed SEIU's election objections. She concluded that the conduct cited by SEIU was not of sufficient weight or seriousness to sustain the objections. Nor was it reasonable to infer that the conduct had any natural or probable impact on employee choice.

On appeal, SEIU argued that its objections should not have been dismissed while the investigation in an unfair practice charge raising the same claims was still pending. PERB noted that it has never addressed whether findings and conclusions in an election objection decision have preclusive effect on identical allegations raised in an unfair practice charge.

In ruling on election objections, the board determines whether the conduct complained of interfered with the employees' right to freely choose a representative. Under this standard, the board explained, it can refuse to set aside an election even when the employer's conduct constituted an unfair practice if the conduct did not actually affect, or have a natural or probable effect on, employee free choice. On the other hand, PERB said, the employer's conduct need not constitute an unfair practice for it to set aside an election. "Although they often arise from the same facts," PERB said, "the issues to be decided in an election objections proceeding are different from the issues decided in an unfair practice proceeding."

In this case, the board observed, the regional director did not address whether the employer's alleged conduct was an unfair practice. Instead, she found that none of the alleged conduct actually influenced, or had the potential to influence, employee free choice during the decertification election. Therefore, PERB clarified, the board agent investigating the unfair practice charge will determine

whether the conduct alleged in the charge states a prima facie case. Accordingly, the decision regarding the election objections has no preclusive effect on the pending unfair practice charge.

### **Severance petition would lead to fragmentation of bargaining units: City of Lodi.**

(*City of Lodi and Lodi Professional & Technical Employees and AFSCME Loc. 146*, No. 2142-M, 11-16-10, 2 pp. + 14 pp. ALJ dec. By Member McKeag, with Chair Dowdin Calvillo and Member Wesley.)

**Holding:** The Lodi Professional & Technical Employees failed to show that the classes in the proposed unit share a community of interest separate and distinct from the general services unit. A state bargaining relationship exists between the city and AFSCME, and granting the petition could lead to a fragmentation of units.

**Case summary:** The Lodi Professional & Technical Employees sought severance of 10 employees in 11 classifications within the city's general services unit. LPTE asserted that these 11 classes had a separate and distinct community of interest from the existing unit. AFSCME, the incumbent representative, opposed the petition, arguing that the 11 classifications should remain in the general services unit.

Following an evidentiary hearing, an administrative law judge applied the community of interest factors set forth in the city's local regulations and concluded that the proposed unit has much in common with the general services unit. Granting LPTE's severance petition would result in two bargaining units, both including employees with diverse educational requirements. Both units would include professional and technical employees who work at the same location and report to the same chain of command. Therefore, the ALJ concluded that LPTE failed to show that its proposed unit is separate and distinct from the general services unit. LPTE's argument that three other public agencies have units similarly structured to the one it seeks was not persuasive.

Nor did LPTE prove that the history of employee relations between AFSCME and the city was unstable or that AFSCME inadequately represented the interests of the proposed unit's employees.

Noting that the professional employees within the proposed unit have a right to be represented separately from sub-professional employees and could request that the unit be severed again, the resulting four-employee unit of professional employees and the six-member employee unit of sub-professional/technical employees would lead to the fragmentation of bargaining units and would not be efficient for the administration of labor relations in the city.

**Equal access accorded during decertification election; no interference with free choice: West Contra Costa Healthcare Dist.**

(*SEIU-United Healthcare Workers West, Loc. 2005 v. West Contra Costa Healthcare Dist.*; *SEIU-United Healthcare Workers West, Loc. 200 v. National Union of Healthcare Workers*; *West Contra Costa Healthcare Dist. and National Union of Healthcare Workers and SEIU-United Healthcare Workers West, Loc. 2005*, No. 2145-M, 11-30-10, 28 pp. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

**Holding:** The district did not deny access rights to SEIU representatives during a decertification election. Nor did it grant preferential treatment to the challenging organization. There was no interference with employees' free choice.

**Case summary:** The National Union of Healthcare Workers filed a petition to decertify SEIU as the exclusive representative of a bargaining unit at Doctors Medical Center of San Pablo. Representatives from both organizations gained access to the medical center. SEIU filed two unfair practice charges alleging that the district unilaterally changed the access rule set out in the MOU and, in various ways, granted preferential access to NUHW and violated its duty of strict neutrality during the election.

The board found that SEIU failed to prove that the district unilaterally changed its past practice by requiring non-employee SEIU representatives to wear an identifying badge and be escorted by medical center staff to access

employee break rooms. Relying on *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 180 CPER 21, PERB reasoned that, while union access rights are a matter within the scope of representation, the district had no obligation to bargain over the requirement to wear an identification badge because the impact on SEIU representatives was de minimis. The time required to obtain the badge and complete the sign-in procedure did not impact their ability to meet with employees or to reach areas of the medical center where they were entitled access. The fact that SEIU representatives did not like to wear the badges because they were occasionally taunted by employees who supported NUHW did not impose a significant adverse impact on access rights. Because the badge requirement was imposed on other non-employee representatives, it did not interfere or tend to interfere with SEIU's access rights.

The board found no evidentiary support for SEIU's claim that the district implemented a policy requiring that SEIU representatives be escorted to break rooms. PERB also concluded that SEIU representatives had not been denied access to those rooms.

In assessing SEIU's alleged neutrality violations, the board explained that where two employee organizations are competing for the right to represent the same employees, the test for determining if an employer has unlawfully dominated or assisted one of the organizations is whether the employer's conduct tends to influence free choice or provide stimulus in one direction or the other. The employer's intent is irrelevant.

The board found that the district's inability to enforce the access rules against NUHW on every occasion did not indicate a preference for that organization or tend to influence employees to support it over SEIU. PERB reached the same conclusion regarding the badge requirement. Nor was there sufficient evidentiary support for SEIU's claim that the district failed to respond to its concerns about NUHW's unauthorized access to parts of the medical center.

SEIU also took issue with a flyer distributed by NUHW that instructed bargaining unit members to give their mail ballots to a "trusted shop steward." PERB agreed

that this instruction was a misrepresentation of PERB's mail ballot procedure. However, given NUHW's issuance of a revised flyer that omitted the ballot instruction and added the availability of PERB's mail ballot rules, PERB found the flyer did not interfere with employees' rights to participate in the decertification election.

The board also dismissed SEIU's election objections and declined to set aside the election results. Remarking that neither the district nor NUHW committed an unfair practice and that the district did not grant preferential access rights to NUHW, PERB found that neither the district's conduct nor NUHW's conduct interfered with employee free choice in the election.

The board upheld the ALJ's denial of SEIU's motion to amend its complaint on the final day of the hearing to allege that an NUHW supporter was a supervisor and acting as an agent of the district when he sought to ban SEIU representatives from the break rooms. PERB found that the amendment would have prejudiced the district because neither the NUHW supporter's conduct nor his status as a supervisor was mentioned in the charge documents.

## ***Duty of Fair Representation Rulings***

### **Decision not to pursue grievance challenging disciplinary action had rational basis: IBEW.**

(*Gallardo v. International Brotherhood of Electrical Workers*, Loc. 1245, No. 2146-M, 12-7-10, 6 pp. By Member Wesley, with Chair Dowdin Calvillo and Member McKeag.)

**Holding:** The union's decision not to pursue a grievance challenging the level of disciplinary action imposed on the charging party was not without a rational basis, or arbitrary or discriminatory.

**Case summary:** The City of Redding imposed a disciplinary demotion on the charging party, a public works maintenance worker, for using his cell phone during a traffic flagging operation. The charging party filed a grievance asserting that the discipline was excessive compared to action taken against other employees for safety violations.

Following a meeting with his shop steward and the department superintendent, the charging party asked the steward to provide a written statement verifying the comments made by the superintendent. The charging party felt the superintendent's comments were threatening and intimidating; the shop steward did not perceive them to be improper and declined to write a statement.

The senior business representative then met with the transportation director and determined that the disciplinary demotion was for just cause. He informed the charging party that the use of his cell phone showed disregard for the safety of his coworkers and the public.

The charging party alleged that, by this conduct, the union breached its duty of fair representation. A board agent dismissed the charge, and the board agreed with that conclusion. PERB said that, while the charging party might not agree with the union's decision not to pursue the grievance, the charge did not demonstrate that the senior business representative's decision was without a rational basis, or was arbitrary or based on invidious discrimination.

The board also found that the union's refusal to prepare a written statement concerning the meeting with the charging party's supervisor was not a breach of the duty of fair representation. The shop steward told the charging party he did not view the statements as threatening. PERB also noted that it lacks jurisdiction over the internal affairs of an employee organization unless there is evidence of a substantial impact on the employer-employee relationship. It concluded that the charge provided no evidence that the union's conduct had a substantial impact on the charging party's relationship with his employer.

## Activity Reports

### ALJ PROPOSED DECISIONS

#### Sacramento Regional Office — Final Decisions

*Hamidi v. SEIU Loc. 1000*, Case SA-CO-407-S. ALJ Christine A. Bologna. (Issued 8-16-10; final 9-23-10, HO-U-994-S.) The unfair practice complaint alleged that SEIU discriminated against the charging party when a union agent filed a complaint with the employer and requested an investigation of the charging party's conduct after he spoke against SEIU at a union meeting. After an informal settlement conference did not resolve the dispute, the board agent recommended a prehearing conference to discuss witnesses and evidentiary issues since the charging party was representing himself. Hamidi did not appear at the first or the rescheduled prehearing conference, where two SEIU attorneys and a witness were ready to proceed. Nor did Hamidi request a continuance, or indicate any problems in attending orally or in writing, or provide any explanation for his failure to appear. SEIU moved to dismiss the complaint and unfair practice charge due to the charging party's failure to appear and proceed at the prehearing conference. The motion was granted under PERB Reg. 32170(f). A board agent may exercise discretionary authority to dismiss a case *sua sponte* where the charging party fails to prosecute the matter, absent a showing of good cause. Since no cause for the charging party's failure to appear at two prehearing conferences, much less good cause, was established, it cannot be concluded that Hamidi would appear at a third prehearing conference or at a formal hearing. The charging party has intentionally abandoned prosecution of his charge. Hamidi also bears the burden of proving the allegations of the complaint under PERB Reg. 32178. His failure to appear at the prehearing conference resulted in no evidence, much less a preponderance of evidence, capable of being produced in support of the complaint. Dismissal is warranted on this basis as well.

#### Oakland Regional Office — Final Decisions

*Morgan Hill Federation of Teachers v. Morgan Hill Unified School Dist.*, Case SF-CE-2592-E. ALJ Donn Ginoza. (Issued 8-26-10; final 9-23-10, HO-U-996.) The district was found to have engaged in several instances of bypassing and direct

dealing as a result of assigning a sixth teaching period to secondary school teachers with a six-period day. Because the loss of a negotiated preparation period involves the waiver of an existing policy, the failure to negotiate with the union was unlawful. The district was found not to have unilaterally changed its policy regarding teacher participation on meet-and-consult task forces, which are organized by subject area. Though it failed to convene a middle school math task force during a year in which it eliminated a two-year course sequence, the district only committed a one-time breach not amounting to unilateral repudiation. Evidence was also lacking to establish that the district repudiated its practice of inviting teachers to participate in task forces.

*SEIU Loc. 1021 v. City and County of San Francisco*, Case SF-CE-601-M. Hearing Officer Harry J. Gibbons (Issued 8-24-10; final 9-23-10, HO-U-995-M.) The complaint alleged that the employer unilaterally changed the "rest break" policy without meeting and conferring with the union. No violation was found. The employer sent the union four notices. In a written response to the second notice, the union "respectfully" declined to bargain. The union claimed that it changed its mind after it received the fourth notice and, at that point, made a telephone demand to bargain. Telephone records contradicted this claim. Thus, the union failed to prove that it was denied notice and an opportunity to bargain, a required element of its prima facie case. To the extent the union proved its prima facie case, the employer proved that the union clearly and unmistakably waived its right to bargain.

#### Los Angeles Regional Office — Final Decisions

*SEIU Loc. 1000 v. State of California (Department of Corrections and Rehabilitation)*, Case LA-CE-661-S. ALJ Thomas J. Allen. (Issued 8-4-10; final 9-23-10, HO-U-997S.) Retaliation was found in the state's issuance of a Letter of Instruction to a union steward who had filed grievances. Failure to investigate combined with other nexus facts to show retaliation.

#### Sacramento Regional Office — Decisions Not Final

*Gallardo v. City of Redding*, Case SA-CE-644-M. ALJ Christine A. Bologna. (Issued 9-15-10; exceptions due 10-11-

10.) The charging party, employed by the City of Redding, was assigned to the bargaining unit represented by IBEW Local 1245. He received written notice of his demotion from the equipment operator to public works maintenance worker in November 2009. The charging party asked the union to file a grievance, and the local did so. On December 2, 2009, the shop steward met with Gallardo's supervisor to discuss the grievance at step 1 of the contractual grievance procedure; the charging party was not at the meeting. The grievance was denied that day. On December 3, 2009, the charging party, his supervisor, and the shop steward met. There are three different accounts of the purpose of the meeting and what was said. The charging party claimed that the meeting was called to question him about the grievance and intimidate him into dropping it. The supervisor admitted making three of four statements, but explained them within the context and purpose of the meeting, which was to discuss Gallardo's coworkers' complaints about him, although the grievance was mentioned. The shop steward corroborated the supervisor's testimony about the purpose of the meeting and the context of the statements. No violation was found. The sole claim of interference is based on the four statements made by the supervisor to the charging party during a meeting on his grievance. The union filed the grievance based on Gallardo's request and dropped it after a step 2 meeting with management. The December 3, 2009, meeting was not about the grievance over the charging party's demotion; that meeting was the previous day. The December 3 meeting was called to discuss coworkers complaints. The charging party failed to discharge his burden of proving the unfair practice of interference by a preponderance of the evidence.

*United Steel, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union, AFL-CIO, CLC (United Steelworkers) v. Oak Valley Hospital Dist., Case SA-CE-646-M. ALJ Shawn P. Cloughesy (Issued 9-13-10; exceptions due 10-08-10.)* Oak Valley Hospital District had employer-employee relations rules that did not provide for card check procedure for achieving exclusive recognition, and a required 75 percent minimum participation requirement in secret ballot elections. Card check procedure in MMBA Sec. 3507.1(c) still applied in the absence of a local rule, and the minimum participation requirement violated MMBA Sec. 3507.1(a).

#### **Oakland Regional Office- Decisions Not Final**

None during this period.

#### **Los Angeles Regional Office- Decisions Not Final**

None during this period.

#### **Report of the Office of the General Counsel**

#### **Injunctive Relief Cases**

Five requests for injunctive relief were filed during the reporting period of July 1 through September 30, 2010. Each request was denied by the board.

##### ***Requests denied***

*Stationary Engineers Loc. 39 v. City of Sacramento* (IR No. 585, Case SA-CE-678-M.) On July 30, 2010, the union filed a request for injunctive relief to prohibit the city from laying off employees. On August 5, the board denied the request.

*California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment (CASE) v. State of California (Department of Personnel Administration)* (IR No. 586, Case SA-CE-1876-S.) On August 2, 2010, the union filed a request for injunctive relief to prohibit the state from furloughing employees. On August 9, the board denied the request.

*CASE v. State of California (Department of Industrial Relations)* (IR No. 587, Case SA-CE-1877-S.) On August 19, 2010, the union filed a request for injunctive relief to prohibit the state from suspending telecommute days. On August 25, the board denied the request.

*Operating Engineers Loc. Union No. 3 v. City of Santa Rosa* (IR No. 588, Case SF-CE-768-M.) On August 31, 2010, the union filed a request for injunctive relief to prohibit the city from implementing a wage reduction. On September 7, the board denied the request.

*Transport Workers Union of America Loc. 250 v. City & County of San Francisco* (IR No. 589, Case SF-CE-761-M.) On September 1, 2010, the union filed a request for injunctive relief to prohibit the city from changing transit staffing/services, schedules, and absenteeism/sick-leave procedures. On September 7, the board denied the request.



## Litigation Activity

Eight cases were opened during the reporting period.

*Santa Clara County Correctional Peace Officers Assn. v. PERB; County of Santa Clara*, California Court of Appeal, Sixth Appellate District, Case No. H035786. (PERB Case SF-CE-228-M.) In July 2010, the union filed a writ petition with the appellate court alleging the board erred in PERB No. 2114-M.

*County of Santa Clara v. PERB; Santa Clara County Correctional Peace Officers Assn.*, California Court of Appeal, Sixth Appellate District, Case No. H035791. (PERB Case SF-CE-228-M.) In July 2010, the union filed a writ petition with the appellate court alleging the board erred in PERB No. 2114-M.

*Santa Clara County Registered Nurses Professional Assn. v. PERB; County of Santa Clara*, California Court of Appeal, Sixth Appellate District, Case No. H035804. (PERB Case SF-CE-229-M.) In July 2010, the union filed a writ petition with the appellate court alleging the board erred in PERB No. 2120-M.

*County of Santa Clara v. PERB; Santa Clara County Registered Nurses Professional Assn.*, California Court of Appeal, Sixth Appellate District, Case No. H035846. (PERB Case SF-CE-229-M.) In July 2010, the union filed a writ petition with the appellate court alleging the board erred in PERB No. 2120-M.

*Siskiyou County Employees Assn. (SCEA) v. PERB; County of Siskiyou, SCEA/AFSCME et al.*, California Court of Appeal, Third Appellate District, Case No. C065476. (PERB Cases

SA-AC-63-M and SA-AC-64-C.) In July 2010, the union filed a writ petition with the appellate court alleging the board erred in PERB No. 2113-M.

*Amalgamated Transit Union Loc. 1704 v. PERB; Omnitrans*, California Court of Appeal, Fourth Appellate District (Division Two), Case No. E051345. (PERB Case LA-CE-358-M.) In July 2010, the union filed a writ petition with the appellate court alleging the board erred in PERB No. 2121-M.

*County of Riverside v. PERB; SEIU Loc. 721*, California Court of Appeal, Fourth Appellate District (Division Two), Case No. E051351. (PERB Cases LA-CE-443-M, LA-CE-447-M and LA-CE-482-M.) In July 2010, the union filed a writ petition with the appellate court alleging the board erred in PERB No. 2119-M.

*Stallings, Williams and Halcoussis v. PERB; California Faculty Assn.*, Los Angeles County Superior Court Case No. BS127710. (PERB Cases LA-CO-501-H and LA-CO-502-H.) In August 2010, the petitioners filed a mandamus action with the superior court seeking to vacate PERB Nos. 2116-H and 2117-H.

## Personnel Changes

Chief Administrative Law Judge Bernard McMonigle passed away September 4, 2010 after battling a major illness. ALJ Christine Bologna has been acting chief ALJ since April 2010.

ALJ Ann Weinman retired in May 2010 after a distinguished career with the National Labor Relations Board and PERB.

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