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Letter From the Editor



Dear *CPER* Readers:

With this issue we step onto a new platform. Not only are we now publishing solely online, but we have a new format. One of several features that we are implementing is the opportunity for you to comment on articles. You can try it out now! We hope to see a spirited — and civil — exchange of ideas and opinions.

We are reviewing your survey responses. A preliminary analysis indicates most of you want more local government stories and more arbitration awards covered in the arbitration log. While we are increasing our local government coverage, we need your help to boost the number of awards we summarize. Send us awards you receive or encourage the arbitrators you use to send us their awards relating to the California public sector.

We recognize that many of you prefer having a hard copy of the magazine to tote around. However, we think the features we are planning to build into our online journal will win you over: information updates, commentary from knowledgeable subscribers, and immediate links to more in-depth sources, to name a few. All this is accessible from any computer, smart phone or iPad. *CPER* was created to keep pace with changes in public sector labor relations, and we aim to continue that mandate on a technological level, as well.

Please continue to send us your ideas and wish lists. We are still collecting feedback via the survey link on the navigation pane of CPER's website at <http://cper.berkeley.edu/survey/>.

We are excited about going green and adapting to the digital age while we carry on the tradition of informative coverage of current developments begun over 40 years ago by Betty Schneider, and continued under Bonnie Bogue and Carol Vendrillo.

Katherine J. Thomson
Editor, *CPER*

Retaliation: So Many Laws, So Little Time....Is Temporal Proximity All a Plaintiff Needs?

By [Melanie M. Poturica and Ian A. Wright](#)



Anti-retaliation statutes abound in both federal and state law to protect employees who report or oppose certain prohibited activities.^[1] It follows that employers must be vigilant in taking steps to ensure that they are protecting themselves from the ever increasing number of retaliation claims. Retaliation charges filed with the Equal Employment Opportunity Commission have increased by almost 40 percent since 2006, and in 2010 they accounted for 36.3 percent of all individual charges filed with the EEOC.^[2]

The Framework of a Retaliation Claim

To succeed on a cause of action based on an anti-retaliation provision, each of the retaliation laws generally requires plaintiffs to establish the same three elements: (1) the employee engaged in protected activity; (2) the employer subjected him/her to an adverse action; and (3) there was a causal connection between the protected activity and the adverse action. The causal connection element of a successful retaliation claim often requires an analysis of temporal proximity, i.e., the timing between the protected activity and the adverse action. The employee must also demonstrate that the employer had knowledge of the protected activity prior to the adverse action.

This article provides an overview of the elements of a retaliation case but focuses on the use of temporal proximity to establish the requisite causal connection. Temporal proximity is the crucial element in many retaliation claims because an employee rarely is able to produce direct evidence of the retaliatory motive behind an employer's adverse actions. In other words, the period of time between the protected activity and the adverse employment action may be used as circumstantial evidence of an employer's retaliatory conduct — the inference of retaliation is much stronger if the period of time is short. It is not surprising then that temporal proximity is one of the most common forms of circumstantial evidence used to establish causal connection.

This article will use Title VII as the legal backdrop with which to discuss the elements of a successful retaliation claim. Title VII prohibits employers from discriminating against employees on the basis of race, color, religion, sex, or national origin.^[3] It also protects employees against retaliation from their employers when employees oppose illegal discrimination in the workplace or participate in an investigation or other process to challenge alleged discrimination.^[4] If a

plaintiff presents credible direct evidence of discrimination, an employer may still prevail if it proves that it would have subjected the employee to the same employment decision regardless of the employee's protected activities.^[5] Direct evidence is "evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption."^[6] An example of direct evidence of retaliation would be an email from a supervisor stating that the employer fired an employee because the employee filed a complaint against the employer for racial discrimination. Rarely does this direct evidence exist. Therefore, a plaintiff may also rely on circumstantial evidence of retaliation to establish his/her Title VII claim.

In *McDonnell Douglas Corp. v. Green*, the Supreme Court set forth a burden shifting approach for Title VII discrimination cases which was subsequently adopted for Title VII retaliation claims as well.^[7] Under this approach, a plaintiff's retaliation claim may succeed without direct evidence. To do so, the plaintiff must establish a prima facie case of retaliation by producing enough circumstantial evidence regarding protected activity, adverse action, and causal connection to create an inference of retaliation.^[8] If the plaintiff succeeds in establishing a prima facie case of retaliation, the burden shifts to the defendant to produce evidence of a legitimate, non-retaliatory reason for the adverse action taken against the plaintiff.^[9]

If the defendant satisfies its burden, the presumption of retaliation established by the plaintiff in his/her prima facie case disappears and the burden shifts back to the plaintiff to prove each element of retaliation outright; some courts refer to this final step as requiring the plaintiff to prove that the employer's stated reason was actually pretext for retaliation.^[10] If the plaintiff proves pretext, the plaintiff has satisfied the ultimate burden of proof and will be entitled to various remedies against the employer.^[11]

Protected Activity

Under Title VII, an employee engages in a protected activity when she opposes an unlawful employment practice, makes a charge, or participates in an investigation, proceeding, or hearing related to Title VII.^[12] The courts generally recognize two forms of protected activities: (1) conduct under the participation clause of Title VII, and (2) conduct under the opposition clause of Title VII.^[13]

The participation clause protects the employee who files a charge of discrimination against an employer with an administrative agency or testifies before or participates in a state or federal administrative agency investigation of another employee's discrimination charge. Threatening to file a charge of discrimination against an employer with an administrative agency is also considered participation conduct.^[14]

On the other hand, the opposition clause prohibits employers from discriminating against employees for opposing employment practices rendered unlawful by Title VII. Examples of opposition conduct include employee complaints to management, a union, or other employees, or filing internal grievances regarding the employer's unlawful employment practices. The opposition clause extends beyond employees who instigate formal complaints; it also protects

employees who speak out about discrimination, not on their own initiative, but in response to questions asked in an employer's internal investigation.[\[15\]](#)

However, Title VII only protects employees who oppose actions taken by the employer; it does not protect an employee's opposition to the independent behavior of a coworker unless the employer condones the discriminatory behavior.[\[16\]](#) And, although the Supreme Court has not definitively addressed this issue, it cited without disapproval a Ninth Circuit decision which held that Title VII protects not only those employees who oppose practices that are actually found to be unlawful under Title VII but also employees who oppose employer conduct based on a reasonable belief that there was a Title VII violation.[\[17\]](#)

In *Yanowitz v. L'Oreal USA, Inc.*, the California Supreme Court held that an employee's stated objections and refusal to obey her supervisor's order that she terminate an employee and replace her with a more attractive employee was protected activity under FEHA's opposition clause.[\[18\]](#) The court concluded that where an employee articulates a reasonable belief that certain employer conduct is discriminatory, the employer is prohibited from retaliating against the employee for that conduct.[\[19\]](#) However, if the employee does not voice his/her belief that the employer is engaging in discriminatory behavior, the employee generally will be unable to establish the protected activity element of the prima facie claim.[\[20\]](#)

Adverse Action

The term "adverse action" does not appear in Title VII; however, the term has been adopted by the courts to refer to the sufficiency of an action taken that will support a cause of action for retaliation. In *Burlington Northern v. White*, the United States Supreme Court held that an adverse employment action is any materially adverse action which "might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[\[21\]](#) Thus, an adverse action may extend beyond workplace-related or employment-related acts to cover any action that a reasonable employee would view as materially adverse.[\[22\]](#)

The California Supreme Court held that the standard for determining whether there was an adverse action under the FEHA was the "materiality" test, which requires "an employer's adverse action to materially affect the terms and conditions of employment."[\[23\]](#) Accordingly, the scope of adverse action under the FEHA is arguably narrower than that of Title VII because it is limited to actions that affect employment.

Causation

Title VII only prohibits adverse action taken *because of* an employee's protected activity. The causal link may be established with direct evidence or with inferences derived from circumstantial evidence.[\[24\]](#) Thus, the issue becomes what level of proof is required to demonstrate a causal connection in the prima facie case. The proximity between the protected

activity and the adverse action may be used to establish a prima facie showing of causation. As discussed below, some courts have even held that temporal proximity may be used to prove pretext.

In *Chen v. County of Orange*, a state court FEHA case, the court highlighted the importance of the causation requirement in retaliation claims and explained that “the possibility of a retaliation claim creates the problem of conferring a de facto immunity on the complainant despite poor job performance or the [fact that the complaint has no merit]. Consider a hypothetical of a ne’er-do-well employee who wants to manipulate the system to his/her advantage: ‘Not doing your job well? Ax about to fall? Never fear: file a discrimination claim, no matter how meritless. Your employer will be afraid to take any action because now you can sue for retaliation.’”^[25] To circumvent this abuse of anti-retaliation statutes, the courts require a causal connection between the protected activity and the adverse action. Thus, the causal link requirement prevents employees from asserting baseless discrimination claims in an attempt to scare their employer from taking an adverse action against them out of fear of liability under an anti-retaliation statute.

In *Clark County School Dist. v. Breeden*, the United States Supreme Court indicated that close temporal proximity alone may be sufficient to establish a prima facie causal connection.^[26] Although demonstrating causality is not always dependent on temporal proximity, employers may raise the lack of temporal proximity to argue that the plaintiff failed to establish the causality element of his/her prima facie retaliation claim.^[27]

The court in *Breeden* also added another requirement for a plaintiff to establish a prima facie showing of causal connection: the employer’s knowledge of the protected activity.^[28] Both the temporal proximity requirement and the knowledge requirement are discussed more thoroughly below.

Temporal proximity. In California and the Ninth Circuit, the courts recognize temporal proximity as being highly probative of a causal connection and give substantial weight to evidence of temporal proximity. These courts also recognize that the prima facie burden of production is less onerous than the plaintiff’s ultimate burden of proof. This view leads to more successful plaintiffs than in jurisdictions that give little weight to temporal proximity because it eases the plaintiff’s burden in establishing the causality requirement of the prima facie retaliation case. This is particularly true because temporal proximity is often the only evidence of causal connection that a plaintiff has. In jurisdictions that give little weight to temporal proximity, these claims will fail.

Temporal proximity may be crucial for a successful retaliation claim. If the plaintiff cannot establish a prima facie causal connection, the burden will not shift to the employer and the plaintiff’s claim will fail. For those plaintiffs whose only evidence of a causal connection is the period of time between the protected activity and the adverse action, the sufficiency of temporal proximity will be determinative of whether they can establish a prima facie showing of retaliation. Unfortunately, there is no period of time that has been definitively held to automatically satisfy the plaintiff’s prima facie burden to demonstrate causation. As such, the

sufficiency of the amount of time between the protected activity and the adverse action for establishing causation by way of temporal proximity will vary from case to case.

In *Breeden*, the Supreme Court appeared to accept the lower court's definition of temporal proximity as "very close" timing between protected activity and adverse action.[\[29\]](#) However, the court did not expressly adopt that definition, nor did it provide its own definition of temporal proximity.[\[30\]](#) In that case, the court concluded that the plaintiff failed to establish causality based on temporal proximity because the adverse action was taken 20 months after the protected activity.[\[31\]](#)

In a Ninth Circuit Court of Appeals Title VII retaliation case, the court held that the plaintiff established her prima facie showing of causation based solely on the fact that the employee was subjected to an adverse action seven weeks after she engaged in protected activity.[\[32\]](#) But another court held that four months between the protected activity and the adverse action was insufficient for this purpose.[\[33\]](#) Another court quickly determined that, where there was only one day between the protected activity and the adverse action, the plaintiff had demonstrated causation based on temporal proximity alone.[\[34\]](#)

Where a court finds that the timing between the protected activity and the adverse action is too remote to establish a prima facie showing of causation based on temporal proximity alone, the plaintiff must then offer additional evidence of causation to satisfy his/her burden.[\[35\]](#) The plaintiff may establish the causal connection requirement with evidence that the employer made statements about how much it dislikes the employee, the employer's failure to follow its own policies when dealing with the affected employee, or the employer's disparate treatment of employees. Therefore, employers should adopt written policies that require supervisors and management to document legitimate business reasons for making employment decisions. In addition, where a plan of action already has been contemplated — even if not yet definitively determined — before the employee engages in some form of protected activity, the employer does not need to suspend the previously planned action once it discovers that the employee who will be affected has filed a retaliation claim.[\[36\]](#) Finally, where discipline is warranted, employers should apply it consistently for similar infractions.

Knowledge. The knowledge requirement is based on the realization that an employer cannot take adverse action against an employee because of the employee's protected activity if the employer had no knowledge of the protected activity.[\[37\]](#) An employer does not need actual knowledge of the protected activity if there is circumstantial evidence that indicates the employer should have known that the employee engaged in such activity.[\[38\]](#) In addition, under the "cat's paw" theory of liability, an employer may be liable under Title VII based on the discriminatory animus of a supervisor, who influences, but does not make, the ultimate employment decision .[\[39\]](#)

Generally, employers may defeat a retaliation claim by demonstrating that all of the decisionmakers behind the alleged retaliatory act were not aware of the protected activity at the time of the adverse act.[\[40\]](#) Employers may be able to prevent the plaintiff from establishing causation by having the actual decision makers declare under penalty of perjury that they were unaware of the protected activity and set forth specific legitimate reasons for the challenged action.[\[41\]](#)

One state court decision emphasized that lack of knowledge of the employee's protected activity will not provide a defense "unless it extends to all corporate actors who contributed materially to an adverse employment decision."^[42] In other words, knowledge may be imputed to the ultimate decision maker. For example, if a supervisor initiates an investigation into an employee's conduct purely for retaliatory reasons and the investigation leads to the employer taking an adverse action against the employee, the supervisor's retaliatory purpose may be imputed to the employer even if the investigation was conducted independently from the supervisor and the employer did not know of the supervisor's retaliatory motive.^[43] Accordingly, employers must take a proactive and preventative approach. An employer must inform employees and supervisors that it will not tolerate retaliation in any form and that it encourages employees to report unlawful activity.

Legitimate, Non-Retaliatory Business Reason

Once the plaintiff establishes the prima facie retaliation case, the burden of production then shifts to the defendant to offer evidence that the action taken was for a legitimate, nondiscriminatory reason.^[44] The burden of production is different from the plaintiff's ultimate burden of proof and simply requires the defendant to produce substantial evidence which demonstrates why the adverse action was legitimate and nondiscriminatory.^[45] For example, an employer may satisfy its burden by offering evidence that a downturn in business required the employer to conduct layoffs and that, in determining which employees to lay off, it used a variety of factors including, seniority, performance, and qualifications.^[46] Evidence of a legitimate, non-retaliatory business reason for the challenged action therefore often provides employers with a defense to retaliation claims.

If the jury rejects the employer's proffered explanation, it may infer retaliation without any additional proof from the plaintiff.^[47] However, if the defendant satisfies its burden, the presumption of retaliation that arose when the plaintiff established his/her prima facie case "simply drops out of the picture" and the burden shifts back to the plaintiff to prove that the defendant's alleged legitimate reason is really pretext for retaliatory animus.^[48] With thorough documentation of employer actions, and policies, procedures, and training that encourage equitable treatment of employees, employers should feel confident in their ability to defend their employment decisions if subsequently challenged.

Ultimate Burden of Proof and Pretext

Once the employer satisfies its burden of producing evidence of a legitimate, non-retaliatory reason for taking the challenged action against the employee, the burden shifts back to the employee to establish that the explanation is merely pretext for the employer's true retaliatory motive. The plaintiff needs to produce "very little" direct evidence of pretext to survive a motion for summary judgment.^[49] One California court recently clarified that although pretext is

relevant, the central inquiry must be “whether the evidence as a whole supports a reasoned inference that the challenged action was the product of discriminatory or retaliatory animus.”[\[50\]](#)

However, the plaintiff may create such a strong inference of retaliation in the prima facie case that he or she may not have to produce any direct evidence of pretext to survive the defendant’s motion for summary judgment and take the case to the jury.[\[51\]](#) As a result, the jury may take into account the weaknesses in the employer’s evidence of legitimacy “in considering whether those reasons constituted the real motive for the employer’s actions, or have instead been asserted to mask a more sinister reality.”[\[52\]](#) Therefore, an employer’s legitimate reason for the challenged action will only provide a complete defense where the plaintiff’s showing is too weak to sustain its ultimate burden of proof.[\[53\]](#)

Temporal proximity to prove pretext. Currently there is conflicting authority regarding whether an employee may rely on temporal proximity to establish that the employer’s proffered explanation for the challenged action is pretext for retaliatory motive. In courts that allow the use of temporal proximity to establish pretext, temporal proximity may prevent the defendant from succeeding on a motion for summary judgment because these courts view temporal proximity as creating a genuine issue of material fact for the jury by raising an inference of pretext.

In *Arteaga v. Brinks, Inc.*, the plaintiff was the subject of an internal investigation. During the investigation, the plaintiff informed his employer that he was suffering from injuries which he believed were work related.[\[54\]](#) The employer fired the plaintiff days after he reported his injury based on the results of the employer’s internal investigation.[\[55\]](#) In plaintiff’s lawsuit alleging retaliation under the FEHA, the employer satisfied its burden of producing a legitimate, non-discriminatory explanation for the termination—the employee had stolen \$7,688.00 from the employer.[\[56\]](#)

The plaintiff then argued that defendant’s proffered explanation was pretextual because he was terminated less than a week after he disclosed his physical disability.[\[57\]](#) The court held that “the temporal proximity between an employee’s disclosure of his symptoms and a subsequent termination may satisfy the causation requirement at the first step of the burden-shifting process...[b]ut temporal proximity alone is not sufficient to raise a triable issue as to pretext once the employer has offered evidence of a legitimate, nondiscriminatory reason for the termination.”[\[58\]](#) The court bolstered its conclusion by emphasizing that the employer began the internal investigation which led to the plaintiff’s termination before the employee notified the employer about his injuries.[\[59\]](#) The court clarified that plaintiffs may use temporal proximity as one factor to establish pretext.[\[60\]](#)

However, in *Dawson v. Entek International*, the plaintiff filed a retaliation claim against his employer under Title VII.[\[61\]](#) The plaintiff went to human resources to lodge a complaint regarding repeated and extreme sexual orientation discrimination. Within two days, plaintiff was terminated.[\[62\]](#) In that case, the court held that “in some cases, temporal proximity can by itself constitute sufficient circumstantial evidence of retaliation for purposes of both the prima facie case and the showing of pretext.”[\[63\]](#) The court indicated that the gravity of the plaintiff’s complaints in that case may have contributed to its conclusion that temporal proximity was sufficient to establish pretext.[\[64\]](#)

Because *Dawson* is such a recent case, there is little authority interpreting its holding. However, if more courts follow its holding that temporal proximity may be used to establish causation and pretext, employers may have a more difficult time winning retaliation cases on summary judgment after presenting a legitimate, non-retaliatory reason for the adverse action. Regardless, until the case law regarding this issue is developed more thoroughly, an employer still has a good chance of prevailing on a motion for summary judgment if plaintiff's only evidence of pretext is temporal proximity.

Conclusion

The increase in retaliation claims should not make employers feel as though they cannot discipline an employee when warranted. Remember that, even after an employee engages in some form of protected activity, an employer may still proceed with previously contemplated action against the employee if there was a legitimate basis for doing so prior to the protected activity.^[65] Accordingly, proper documentation and legitimate reasons for the action should provide a solid defense to any action taken against an employee regardless of the proximity between the activity that is allegedly protected and the adverse action.

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[1] For example, Title VII of the Civil Rights Act of 1964, the Fair Employment and Housing Act, the California False Claims Act, the Meyers-Milias-Brown Act, the Americans with Disabilities Act, the Family and Medical Care Leave Act, the California Family Rights Act, and the Age Discrimination in Employment Act all contain provisions that protect employees from retaliation.

[2] See <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

[3] Title VII of the Civil Rights Act of 1964, 42 USC Secs. 2003 et seq.

[4] *Id.*

[5] *Clark County School Dist. v. Breeden (Breeden)* (2001) 532 U.S. 268, 272.

[6] *Davis v. Chevron, USA, Inc.* (5th Cir. 1994) 14 F.3d 1082, 1085 (alterations in original, quotations and citations omitted).

[7] *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802; see also *Miller v. Fairchild Industries, Inc.* (9th Cir. 1986) 797 F.2d 727, 731-32 (stating “[t]he order and allocation of proof for Title VII suits outlined in [*McDonnell*], also covers actions for [retaliation].”).

[8] *McDonnell Douglas Corp. v. Green, supra*, 411 U.S. at 802.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 804.

[12] See 42 USC Sec. 2000e-3(a).

[13] *EEOC v. Nalbandian Sales, Inc.* (E.D. Cal. 1998) 36 F.Supp.2d 1206, 1209.

[14] *Gifford v. Atchison, Topeka & Santa Fe Railway Co.* (9th Cir. 1982) 685 F.2d 1149, 1156, fn. 3.

[15] *Crawford v. Metro. Government of Nashville and Davidson City, Tenn.* (2009) 129 S.Ct. 846, 851-53.

[16] *Silver v. KCA, Inc.* (9th Cir. 1978) 586 F.2d 138, 141.

[17] *Breeden, supra*, 532 U.S. at 270; see also *Rucker v. Higher Educational Aids Bd.* (7th Cir. 1982) 669 F.2d 1179, 1182 (Interpreting Title VII, the court stated, “it is the good faith and reasonableness, not the fact of discrimination, that is the critical inquiry in a retaliation case.”).

[18] *Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1036.

[19] *Yanowitz, supra*, 36 Cal.4th at 1036.

[20] *Id.* at 1046.

[21] *Burlington Northern & Santa Fe Railway v. White* (2006) 548 U.S. 53, 68.

[22] *Id.* at 69; see also *Thompson v. North American Stainless, LP* (2011) 131 S.Ct. 863, 868 (confirming cause of action for third-party retaliation for persons who did not themselves engage in protect activity).

[23] *Yanowitz, supra*, 36 Cal.4th at 1036.

[24] *Jordan v. Clark* (9th Cir. 1998) 847 F.2d 1368, 1376.

[25] *Chen v. County of Orange* (2002) 96 Cal.App.4th 926, 948-49.

[26] *Breeden, supra*, 532 U.S. at 237-74.

[27] *Porter v. California Dept. of Corrections* (9th Cir. 2005) 419 F.3d 885, 896, fn. 6.

[28] *Breeden, supra*, 532 U.S. at 273.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 272.

[32] *Thomas v. City of Beaverton* (9th Cir. 2004) 379 F.3d 802, 812.

[33] *Hughes v. Derwinski* (7th Cir. 1992) 967 F.2d 1168, 1174-75.

[34] *O'Neal v. Ferguson Construction Co.* (10th Cir. 2001) 237 F.3d 1248, 1255.

[35] *Id.* at 1253.

[36] *Breeden, supra*, 532 U.S. at 272.

[37] *Breeden, supra*, 532 U.S. at 273.

[38] *Hernandez v. Spacelabs Medical, Inc.* (9th Cir. 2003) 343 F.3d 1107, 1116.

[39] *Staub v. Proctor Hospital* (2011) 131 S.Ct. 1186, 1193-94.

[40] *Morgan v. Regents of the University of California* (2000) 88 Cal.App.4th 52, 73.

[41] *Id.* at 574-75.

[42] *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 109.

[43] *Id.* at 113.

[44] *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 806.

[45] *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 142.

[46] *Nidds v. Schindler Elevator Corp.* (9th Cir. 1996) 113 F.3d 912, 918.

[47] *Reeves, supra*, 530 U.S. at 151-53.

[48] *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 511.

[49] *Chuang v. University of California Davis* (9th Cir. 2000) 225 F.3d 115, 1127-28.

[50] *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 715.

[51] *Chuang, supra*, 225 F.3d at 1128.

[52] *Mamou, supra*, 165 Cal.App.4th at 715.

[53] *Id.*

[54] *Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 334.

[55] *Id.*

[56] *Id.* at 352.

[57] *Id.* at 353.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 354.

[61] *Dawson v. Entek International* (9th Cir. 2011) 630 F.3d 928, 932-33.

[62] *Id.* at 936.

[63] *Id.* at 937.

[64] *Id.*

[65] *Breeden, supra*, 532 U.S. at 272.

Labor's Lessons

By [Gregory J. Dannis](#)



I have often said every school district is unique — that each one is a different country with each bargaining table representing a distinct subculture within. I still believe this, but I am awakening to an awareness that all districts share some common traits and “truths” regarding negotiations and labor relations.

I believe these truths are universal, but they are apparently inconvenient as well, since most are known but rarely spoken aloud. I call these truths “Labor’s Lessons,” and my purpose is to expose as many of them as possible.

One note of caution: As I proceed, please be mindful of Mark Twain’s warning, “Every generalization is dangerous — especially this one.”

The Negotiated Contract

The negotiated contract is the employer-employee relations bible. I have negotiated agreements with as few as 50 pages and as many as 400; yet common ground exists in all of them.

Lesson 1: There is a connection between the length of the contract and the strength of the labor-management relationship.

Every contract describes a “code of conduct” for the work place — what the employer or employees or the union should not or cannot do, or are encouraged or required to do. If each party believes it knows what the other will or will not do without the need for a written rule, fewer rules are needed and a shorter contract results. If both parties feel assured that each will not invade the other’s sphere of authority and influence, fewer subjects need to be included.

There are exceptions to this truth. A large organization might run inefficiently with generic work rules. Such a district might need articles addressing elementary and secondary education; specialist positions; pre-school and adult school; regional occupational programs, and more. A big district might need specific sections addressing support services such as transportation, food service, clerical and instructional assistance, maintenance and operations, and technology.

Even so, the lesson still applies to all districts: The stronger the relationship, the shorter the contract.

Lesson 2: The two longest articles in every contract are about not being at work and complaining about work when you are there.

The lengthiest articles in every contract are “Leaves of Absence” and “Grievance Processing” — one describing the many reasons for not being at work, and the other prescribing how to lodge complaints when you are present.

Leaves of absence. In one of my contracts, this article is 22 pages long, single spaced with 9-point font. After covering preliminary matters such as definitions, eligibility, return rights, restrictions, application, notification, cancellation, and expiration, there follow approximately 20 kinds of leave! These include: bereavement, pregnancy and disability, paid disability, optional unpaid disability, child care, illness, catastrophic illness, industrial injury or illness, personal necessity, personal, sabbatical, exchange, military, witness, jury, conference and convention, substitute, half-time, reduced workload, family care, and medical.

It is entirely possible for a full-time employee to work half-time, or even “no-time” given the plethora of available leaves. And we haven’t even talked about vacation! Perhaps a more efficient approach might be to dispense with the leave of absence and vacation articles, and substitute one that simply says, “Please show up when you can. We’d really appreciate it!” Fortunately, the vast majority of public school employees show up for work every day, every year, and do not avail themselves of the many opportunities to be absent.

Grievances. Most contracts have a three- to five-step grievance process that includes levels such as informal, superintendent/designee, mediation, school board, and binding or advisory arbitration. There are time lines for each step, and if one is fortunate, his or her grievance will reach a final decision within a year after the process commenced.

The irony of the lengthy grievance article is that the number of grievances filed has little or no relation to whether the employer is good or bad, or friendly or hostile when it comes to contract enforcement. Rather, the number of grievances filed is more about the nature of the labor-management relationship and how the parties choose to resolve disagreements.

Even in the “best” district, any union worth its dues could file dozens of legitimate grievances every day. Why? Because districts have multiple sites with dozens if not hundreds of site and department-level supervisors making daily workplace decisions “on the spot” and “in the moment.” Despite the contract’s purpose of furthering consistent practices and working conditions, site-level administrators — *and* employees *and* union representatives — often want local control and flexibility. This results in contract non-compliance with the tacit approval of all concerned.

When this elasticity stretches too far, or adversely impacts someone or some group of employees, or disturbs someone’s sense of fairness, or when it poses the threat of becoming a past practice and a precedent, one of two things will happen: (1) the parties with a good relationship will resolve the problem informally, or (2) the parties with a bad relationship will battle it out through the grievance process.

There is also a “chicken and egg” strategy in which labor sometimes uses the grievance process to organize. For example, if difficult negotiations are likely or already occurring, the union will file multiple grievances over matters it normally would not in order to put pressure on the employer in negotiations — “Accept our demands and we will stop filing.” — and to rouse a disengaged rank and file by showing them the relevance and necessity of a strong and vigilant union to protect them against an unfair employer — “Look at all the grievances we’ve had to file....You need us!”

Lesson 3: Contract sections can be traced back to individual employees.

Every treatise on labor law waxes poetic on how the negotiated agreement is a majestic “broad brush” that governs working conditions for all employees in the unit. The contract truly represents the exclusivity of the “exclusive representative,” for the employer must “talk only to the union,” and not with individual employees.

Despite this truism, unions and employers spend an inordinate amount of time discussing, negotiating, and writing contract language for “singleton” issues. This makes it possible to put a name to many sections of the contract! For example:

- That limit on the length and frequency of faculty meetings? Yes, that was because of Vince Verbose, the principal who used to hold two hour meetings three times a week.
- That restriction on involuntary transfers? Sure, that was because of Suzie Sourpuss. She alienated everyone at every site and kept getting moved every year (usually at the confidential request of her peers!).
- That reclassification of bus drivers, custodians, and school secretaries five years ago? Of course! That was the year the union president was a bus driver, the bargaining chair was a custodian, and three secretaries were on the bargaining team!

Maybe if the parties knew in advance they were required to put employee names after the “singleton sections,” they would concentrate on broader, “collective” concerns and not waste time on such narrow issues.

The Negotiations Process

There is a rite of passage the parties must endure to produce a contract. What are Labor’s Lessons regarding the negotiations process?

Lesson 1: Negotiations alter the space-time continuum, changing the very measurement of time itself.

I always believed in the immutability of time — until I experienced negotiations. Bargaining is unreal in so many ways, but I did not anticipate the altered measurement of time itself! This time warp can be calculated between ratios of about 2:1 to 6:1 depending on the activity at hand. For example:

- When the parties agree to take a one-hour lunch break, in negotiations time this signifies an interlude of two hours — a 2:1 ratio.
- “We just need a five minute caucus” in bargaining reality means a half-hour — a 6:1 ratio.
- “We will respond to your proposal at the next session” may in fact mean you will not see a counter proposal for months, if ever. I cannot even calculate the ratio for this.

Even more astounding is how units of time can be compressed. An eight-hour session can metamorphose magically into six and even four hours! This phenomenon rarely happens in the opposite direction, however, in which the parties actually stay beyond the established ending time.

Lesson 2: There are indices, criteria, and other assessments in negotiations that do not exist in the real world.

In negotiations, the parties are always measuring or assessing something. How much does this cost? How does this compare? Is this fair? Is this affordable? How much money do they have? How much do they work and can they do more? Will this help us? How will this help students? Can I sell this to the members/school board?

This constant appraisal applies to the substance and the process of bargaining. Are they telling the truth? What are they hiding? Why are they so silent? What do they really want? What are they afraid of? What are we afraid of? Why can't we talk like normal people and just say what we want and what we fear?

Some of these indices and criteria include the following:

Fiscal health of the district (or the union). One need never look at a budget or auditor's report to discern the health of the district, nor does one need the list of dues paid to discover the union's prosperity or poverty. Instead, the following indicators are universal and foolproof:

- Quality of the coffee
 - District: Terrible! Oily, black as ink, cooking for days. Chemical white powder has no impact or effect. (District is poor.)
 - Union: Gourmet! Multiple blends, a machine that brews individual servings, real cream. (Union is flush!)
- Computers, hardware and software
 - District: Computers 10-years old with black and white monitor screens. Loaded with Word 2000; the only game is Pong. (District is working with FCMAT.)
 - Union: Wireless everywhere plus cloud technology. Sleek lap tops loaded with programs that can dissect the district budget 10 different ways at the speed of sound. (Union's interest earnings exceed district reserves.)
- Facilities and furnishings....Don't even ask! But if negotiations heat up, anticipate being accused of extravagant and wasteful spending on the 50-year-old district office with its original furniture and carpeting!

Effectiveness of the bargaining process. Are the parties communicating and making progress? These are some tell-tale signs:

- *The Caucus Time/Table Time Ratio.* The more time spent away from each other in caucus, the worse the process is working.
- *The "Post-It Index."* At some tables, only the spokesperson is allowed to talk, and team members may contribute only by sending post-its back and forth. In this case, the more post-its that are "flying," the more trouble you are in.

Feasibility of proposals. What factors do the parties consider to measure the chances for ratification? How do they judge what they can and cannot agree to? A few criteria are:

- *The "Fear Index."* In recent negotiations, both sides unfortunately are compelled to assess what each might lose unless agreement is reached, leading each to inquire inwardly, "How afraid are they?" Management assesses union and employee fears of lost wages, benefits, and employment to determine whether concessions will be achieved. Labor measures the employer's fear of qualified or negative budget certification, state takeover, and the public's reproach to predict what alternative measures the district might take to avoid these outcomes if the union refuses to "give back." In effect, each wonders about the other, "What is their Fear Index?"
- *The "Kill Factor."* A corollary to the Fear Index, the Kill Factor gauges whether and to what degree union leadership might get "killed" figuratively by membership, and district administration by its governing board (and perhaps the district community). This inquiry requires both parties to confront whether leaders are willing to face the wrath of constituents by supporting an odious agreement which they nevertheless believe is necessary to safeguard the continued viability of both organizations.

The absurdity algorithm. An algorithm is a logical sequence of steps for solving a problem. Although bargaining is inherently a problem-solving process, often it is neither logical nor sequential, hence the Absurdity Algorithm (the "AA"), examples of which are as follows:

- *No good deed goes unpunished.* As oxymoronic as it sounds, this AA is almost always true, at least from the employer's experience. If the rules are "bent" just once, even at the union's request, you have established a new rule to which you will forever be held. If an employee is given that "one extra chance" out of a sense of concern and empathy (usually at the union's request), you have expanded the steps of progressive discipline that you will be demanded to apply to all who come thereafter. If you offer an early retirement incentive to mitigate layoffs, you may be confronted with a counterproposal to allocate some of the savings to remaining employees through wages, benefits, or restoration of furlough days, thereby defeating the very job-saving purpose of the incentive.
- *If you think you've seen it all, you haven't.* Never assume it cannot get any more absurd, because it will. Recently, when a district proposed furlough days for classified employees, the union resisted as expected, but finally assented when the district promised to negotiate impacts and effects. The district expected to see proposals on timing of the days to minimize the impact of lost wages, and contingencies for restoration based on

improved finances. Instead, the union proposed to add new holidays equal in number to the furlough days, in effect requiring the district to pay for the unpaid days!

- In another AA, a classified union spent hours decrying the abysmal working conditions under which employees were suffered to work. The district finally convinced the union to move on to discuss its priorities. The union responded by demanding increased longevity pay since the vast majority of its members had worked for the district more than 20 years!

Negotiations have always included a little theatre of the absurd, but as economics continue to stress the system and the parties, what used to be a one-act play is becoming a full-scale production.

Politics and the Public

We negotiate the delivery of public education to six million students, and we debate the expenditure of millions of dollars approximating 40 percent of the annual revenues for the seventh largest economy in the world. Our core mission still harkens back to Thomas Jefferson and Horace Mann, who thought public schools could be the great equalizers between classes. With this mixture — education, children and money — how could our negotiations *not* be infused with politics and public pressure?

One commentator noted, “It’s hard to say ‘school’ in America without saying ‘reform’ right after it. For more than a half century we have had one magic potion after another.” These education elixirs include child-centered education; open school; discovery learning; compensatory education; team teaching; new math; new physics; new biology; phonics; math facts; more homework; less homework; bigger high schools; smaller classes; merit pay; magnet schools; direct instruction; computer-assisted instruction; testing and exit exams; no social promotion; vouchers; charter schools; KIPP; Success for All; Accelerated Schools; national standards; common core standards; and No Child Left Behind.

There will always be a new and better idea to cure the ills of public education, which according to many is always near death. However, as Will Rogers was supposed to have said, the schools were never as good as they used to be.

Since education and politics have always been inseparable, can there possibly be any new Labor’s Lessons? I believe there are several.

Lesson 1: Negotiations no longer occur out of the public eye.

We work behind closed doors to discuss and agree to contract terms that impact our most cherished institution. We work in secret, and what we say is rarely revealed. This is no longer acceptable. Parents and taxpayers want to know what the parties are proposing and accepting because the resulting working conditions fundamentally affect teaching and learning conditions. They are demanding more information than ever before.

A recent *Sacramento Bee* headline declared: “Parents Band Together to Support California Schools.” The lead paragraph stated: “Once upon a time parents helped with homework, made cupcakes for bake sales and ushered kids to campus in carpools. They left the rest up to politicians and educators. Not anymore.” After two years of massive budget cuts and reductions in programs and personnel, parents “are no longer satisfied to sit on the sidelines.”

Parents have come to believe that the education establishment — employers and unions — are motivated by self-preservation, and while they literally have seats at the table, parents do not. Unhappy with larger classes and unsatisfactory teachers, parents are organizing to change the system because as one said, “Parents never had a voice. There are many that have an interest in the status quo. Parents are the outliers.”

Regardless of a district’s size, wealth or demographics, a single board meeting dedicated to “sunshining” the parties’ initial proposals is woefully insufficient for the degree of “public notice” now being demanded.

Lesson 2: Traditional political alliances are shifting as public demands for quality education increase.

Consider the following:

- Twenty-one percent of California students drop out of high school, and the rate is even higher among Latinos and African Americans. Some estimate the drop out rate in Los Angeles Unified is 50 percent or more.
- According to one report, despite these numbers and low test scores, districts nationally rate less than 1 percent of teachers as “unsatisfactory.”
- The National Education Association held its first conference in 1887. The first item on the agenda was tenure.
- In 1976, the National Education Association endorsed Jimmy Carter and has endorsed every Democratic presidential hopeful since then.
- Recently the mayor of Los Angeles declared the teachers union for which he used to organize to be “one unwavering roadblock” to school reform. He said, “At every step of the way, when Los Angeles was coming together to effect real change in our public schools, UTLA was there to fight against the change and slow the pace of reform.”
- Union leadership responded that they are not “the villains of education” and denounced the idea that they are “defenders of the status quo.”
- The union simultaneously announced it would oppose any linking of teacher evaluations to student test scores and criticized a court settlement that dispensed with the requirement that layoffs would be according to strict seniority in adversely impacted low-performing schools.
- Alice Huffman, president of the California NAACP, is a Democratic Party activist who worked for the California Teachers Association for 12 years and describes herself as a strong believer in labor rights. She opposed CTA in supporting recent legislation regarding parental power to change low-performing schools, including dismissing teachers and converting to charters.

- Stating that she was looking out for the best interests of black and Latino children, Huffman commented: “It’s a people’s movement, in a way, from groups like the NAACP saying ‘enough is enough.’ We’re all saying you have to do something about our young people here. You can’t just leave them hanging year after year. I’m not trying to destroy the union, but sometimes you have to make a choice in life and right now, the education of our young people is more important than the union.”

These seemingly disparate points yield a cohesive result: The Democratic Party-organized labor coalition is breaking down as parents, especially those in inner cities, demand more local control, more school options, and better outcomes. As one politician put it, the trouble in California schools is no longer an “elephant in the room, it’s a donkey in the room.”

According to many, this shift dictates a change in union strategy. A recent letter to the *New York Times* by a professor of industrial relations put it succinctly:

Public workers select and join unions to have bargaining power, to increase compensation and to tighten work rules, but they can’t always be moving forward; in hard times a few steps backward in collective bargaining are necessary to save jobs.

Public employees gain their bargaining strength and legal status from public and political support. But if the public becomes irritated by union stubbornness in an economic downturn, support will be withdrawn and public officials, instead of currying favor with unions, will show everyone how tough they are by fighting unions.

So, what can the public sector unions do? Understand that they live in a paradox. Thrive by bargaining hard in good times, and being flexible in hard times, and know what the members want (to keep their jobs) and what the public wants (for no one to come through hard times unscathed).

The growing chorus of parent, politician, and taxpayer voices shouting that education is racing to the bottom and waiting on a superhero for its rescue cannot be denied. Relationships once taken for granted are shifting and disappearing before our very eyes. An inevitable byproduct is the allocation of blame and the search for a scapegoat.

The Parties

In the labor-management power equilibrium, control of the budget (money!) and the continued viability of the enterprise reside in the employer. The negotiations table is the one forum in which there is an uneasy yet equal power sharing. This fragile stasis depends largely on support for labor from the public, politicians and the rank and file. When this foundation wavers, labor becomes a prime target for blame.

Lesson 1: The escalating criticism of public sector unions should concern public employers, especially education employers.

Newspaper headlines say it all: “Public Workers Face Outrage as Budget Crises Grow.” “Public Workers: The New Scapegoats?” The words are even more specific when it comes to California schools: “Is California the First Failed State?” “Waiting for Teachers’ Unions to Change.” “The Time for Teacher Accountability is Now.”

After years of being called unfair and disrespectful, and superfluous bureaucrats, I bet that some on the management side for at least a fleeting moment have thought, “Finally! The public is finally seeing the bullies we’ve had to deal with for years! They realize at last that union demands are only for the benefit of its membership regardless of the harm to programs or student achievement! The public has finally seen through the sheep’s clothing to the wolf we’ve known for years!”

This feeling of “at long last, some equal treatment” might feel good for awhile. But as the late, great diplomat and negotiator Richard Holbrooke said, “There are limits to the pleasure one can take from other people’s distress.” Indeed, when one scratches below the surface, it is not just public employee unions being attacked, it is all public employees — teachers *and* management. As one letter writer put it to the *New York Times*, “[Teachers are] not the problem. The bureaucrats (including school administrators) are. My outrage is not directed at the government workers on the front line. I am outraged by the bloated bureaucracy and those who enable it.”

Unions and their membership are often thought to be separate, e.g., “It’s the union’s agenda but our good teachers do not support it.” Sometimes this disconnection is intended to drive a wedge between the union and its members. The court of current public opinion, however, is blurring this line by asserting our problem is the union, the employees they represent, and the system that enabled what we now conclude has been very bad behavior.

This verdict convicts all parties, and employers should be concerned about mounting criticism, which has begun to take on the aspect of “piling on” labor and management in equal measure.

Lesson 2: Management and labor must jointly acknowledge that change is needed even while challenging assumptions.

We are our own worst enemies. As one politician commented: “We can’t keep saying ‘no’ to every effort to reform and transform our schools. We’ve got to support our teachers, but we also have to hold teachers accountable.”

Another writer was more direct: “Teachers can badmouth [the documentary] ‘Waiting for Superman,’ boycott it, and hunker down. Or they can recognize they’ve reached a pivotal moment in the life of their union — and reform before it’s too late.”

We should not, however, allow this evolving criticism of labor to divide us into separate camps. We should not tolerate the creation and perpetuation of a culture of blame. Instead, we should search together for truth in the midst of the finger pointing. This is not possible, however, if we fight with each other. As Aeschylus, the father of Greek tragedy said, “In war, truth is the first casualty.”

Consider, for example, the heated debate over the “value added” approach of using student test data in teacher evaluations. Even supporters admit the data is flawed for a multitude of reasons, including the random (or deliberate) assignment of students, and the absence of measuring social skills that are crucial to early learning.

All too often however, school administrators and union leaders have defeated any attempt at teacher measurement partly by pointing out such limitations. But the politics of education have changed. When confronted with the prospect of teachers being misjudged, one commentator responded, “On whose behalf do you want to make the mistake — the kids or the teachers? We’ve always erred on behalf of the adults before.”

When the public sees the fierceness of the attack against any new methodology, it hears that it is impossible to quantify the ephemeral elusive “art” of teaching. The public hears the education establishment asserting that, unlike every other profession, teacher performance cannot be measured at all.

Labor’s Lessons teach us that this is how public education loses credibility and support. Instead of sending a message of “back off — we can’t be judged,” the education establishment should concede that the current system is failing many students and jointly pursue meaningful change, even if the path to reform runs through the bargaining table.

The Final Lesson: The Language of Negotiations

Labor’s Final Lesson is being taught across our country even as we meet because of a recent tragic event. We see a nationwide discussion over the power of words and the value of civility. It is time to rededicate ourselves to the civil exchange of viewpoints in negotiations, especially when all parties share an abiding interest in resisting the dismantling of our public school system.

We should avoid speaking in anger, for as one educator said, “Speak when you are angry and you’ll make the best speech you’ll ever regret.” As our resources continue to shrink, emotions can run high and tempers can flare in negotiations that focus on nothing but cuts and take-aways. But consider this: it will not always be this way, and when the moment to “add back” arrives, how will the parties make the most of it? If the relationship has been ruined due to the exchange of too many angry words, when things turn around, how will the parties be able to shake hands if both have clenched fists?

It is even more damaging to abuse and overuse words to the point they are drained of all meaning. We have so many complex and critical issues to confront, and for most of them, our best chance of success is through cooperation and agreement. We do not have time to waste by casually tossing out words like “respect” and “disrespect,” “business necessity,” “State takeover,” “attract and retain,” “a well-paid employee is a happy employee and a better employee,” and finally, “it’s all for the kids.” These words are designed to distract and are the weapons of choice for issue avoidance. We do not have time for empty words.

We have grave problems to conquer, and if we heed Labor's Lessons, we can be jointly victorious without either side seeking to be triumphant. We need to reject rigidity and embrace flexibility. For, perhaps the greatest Labor's Lesson of all is this: The most successful people are those who are good at Plan B.

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Claim Alleging Breach of Duty of Fair Representation Is Within PERB's Initial Exclusive Jurisdiction

It may not be a surprise to labor lawyers, but a California appellate court finally has held that a breach of a union's duty of fair representation is an unfair labor practice under the Meyers-Milius-Brown Act. In *Paulsen v. Local 856 of the Intl. Brotherhood of Teamsters*, the court ruled an allegation of breach of the duty is an unfair practice claim that is subject to the initial exclusive jurisdiction of the Public Employment Relations Board. Therefore, the employees' lawsuit could not be brought in court.

Right to Overtime Pay 'Concealed'

The plaintiffs were current and retired deputy probation officers employed by the County of Marin and represented by the Teamsters. They claimed that the union wrongfully classified them as exempt employees during negotiations with the county, entered into a secret agreement with the county to deprive them of their overtime benefits, and misled probation officers into believing that overtime compensation could not be negotiated. When the county later disclosed to the employees that it might have been out of compliance with the Fair Labor Standards Act, the union did nothing to assist the probation officers.

The plaintiffs filed a class action in court, alleging a breach of the duty of fair representation, fraudulent concealment, and a breach of fiduciary duty. The union argued the complaint should be dismissed because the claims were within PERB's initial exclusive jurisdiction. The trial court agreed because all three claims were essentially duty of fair representation charges. The plaintiffs appealed.

Case Law Conflicting

Since 2001, a local agency employee has been required to exhaust administrative remedies under the MMBA by filing charges with PERB before going to court. The 2000 amendment to the MMBA states, "The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy...shall be a matter within the exclusive jurisdiction of the board."

The plaintiffs contended that a breach of the duty of fair representation is not arguably an unfair labor practice under the MMBA. They pointed out that, while the Higher Education Employer-Employee Relations Act defines a breach of the duty of fair representation as an unfair practice, the MMBA is silent on the subject.

PERB has found that the MMBA impliedly imposes a duty of fair representation on exclusive representatives, the court noted. PERB, however, has not discussed its reasons for finding a duty of fair representation under the MMBA. While the board cited one appellate case as support for its conclusion, that case merely adopted case law under the National Labor Relations Act without examining whether the MMBA is different.

The plaintiffs relied on a case that did notice a distinction between the provisions of the MMBA and federal labor laws. The court in *Andrews v. Board of Supervisors* (1982) 134 Cal.App.3d 274, 1982 Cal.App.LEXIS 542, 55 CPER 17, refused to find an implied duty of fair representation in the MMBA because the act allows employees to represent themselves individually in their employment relations with their public employer. The *Paulsen* court pointed out, however, that the premise of *Andrews* had been undercut by *Relyea v. Ventura County Fire Protection Dist.* (1992) 2 Cal.App.4th 875, 1992, Cal.App.LEXIS 53, 92 CPER 17, which held that local government employees cannot compel their employers to negotiate terms and conditions of employment with them individually.

The court concluded that, at least in bargaining matters, an employee organization is the exclusive representative and has a duty of fair representation under the MMBA. Since the act requires that a complaint alleging a violation of the MMBA be processed as an unfair practice charge, the court found the duty of fair representation claim within the exclusive jurisdiction of PERB. The court buttressed its decision by noting that entering into a secret agreement with the county to deprive the plaintiffs of overtime benefits was arguably a breach of the union's duty to bargain in good faith, which PERB regulations define as an unfair practice under the MMBA.

The court rejected the plaintiffs' contention that they should be allowed to proceed in court because PERB does not allow class actions. There is nothing in the MMBA or in case law that indicates a class action before PERB is impermissible, said the court. Since the court found the other two claims — breach of fiduciary duty and fraudulent concealment — were essentially the same as the breach of duty of fair representation allegation, the court upheld the trial court's dismissal of the complaint. (*Paulsen v. Local 856 of the Intl. Brotherhood of Teamsters* [2011] 193 Cal.App.4th 823, 2011 Cal.App. LEXIS 308.)

Agreement to Arbitrate Furlough Grievance Would Be Improper Delegation of Council's Budgetary Discretion

The California Supreme Court will review a decision that has held an agreement to arbitrate whether furloughs violated workweek and salary provisions of a collective bargaining agreement would be an improper delegation of the council's policymaking powers. Viewing the imposition of furloughs as an exercise of discretion during a fiscal crisis, the Court of Appeal in *City of Los Angeles v. Superior Court* held that an arbitrator's review of a challenge to the furlough decision was tantamount to determining issues of discretionary budgetary and salary-setting powers. The Supreme Court granted review on July 13, 2011, after this CPER Journal issue originally was posted.

Fiscal Emergency

In May 2009, the mayor of Los Angeles asked the city council to declare a fiscal emergency and adopt an ordinance allowing furloughs. Facing a deficit of \$500 million and a cash flow crisis, the council declared a fiscal emergency under its administrative code and Government Code Sec. 3504.5. Those provisions require prior notice to employee organizations and an opportunity to meet and confer over changes in terms and conditions of employment, except in cases of emergency, when notice and conferring with the employee organizations is permitted after adoption of an ordinance.

The mayor imposed one furlough day every two weeks. Over 400 grievances were filed alleging violations of provisions in the memoranda of understanding that governed salaries and the length of the workweek. The city denied the grievances on the ground that they were implemented in accordance with the city council's ordinance and not grievable.

The union filed a petition to compel arbitration. It pointed to Sec. 3.1 of the MOU, which defined a grievance as "any dispute concerning the interpretation or application of this written MOU or departmental rules and regulations governing personnel practices or working conditions...." The city contended that furloughs implemented in conjunction with a fiscal emergency were not grievable. It relied on its management rights clause, which stated in part, that the city's powers included the rights to "relieve City employees from duty because of lack of work, lack of funds or other legitimate reasons" and "take all necessary actions to maintain uninterrupted service to the community and carry out its mission in emergencies." The trial court granted the petition to compel arbitration. The city challenged the trial court's decision in the Court of Appeal.

Courts Decide Arbitrability

The union contended that an arbitrator should decide whether the parties had agreed to arbitrate issues relating to furloughs. The court reiterated case law that holds the question of subject matter arbitrability is decided by the courts unless the agreement clearly and unmistakably assigns that question to the arbitrator.

The union argued that, under the MOU, an arbitrator's jurisdiction encompassed disputes over interpretation of the MOU, which included interpretation of the definition of an arbitrable grievance in Sec. 3.1. The court did not find the language clearly and unmistakably called for an arbitrator to rule on arbitrability, and ruled the question was for the court to decide.

Parties' Intent Not Decided

Looking at the question of arbitrability, the court found the MOU ambiguous. Eventually, the court decided not to resolve the ambiguity, and merely assumed that the city agreed to arbitrate furlough grievances. But, before it reached that result, it determined the management rights clause was a limitation on subject matter arbitrability. In one of many lengthy footnotes, the court interpreted the management rights clause of the parties' memorandum of understanding as not limited by the terms in the remainder of the agreement.

The union argued that whether the city has the right to unilaterally furlough employees involved interpretation of the MOU, as described in Article 3.1, and was arbitrable. The court, however, focused on a proviso which reads, "provided, however, that the exercise of these [management] rights does not preclude employees and their representatives from...raising grievances about the practical consequences that decisions on these matters may have on wages, hours, and other terms and conditions of employment." In a prior case involving the city and the same union, this proviso was found to exclude from arbitration a grievance where a laid-off employee asserted that there was sufficient work and funding for his position. The court in *Engineers and Architects Assn v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 1994 Cal.App. LEXIS 1219, 110 CPER 68, held that once the layoff was shown to be the result of lack of work and/or funds, the decision was a management decision which was not arbitrable.

To the court, the question became whether the furlough decision was a management right described by the phrase, "relieve City employees from duty because of...lack of funds"; if so the grievance was not arbitrable. The union argued that the phrase referred only to layoffs, not furloughs. Finding the phrase ambiguous, and with no extrinsic evidence to assist it with interpretation, the court decided not to answer the question.

Improper Delegation

Assuming an agreement to arbitrate furlough decisions, the court considered the city's contention that such an agreement would be an improper delegation of its discretionary power. The court agreed after comparing the potential result of arbitrating furlough grievances to the results of interest arbitration as described in two cases, *San Francisco Fire Fighters v. City and County of San Francisco* (1977) 68 Cal.App.3d 896, 1977 Cal.App. LEXIS 1376, 35 CPER 28, and *County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 2009 Cal.App. LEXIS 620, 196 CPER 31.

In *San Francisco*, the court held that the city and its fire commission could not delegate to an arbitrator the fire commission's powers and duties to prescribe rules and regulations, unless the city charter authorized the delegation. The court explained, "[P]owers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of

public trusts and cannot be surrendered or delegated to subordinates in the absence of statutory authorization.”

In this case, the court noted, the Los Angeles city charter gives the city council and mayor discretion to make a budget. It also provides that the council has the power to set employees’ salaries, unless otherwise set in collective bargaining agreements. The court observed that implementing furloughs is included within setting salaries, and “a furlough imposed in a fiscal emergency is encompassed within budget making. The court continued, “Moreover, it cannot legitimately be disputed that setting salaries is a *discretionary* function,” citing *Sonoma County*. The court concluded that the decision to impose furloughs was an exercise of the city council’s discretionary power over salaries and budgets and could not be delegated to an arbitrator.

The union tried to convince the appellate court that the grievance arbitrations here were different than interest arbitrations, where arbitrators decide the future terms of a collective bargaining agreement when the parties cannot reach agreement. As the court in *Sonoma County* explained, interest arbitration is more like legislation, while grievance arbitration is a quasi-judicial determination of existing rights. The union argued in vain that the arbitrator here would not engage in policymaking functions, but only interpret wage and hour provisions in the MOU, which the city council already ratified.

The court, however, found the union’s contentions “an elevation of terms over substance.” Whether called interest arbitration or grievance arbitration, the union here was seeking to have the arbitrator decide discretionary policy issues. “The Union wants a determination made that the City *violated* the salary and workweek provisions of the MOU by instituting furloughs, and that the furloughs were therefore improper,” the court observed. “This is a challenge to a City Council’s decision to impose furloughs as a response to the City’s dire financial condition.” Therefore, an agreement to arbitral review of the decision would have been an improper delegation of its powers. (*City of Los Angeles v. Superior Court* [2011] 193 Cal.App.4th 1159, 2011 Cal.App. LEXIS 354.)

Efforts to Eliminate Binding Interest Arbitration Continue in California

More than 20 local entities in California have binding interest arbitration for at least one unit of employees. The City of Vallejo was the first of these, establishing it for both safety and non-safety employees in 1970. In June 2010, as the city was emerging from bankruptcy, however, voters in Vallejo passed a measure that repealed the binding interest arbitration requirement in the city charter.

In the November 2010 elections, binding interest arbitration was dropped for the firefighters in the City of Stockton. Voters in the City of San Jose passed a measure limiting interest arbitration for police and fire unions. The city's Measure V opens the arbitration hearing to the public and classifies documents submitted during the hearing as public records. It provides that either party may request a retired trial court judge to act as chair of the arbitration board if the parties cannot agree on an arbitrator. It modified the factors to be weighed by the arbitration board to make the primary consideration the city's financial condition and "its ability to pay for employee compensation from on-going revenues without reducing City services." It restricts compensation increases that exceed the rate of revenue increases over the previous five years, retroactive changes to retirement benefits, creation of unfunded liabilities for the city, and provisions that interfere with managerial rights.

Now the city council of San Luis Obispo is asking its voters to overturn the interest arbitration provision of the city charter, which requires arbitration of police and fire impasses. The San Luis Obispo Police Officers Association filed for a restraining order in May, claiming that the city was required to meet and confer on the ballot proposition before deciding to place it before the voters. The trial court did not agree.

The town's chamber of commerce is advocating for repeal of binding interest arbitration. It emphasizes that the city's annual minimum salaries for police officers and firefighters are higher than in the City of Los Angeles. Its maximum salary for police officers is also higher, while its population is about one-tenth the size.

Supporters of repeal point to the results of the only interest arbitration in the city's history. In early 2008, before the recession, the police union won pay increases totaling more than 27 percent over a four-year period — January 2006 through December 2009. In issue-by-issue arbitration, the arbitrator chose the union's salary package over the city's proposal of raises totaling 19 percent. The arbitrator compared salaries in the city to those in medium-sized cities in coastal California from Santa Barbara to Napa.

The police and fire unions counter that they have no right to strike. Before the voters approved binding interest arbitration in 2000, the city could impose its last, best, and final offer if there was no agreement. The unions point out that their unit members have not received any cost-of-living raises since January 2009, and the unions agreed last December not to ask for increased employer contributions to health benefits premiums.

The voters will decide by mail-in ballot at the end of August.

County Retirement Act Does Not Exempt Pension Information From Disclosure

A recent Court of Appeal ruling makes clear that information about pensions of individual county retirees must be disclosed if requested under the Public Records Act. The holding in *Sacramento County Employees Retirement System v. Superior Court of Sacramento County* aligns the public's right to county pension information with its right to information from the California Public Employees Retirement System.

'Confidential Information'

In May 2009, the *Sacramento Bee* asked SCERS for a list of retirees receiving pensions over \$100,000, including the retiree's name, amount received, retirement date, and department from which the pensioner retired. SCERS disclosed the existence of 221 pensions over \$100,000 and related them to county departments, but would not name the retirees or their retirement dates. It claimed the information was confidential under the County Employees Retirement Law of 1937, specifically Government Code Sec. 31532. The *Bee* expanded its requests to include pensions of all SCERS retirees, but SCERS refused to provide identifying information. It asserted that the date was constitutionally protected, confidential financial information.

The *Bee* asked the court to order SCERS to disclose the requested information under the Public Records Act. It explained that the information was needed to investigate such issues as pension spiking, where an employee cashes out vacation leave or takes higher paying work in the last year of employment to boost his or her retirement payout.

SCERS protested that it had information on age, contact information, Social Security numbers, marital status, and beneficiary information that it had always believed was confidential. It asserted that only 20 percent of funding for benefits comes from the county, but conceded that, if investment returns declined, the public funds would have to make up the balance.

The trial court ordered SCERS to disclose the pension benefits paid in 2009, including the name, date of retirement, last held position, last department, years of service, base pension, cost-of-living adjustment, total health allowance, and monthly benefit. SCERS asked the appellate court to overturn the order.

Presumption in Favor of Disclosure

SCERS' first contention was that the issue had been decided against the *Bee* in a prior lawsuit in 2005, and the *Bee* was collaterally estopped from suing for the information again. The court pointed out, however, that the ruling was based on cases that have since been disapproved by the Supreme Court in *International Federation of Professional & Technical Engineers, Loc. 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 2007 Cal. LEXIS 8918, 187 CPER 21. Since the *Bee's* new lawsuit concerned a matter of public importance concerning the retirement board's duties under state law, the court decided not to apply collateral estoppel.

The Public Records Act requires public entities to disclose records to a member of the press or public unless exempted. The court noted that exemptions in the statute are construed narrowly. In addition, in 2004, California voters “enshrined” the right of access to public records in the California Constitution.

SCERS did not argue that the data on individual pensions were not public records. It contended, however, that Sec. 31532 of the retirement act exempted the records from disclosure. That section states, “Sworn statements and individual records of members shall be confidential and shall not be disclosed to anyone except insofar as may be necessary for the administration of this chapter....”

The parties interpreted the phrase “individual records of members” differently. SCERS contended that the term referred to all information about a member that SCERS keeps. The *Bee* countered that the phrase refers narrowly to information provided by a member or on the member’s behalf to SCERS.

Because the statute is ambiguous, the court looked outside its language to determine its meaning. In 1977, the court noted, the state attorney general examined the same issue and rendered its opinion that pension benefits of county employees were not confidential. The opinion was based in part on the fact that Sec. 31532 was similar to a section governing CalPERS. Both used the term “individual record,” and the CalPERS statute clearly equated the phrase with information filed *by* an individual or beneficiary. In addition, the court observed that a 1937 statute governing the confidentiality of the California State Teachers Retirement System also made data “filed by any member or beneficiary” confidential. Since SCERS did not proffer any reason why the legislature would have intended county pensions to be confidential when other public pensions are not, the court concluded that the term “individual records” in Sec. 31532 “refers to information provided *by* a member or on the member’s behalf (such as medical reports), *to* SCERS, and *not* all records that *pertain to or relate to* a member.”

The court held the following information is not confidential under Sec. 31532: “the name, date of retirement, department retired from, last position held, years of service, base allowance, cost-of-living adjustment, total health allowance and monthly pension benefit of each retiree.”

SCERS argued that a “catchall exemption” in the Public Records Act entitled it to keep the information private. Section 6255(a) provides that an agency may withhold a public record where “the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.” The court found that the interests in favor of confidentiality were not weighty enough to prevent disclosure.

While the court agreed that individuals have a right to privacy in their personal finances under the California Constitution, it found public pensions are not private financial information. It relied on *International Federation*, where the Supreme Court held that salaries of public employees are subject to disclosure. In that case, the Supreme Court explained, “Counterbalancing any cognizable interest that public employees may have in avoiding disclosure of their salaries is the strong public interest in knowing how the government spends its money.” Included in the Supreme Court’s recitation of examples of favoritism or

mismanagement were instances of public pension scandals, the court pointed out. SCERS could not deny that its pension liabilities are backed by public money. Therefore, the court found financial privacy did not weigh against disclosure.

SCERS asserted that publication of individuals' pension benefits would expose them to hostility. The court acknowledged this was a legitimate concern, but found it was overblown, since neighbors would likely blame the public agency rather than the pensioner.

SCERS also expressed its fear that disclosing pension information linked to individuals would make them vulnerable to elder abuse. The court found the fear speculative. It observed that the contact information and Social Security numbers of pensioners would remain private, and the mere possibility that someone could look up a retiree's address was insufficient to outweigh the interest in disclosure.

The court rejected SCERS' contention that the *Bee* could find the information elsewhere. In sum, the court found the interest in handing over the information so that the newspaper could investigate pension abuses outweighed pensioners' privacy interests.

Several retiree associations filed friend of the court briefs that urged the court to require hearings for individuals who wished to keep their pension information private. The court observed that the Supreme Court in *International Federation* rejected the same suggestion in the absence of evidence justifying individual hearings. As no such evidence was before the *SCERS* court, and there was no reason asserted for treating any group of retirees differently than others, the court declined to remand the case for an order directing SCERS to notify retirees of the impending disclosure of their non-confidential information. The trial court's order was upheld. (*Sacramento County Employees Retirement System v. Superior Court of Sacramento County* [2011] 195 Cal.App.4th 440, 2011 Cal.App. LEXIS 569.)

Arbitrator Rules in Favor of Rejected Tentative Agreement

Transit operators who work for the San Francisco Municipal Transit Agency will work for three years under a tentative agreement they rejected. The mediation/arbitration board chaired by arbitrator Carol Vendrillo decided the terms of the tentative agreement were the best resolution of the negotiations, despite the fact that members of Transit Workers Union Local 250-A had voted it down several days before.

The MTA entered negotiations seeking to cut the total compensation of Muni operators by 20 percent in a successor agreement to the contract that expires June 30, 2011. The union, which represents 2,200 operators, thought it did a good job when it wrested a tentative agreement from the MTA that froze wages at current levels, preserved wage premiums and holidays, decreased employee health benefit costs, and continued the MTA's payment of both the employer's and employees' pension contributions for current employees.

The members did not agree. They were unhappy with changes in work rules and the disciplinary procedure.

While the union gained a just cause provision in the contract, the time for the employer to notify an employee of a disciplinary charge increased from 14 to 28 days after MTA has knowledge of an event or conduct on which the discipline is based. That time is automatically extended for complicated cases. The discipline will be implemented if not resolved before arbitration. In the past, discipline was not imposed until the grievance procedure was concluded. The MTA agreed, however, to a longer time to file a grievance and to binding, rather than advisory, arbitration.

Under the last contract, a three-member accident review board with a union representative determined whether operators were at fault for accidents. Now, a transit safety professional will decide whether an accident was preventable.

The new agreement allows the agency to use part-time operators to cut overtime costs. In addition, operators would not become eligible for overtime unless they work at least 40 hours in a week or eight hours in a day. They can no longer count leave time as time worked.

The union lost its role in reviewing and objecting to schedule changes on the basis of safety or hazard concerns. Before, it could take unresolved safety and health disputes to arbitration before schedules were implemented. Now TWU only has the right to make its concerns known to the senior scheduling manager.

Union leadership blamed many of its losses on a charter amendment passed by San Francisco voters last November. The balance shifted in favor of the MTA when Proposition G went into effect. The amendment eliminated the charter provision that required the wages of Muni operators to be as high as the average for similar employees in the two highest-paying comparable transit systems, making wages subject to negotiation. It abolished the trust fund that used MTA contributions to provide additional vacation, retirement and health benefits to operators, although it required that the employer health benefit contribution be equivalent to its contribution for other city employees during the first agreement reached after November 2011. It

made incentive bonuses for employees optional instead of mandatory. It also scuttled any past practices and side-letters that are not in writing and approved by the MTA executive director or board of directors.

In addition to changing some of the parameters for wages and benefits, the charter amendment enacted binding interest arbitration in the event the parties' negotiations went to impasse. Along with factors that arbitrators traditionally use, such as changes in the consumer price index and wages of comparable employees in other cities, the charter now requires the MTA arbitration board to consider the interests and welfare of transit riders, the agency's ability to pay the costs "without materially reducing service" or requiring fare increases in a manner inconsistent with charter criteria for raising fares, and the agency's ability to efficiently and effectively tailor work hours and employee schedules to the public demand for service.

The new contract is estimated to save the MTA \$41 million over three years, and will expire June 30, 2014.

County Required to Grant Hearing to Employee Denied Wages and Benefits During Pendency of Disability Retirement Application

Although the County of Riverside rescinded an officer's medical separation and applied for her disability retirement, the officer was still entitled to appeal the denial of wages and benefits under the collective bargaining agreement and the Public Safety Officers Procedural Bill of Rights Act, the Court of Appeal held in *Riverside Sheriffs Assn. v. County of Riverside*.

Not Made Whole

Beatrice Sanchez was employed by the county as a probation corrections officer. When told she would have to work the graveyard shift, she brought in a letter from her doctor stating she could not work that shift, among other restrictions. Although the county began an interactive process to determine if it could reasonably accommodate her medical condition, Sanchez declined all positions offered.

The county decided she could not perform the essential functions of her position with or without accommodation. It placed her off work without pay on October 25, 2008. On April 6, 2009, it sent her a notice of intent to release her from employment. The notice stated she was not being terminated for disciplinary reasons, but only because of her medical condition, and was therefore not entitled to a hearing under the memorandum of understanding between the county and the Riverside Sheriffs Association. It offered her the opportunity to respond orally, and suggested she contact the office to inquire about disability or service retirement.

Sanchez' attorney responded that her medical condition could be accommodated, and that she was entitled to appeal her termination. On April 23, the county terminated her employment for medical reasons. The next day, Sanchez demanded reinstatement and asked to appeal her termination.

On May 18, the county learned the Court of Appeal had ruled against it in *Riverside Sheriffs Assn. v. County of Riverside* (2009) 173 Cal.App.4th 1410, 2009 Cal.App. LEXIS 776. In that case, the court had held that the county could not both terminate an employee and apply for her involuntary disability retirement, since a terminated employee is not eligible for disability retirement. Until the disability retirement became final, the employee was entitled to a hearing on the appeal of her termination.

On May 19, the county rescinded Sanchez' termination. It filed for her involuntary disability retirement on July 7, stating that her retirement was effective October 25, 2008.

In September, Sanchez petitioned the court for an order directing the county to process her request for an administrative appeal under the MOU and under the Public Safety Officers Procedural Bill of Rights Act. She argued the county should reasonably accommodate her because she was able to work four of the five possible shifts. She claimed she had not received wages or benefits since her termination. The county contended she was not entitled to a hearing

because it had never processed her termination, and had provided short-term disability payments and health insurance benefits. Therefore, her only remedy was to appeal her disability retirement. The trial court found that Sanchez was entitled to a post-termination hearing since she had never been either reinstated or placed on leave with pay and had not been made whole for lost wages and benefits. The county appealed.

Not ‘Factually Moot’

The county argued that the trial court erred because Sanchez’ termination had been rescinded and an administrative appeal would be “factually moot.” The appellate court disagreed.

The court explained the legal framework of the case. Government Code Sec. 21153 mandates that an employer file for disability retirement on behalf of an employee if the employer finds the employee disabled and the employee is eligible for a disability retirement. The prior *Riverside* case held that an employer could not both terminate an employee and apply for her disability retirement.

The MOU allows an employee to appeal a disciplinary action and have the case heard before a neutral arbitrator or hearing officer. The PSOPBOR entitles an officer to an administrative appeal of “punitive actions” taken against her by her employer. A hearing under an MOU generally suffices. Prior cases have found that dismissals and reductions in salary are punitive and disciplinary in nature.

The county admitted it should not have terminated Sanchez, but claimed it had corrected its mistake. The trial court, however, had found that Sanchez had been denied wages and benefits that she would have received “if she had been treated as a non-terminated employee eligible for disability retirement.” The appellate court emphasized that, at the time of her trial court hearing in January 2010, Sanchez had not received wages and some of her benefits for over a year and had not yet been granted a disability retirement.

The court held that the county’s denial of wages and benefits constituted “disciplinary action” under the MOU, and “punitive action” under the PSOPBOR. Sanchez had effectively been terminated. Although it would not have been appropriate to reinstate her, the court said, there was no explanation why she was not placed on administrative leave pending the disability retirement. The court rejected the county’s contention that the rescission of Sanchez’ termination made the case different from the prior *Riverside* case. It found that while Sanchez was not entitled to appeal the termination, she was entitled to appeal the denial of the benefits of her employment. (*Riverside Sheriffs Assn. v. County of Riverside* (2011) 193 Cal.App.4th 20, 2011 Cal.App. LEXIS 220.)

State Auditor Blasts Commission on Teacher Credentialing

In April, the California State Auditor released a report concerning the Commission on Teacher Credentialing, the state body charged with issuing teaching credentials and disciplining teachers found to have engaged in unprofessional conduct. The audit revealed a number of problems in the commission's educator discipline process, and in its hiring and firing practices. "It's one of the worst-run organizations we've seen in a long, long time — of any state agency that we've looked at," State Auditor Elaine Howle told the *Sacramento Bee*.

The audit was requested by Senate President Pro Tem Darrell Steinberg (D-Sacramento), after he received reports from Kathy Carroll, a former commission attorney, who described the agency as a "private bureaucratic empire using public funds." Carroll was fired during the audit process.

Howle expressed grave concerns about the commission's practices in processing reports of misconduct. The Division of Professional Practices investigates allegations of misconduct or unprofessional conduct. During the summer of 2009, the division had approximately 12,600 unprocessed reports of arrest and prosecution. This backlog represented three times the number of reports that the agency processed in a year, and resulted from "an insufficient number of trained staff, ineffective and inefficient processes, and a lack of an automated system for tracking the division's workload," according to the report. In 11 of 29 cases randomly selected for review, the auditor found that the division took more than 80 days to open a case after receiving a report of misconduct, with one taking nearly two years, and another nearly three. The audit also revealed that the division did not adequately track the status of criminal cases where, if the credential holder were to be convicted, revocation of his or her credential would be mandatory. In 6 of 23 such cases randomly selected during the audit, there was no record of current activities on the case.

These lapses "potentially allowed educators of questionable character to retain a credential," Howle reported. In one of the most egregious cases, it took two years to revoke the credential of a teacher who had pleaded guilty to charges of prostitution. In another, the commission did not request documents from police until 17 months after it learned that an educator had been charged with exposing middle school students to pornography. The audit also cited a matter involving a substitute teacher who urinated in a classroom while students were present. Although he was banned by a judge from teaching for one year or being in the presence of children without adult supervision, the commission did not revoke his credential until six months after the end of the court case.

In addition, the audit found the division relied on the prosecution of criminal charges rather than conducting its own investigation, which jeopardized its ability to investigate misconduct where the prosecution does not result in conviction. Other findings were that the division does not always effectively process RAP sheets, has not developed comprehensive written procedures for reviewing reported misconduct, and uses a database that does not always contain complete and accurate information.

The audit also discovered that, in order to streamline the workload, the division will close or not open cases which it believes the Committee of Credentials would not recommend disciplinary action. The auditor questioned the division's legal authority to take such actions.

The commission does not have a complete set of approved hiring procedures, and its managers and staff do not consistently document their steps in the hiring process or the reasons for their hiring decisions, the auditor concluded. Forty percent of commission employees who responded to the auditor's survey indicated that familial relationships or employee favoritism affected the commission's hiring and promotion practices. Forty-three percent said they fear retaliation if they were to file a grievance or formal complaint. "[T]he commission is vulnerable to allegations that its hiring decisions are unfair and that employment opportunities are not afforded equally to all candidates," Howle reported.

Dale Janssen, the commission executive director at the time the audit was released, claimed that the backlog had come to his attention in July 2009, and was eliminated as of June 2010. He blamed some delays on lengthy police or court processes or failure of school districts to notify the commission in a timely manner. He also pointed to the recent institution of an electronic case-tracking system.

The commission submitted a formal response to the recommendations contained in the audit. It claimed that it has already introduced a procedure to reduce the number of unnecessary RAP sheets and has requested an opinion from the attorney general to determine whether the commission may delegate to the division the authority to close investigations. It has prepared comprehensive written procedures "to ensure consistency and conformity by staff in processing and analyzing reported misconduct," and developed an automated workload report to monitor the progress of all cases. Further, it is planning to draft a comprehensive hiring manual with the State Personnel Board, and has circulated a revised equal opportunity policy. It has also developed a plan for improving its discipline function.

Legislators reacted to the audit with outrage. Steinberg called the findings "more than troubling" in his remarks at the May 10 Joint Legislative Assembly Committee hearing on the audit. "Lives of school children are literally put in danger by an agency that seems to show no sense of urgency in protecting our kids." See his full remarks at <http://www.youtube.com/watch?v=01340zeczyA0>. Assembly Member Ricardo Lara (D-Bell Gardens), chair of the Joint Legislative Audit Committee, called for the dismissal of Janssen and General Counsel Mary Armstrong. Both submitted their resignations earlier this month. Lara also called for the ouster of Commission Chair Ting Sun. Sun, whose term expires in November, said she does not plan to resign from the board.

But the fallout may not stop there. The *Sacramento Bee*, in a recent editorial, called on Governor Brown to eliminate the agency altogether. "[T]he commission has lost its way," it said. While the duties performed by the commission are important, the 19-member board "is too large and unwieldy." Further, it continued, it is "dominated by teachers, which creates an inherent conflict of interest." "California could save money, reduce conflicts of interest and improve the credentialing and disciplining of teachers by eliminating the commission and shifting its duties to

the Department of Education,” it concluded. “With top leaders leaving the agency, now is the perfect time.”

The audit report can be found at <http://www.ctc.ca.gov/audit/2010-119-BSA-report.pdf>. The commission’s response is at <http://www.ctc.ca.gov/commission/agendas/2011-06-2H.pdf>.

Defendant Has Burden to Prove Failure to Mitigate Under Education Code

In *Candari v. Los Angeles Unified School Dist.*, the Second District Court of Appeal ruled that neither Education Code Sec. 45307 nor the Los Angeles Unified School District Personnel Commission rule 904(P) alter well-established law requiring an employer to affirmatively prove failure to mitigate damages as an affirmative defense. The court held that defendants failed to meet their burden and back pay was properly awarded to the plaintiff.

Steven Candari was terminated from his position as a tenured “permanent” carpenter for LAUSD for insubordination, violation of employee ethical rules, and appearing for work under the influence of alcohol. Candari appealed to the LAUSD Personnel Commission, and an evidentiary hearing was held before a hearing officer. The hearing officer found insufficient evidence supporting a majority of the charges and recommended rescission of the dismissal, a 45-day suspension, and reinstatement. Although originally he recommended that Candari be awarded back pay, he later reversed, finding that Candari had failed to mitigate damages by looking for work after he was terminated. The commission adopted the hearing officer’s recommendations, and Candari filed a writ of mandate in superior court. The court ruled the denial of back pay was not supported by the weight of the evidence and contrary to the general rule imposing the burden of proof regarding mitigation on the employer. It remanded the case to the commission to determine the amount of back pay owed.

On appeal, the district claimed that language in Sec. 45307 and rule 904(P) providing that an award of back pay “may” be made, gave the commission substantial discretion in determining whether to award back pay and that the trial court had no grounds to disturb its determination. While the Second District recognized that the word “may” in both the statute and the rule denotes discretion, it instructed that “the discretionary authority enjoyed by the Commission is not absolute.” “The exercise of discretion by an administrative agency or board must be impartial and ‘guided and controlled...by fixed legal principles,’” it continued, quoting *Harris v. Alcoholic Bev. Etc. Appeals Bd.* (1965) 62 Cal. 2d 589, 1965 Cal. LEXIS 278. “The Commission was required to act in accordance with the legal principles applicable to the relevant facts in deciding the issue before it.”

While the court agreed with the district “that both public and private employees faced with a wrongful discharge have a legal duty to mitigate damages while pursuing remedies against their former employer,” it found that nothing in the wording of either the statute or the rule changed the “well-established law” that the burden of proving failure to mitigate rests with the employer, citing the Supreme Court’s decision in *Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 1970 Cal. LEXIS 199.

The district argued that the court should not rely on *Parker* because that case involved a private employment contract, not the discharge of a public school employee where Sec. 45307 applied. It urged the court to look instead to *Davis v. Los Angeles Unified School Dist. Personnel Com.* (2007) 152 Cal.App.4th 1122, 2007 Cal.App.LEXIS 1096, 185 CPER 76, where a discharged LAUSD employee was denied back pay by the commission. The court refused, finding that the

Davis court never even mentioned Sec. 45307. Further, *Davis* could not work because of a disability that pre-dated the wrongful termination, meaning that the employer could not be liable for back pay because *Davis* would not have been able to work in any event.

The court also was not persuaded by the district's reliance on *Martin v. Santa Clara Unified School Dist.* (2002) 102 Cal.App.4th 241, 2002 Cal.App. LEXIS 4665, 156 CPER 37, in which a teacher's award of back pay upon reinstatement was reduced for failure to mitigate. In *Martin*, noted the court, the Sixth District found that the defendant had introduced sufficient evidence in support of its failure to mitigate defense, including the availability of comparable teaching jobs. By contrast, in this case, the district did not introduce sufficient evidence to meet its burden.

"The controlling law is clear," said the court. "The employer must demonstrate the availability of comparable or substantially similar positions *before* projected earnings of alternative employment opportunities *not sought* by the discharged employee are properly considered." It was not enough for the district to merely show that Candari had not sought other carpentry positions. It would also have had to show that there were comparable carpentry jobs available to meet its burden. Nor was it enough to rely on Candari's admission that he did not seek other employment. The court found that the only relevant evidence in the record was that Candari was working at a part-time dockworker position, from which one could reasonably infer that Candari was willing and able to work.

The court upheld the judgment of the trial court holding that the district had failed to meet its burden of proof on the mitigation defense and that Candari was entitled to back pay. (*Candari v. Los Angeles Unified School Dist.* [2011] 193 Cal.App.4th 402, 2011 Cal.App. LEXIS 262.)

Temporary Reassignment to an Equivalent Position Not a Demotion

Two executive assistants to the superintendent/president of a community college district were not demoted to inferior positions within the meaning of Education Code Sec. 88001(d) when they were temporarily reassigned to be assistants to vice presidents, according to the Sixth District Court of Appeal in *Lawrence v. Hartnell Community College Dist.* Nor were their due process rights violated when they were reassigned without notice or hearings.

Gail Lawrence and Sharon Culver were non-union permanent classified employees of the Hartnell Community College District. They were assistants to superintendent/president Dr. Edward Valeau until he resigned. At the time Dr. Phoebe Helm took his place on an interim basis, the college was in imminent danger of losing its accreditation. In order to make the required corrections in a short amount of time, Helm made a number of personnel changes, including reassigning Lawrence and Culver to positions assisting the vice presidents of academic affairs and student services. The employees previously in those positions were moved to the office of the superintendent/president. The reassignments did not affect any of the employees' job classifications, titles, wages, or benefits. The moves were temporary and not performance-based.

Lawrence and Culver never reported to their new assignments. They each submitted doctors' notes stating, without more, that they were unable to return to work. Both, however, informed the district that at all times they were able to return to their prior positions in the superintendent/president's office.

The district held their new positions open for more than five months. At that point, it notified Lawrence and Culver that their entitlement to paid leave was exhausted. If they did not obtain written releases from their doctors permitting them to return to work, they would be separated from employment and put on the 39-month reemployment list. They never submitted the medical releases and were terminated.

Lawrence and Culver filed a petition for a writ of administrative mandamus to compel the district to reinstate them to their former positions or, alternatively, to conduct hearings on the propriety of their "demotions, involuntary transfers, and terminations." The trial court denied the writ, finding that the reassignments were not demotions within the meaning of Sec. 88001(d). Nor were they disciplinary actions within the meaning of Sec. 88001(e) and, therefore, Lawrence and Culver were not entitled to the notice and hearing rights provided by Sec. 88001(c).

Section 88001 Claims

On appeal, Lawrence and Culver claimed that the trial court had read Sec. 88001(d) too narrowly. The section reads, "'Demotion' means assignment to an inferior position or status without the employee's voluntary written consent." The appellate court, applying the general rules of statutory construction, concluded that a position with a lower classification is an 'inferior position'" within the meaning of the section. "But," it reasoned, "'assignment to an inferior

position' must connote more than a reduction in classification; otherwise, the Legislature would have used the word 'classification' instead of 'position.'"

The appellants contended that an inferior position is one that has "a less distinguished title" or involves "significantly diminished material responsibilities." The court rejected that interpretation. Instead, relying on *Reed v. City Council of City of Roseville* (1943) 60 Cal.App.2d 628, 1943 Cal.App. LEXIS 565, it outlined a test for determining if a reassignment to a position with the same classification, title, salary, and benefits is a demotion within the meaning of the section. If, "after a comparison of the qualifications and/or duties of the two positions (A and B), it 'instantly appears' that a person qualified to perform the duties of position A would not be qualified to perform the duties of position B, then position A is, in our view, the inferior one."

While the appellants claimed that the former positions had been filled by considerably younger and less qualified employees, they failed to introduce any evidence showing that those employees had difficulties performing the duties of those positions, which suggested to the court that the positions were similar. Nor could they identify specific, concrete differences between the two assignments. To the contrary, the testimony of Dr. Helm that the appellants would have done "very much the same kind of work" in their new positions and the job descriptions of both positions supported the trial court's conclusion that appellants had not been reassigned to "inferior positions."

Turning to the meaning of the word "status" within the context of Sec. 88001(d), the appellants equated it with prestige, whereas the district maintained that it refers to designations, such as full- or part-time, permanent, or at-will.

The court found no definition of the term in the Education Code or in case law. Since the common usage of the word was susceptible to both interpretations, the court looked to the context in which the word appears. It noted that Sec. 88001(c) defines "regular," as in "regular classified employee," as referring to a classified employee who has "probationary or permanent status." Other provisions of the code refer to "paid status," "permanent status," "involuntary leave status," and "regular status in a full-time position." The court found that these usages supported the district's definition.

Finding no clues in the legislative history as to how the legislature intended to use "status," the court turned to a consideration of the public policy underlying the statute, pursuant to the rules of statutory construction set out in case law. It concluded that both public policy and practical considerations made it highly unlikely that the legislature intended to give the term the appellants' subjective interpretation. "As becomes immediately apparent, such a nebulous standard is no standard at all." If the appellants' standard were adopted, said the court, any classified employee would have the right to notice and a hearing upon being transferred to a position he or she considered less prestigious. Further, such an interpretation would deprive school management flexibility to address staffing issues and replace it with "distracting and costly administrative procedures and litigation." And, the court cautioned, the effects would be widespread, impacting the entire classified service of both K through 12 schools and community colleges.

“These considerations lead us to conclude that the Legislature intended ‘status’ to refer to objectively ascertainable indicators that establish an employee’s standing relative to that of other employees,” the court held. It gave the examples of full-time versus part-time and confidential versus non-confidential to “illustrate the stark difference between objectively ascertainable indicators of ‘status’ and the highly subjective indicators that appellants urge us to adopt.”

The court found the cases relied on by the appellants did not support their interpretation. It agreed with the trial court’s conclusion that the appellants’ reassignments were not demotions or disciplinary actions triggering notice and hearing rights.

Due Process Claims

The court also determined that the appellants had not been deprived of due process when they were not given pre-reassignment notice and hearings. While they had a property right in continued employment under Education Code Secs. 88121 and 88001 (d), (e), and (h), they were not demoted and so suffered no loss of property rights. Further, an employee has no fundamental or vested right to continuation in a particular job assignment, said the court, citing *Dobbins v. San Diego County Civil Service Com.* (1999) 75 Cal.App.4th 125, 1999 Cal.App. LEXIS 867.

In an unpublished section of the opinion, the court found that the appellants also were not terminated in violation of their due process rights. It agreed with the district that they were not terminated for cause, but that they were separated from employment and placed on the 39-month reemployment list after all of the leaves of absence to which they were entitled were exhausted, pursuant to Sec. 88195.

Underlying their position that they had been terminated for cause, rather than separated, was the appellants’ claim that the district had miscalculated their leave time. It was undisputed that the way in which the district calculated leave time for its employees was incorrect, according to *California State Employees Assn. v. Colton Joint Unified School Dist.* (2009) 170 Cal.App.4th 857, 170 Cal.App. LEXIS 86, an unrelated case published a year after the appellants were notified that their leave time had been exhausted. Had their leave time been calculated according to *Colton*, they would have received more time off and more money.

The board resolution listed two reasons for their separation; “exhaustion of entitlement to all paid leave” and “abandonment and/or refusal to resume the duties” of their positions. The court found substantial evidence to support the trial court’s findings that the terminations were not disciplinary and that they were released from employment because they had run out of leave. Further, “although the District certainly could have terminated appellants for having abandoned their positions,” the court found no evidence that it did so.

The court also gave short shrift to the appellants’ contention that because they were released from employment before their available leave expired, the trial court should have ordered

reinstatement. It was the appellants' burden to prove that their separations were premature, and the evidence did not conclusively establish that their available leave extended beyond the dates specified in their doctors' notes, said the court. The court held that, since the appellants failed to prove that they were terminated for cause or before their leave ran out, the trial court was correct in concluding that they were not entitled to pre-separation notice and hearings or to reinstatement and that, therefore, there was no due process violation. (*Lawrence v. Hartnell Community College Dist.* (2011) 194 Cal.App.4th 687, 2011 Cal.App. LEXIS 462.)

Los Angeles Teachers Accept Salary Cut To Save Jobs, But Block New Evaluation Program

United Teachers Los Angeles and the Los Angeles Unified School District have reached an agreement anticipated to save an initial 3,400 jobs and another 1,700 for the 2011-12 school year. Under the one-year contract, employees will take up to four furlough days in 2011-12, three instructional and one pupil-free. The district's initial proposal was for 12 furlough days. The number of days may be reduced if the district receives additional state revenues, but may be increased if revenues are cut in the state budget.

The furlough days will reduce annual salary, but will not affect the current regular salary schedules or step/column advancement. The daily rates and hourly rates will not be lowered. However, the annual salaries will be reduced to reflect the furlough days for purposes of calculating State Teachers Retirement System credit.

Of a total of 24,556 ballots cast by UTLA members, 83.2 percent voted in favor of the agreement. The board approved the pact earlier this month. It is estimated to save the district approximately \$42 million.

Approximately 7,300 pink slips were sent out in March to teachers, counselors, nurses, and librarians, igniting protests and demonstrations. The agreement specifies that the district must restore for 2011-12 all position reductions of school-based UTLA-represented employees paid from the general fund or adult education fund contained in the board action of February 15, 2011. The number of positions affected is listed in the agreement as 3,402. The district sent out 3,433 RIF rescission notices on June 16.

On its website, the union posted a notice to its members that explained, while there may be more rescissions, depending on new budget information coming from the schools, "not all jobs will be able to be saved because more than 700 jobs were lost through declining enrollment, the loss of federal stimulus funding, and the District's giveaways of schools through Public School Choice."

On the other hand, there is no sign on the horizon of any agreement regarding a revamped teacher evaluation system that the district and UTLA have been discussing for several years. The board had voted to reopen contract negotiations regarding evaluations and to use student test scores as part of the evaluation process. It proposed a program called Academic Growth Over Time. The union was not in accord, and negotiations came to a standstill.

Then, last April, the new superintendent, John Deasy, sent a letter to school employees listing incentives for volunteers to participate in the program, including a stipend, paid training days, and the option to bypass the standard evaluation for one year. Participants would not face adverse consequences to their employment status.

UTLA filed an unfair practice charge with the Public Employment Relations Board, claiming that this offer was an attempt to unilaterally impose the district's evaluation process by making deals with individual employees. On May 26, PERB issued a refusal to bargain complaint against

LAUSD, asserting that preliminary evidence suggests the district did not bargain in good faith. The board, however, denied the union's request for an injunction.

LAUSD told CPER that it is moving forward with the "Initial Implementation Phase" of the program. As of press time, there are approximately 750 teachers, 140 school leaders, and 104 schools who have volunteered to participate.

Dismissal of Teacher for Posting Pornographic Ad on Craigslist Upheld

The Fourth District Court of Appeal, in *San Diego Unified School Dist. v. Commission on Professional Competence* found that the Commission on Professional Competence erred when it reinstated a teacher who had been dismissed by the district for posting an ad on Craigslist that contained graphic photos and obscene text soliciting sex.

Frank Lampedusa was a tenured teacher and dean of students at Farb Middle School. He was dismissed after the district received an anonymous call from a parent of one of the students at Farb, reporting that a friend of his had found an ad posted by Lampedusa on the Craigslist “men seeking men” web page. It was titled, “Horned up all weekend and need release,” and contained graphic text describing the kind of sex he was seeking. The ad also contained pictures of his face, torso, abdomen, anus, and genitalia.

Upon being contacted by the district, Lampedusa immediately took down the ad. He continued to work at Farb for several weeks before being put on administrative leave. He was served with a notice of suspension, intention to dismiss, and dismissal charges alleging evident unfitness for service under Education Code Sec. 44932(a)(5), immoral conduct under Sec. 44932(a)(1), and persistent refusal to follow board guidelines or the law under Sec. 44932(a)(7).

At the hearing before the commission, Lampedusa testified that he did not intend for any student to view the ad, which he thought would be adult and private. He also said that he thought it was the responsibility of parents and students not to access his ad. He testified that he had previously posted ads soliciting sex and would continue to do so in the future, although he would be censoring them more. The school principal testified that, upon seeing the ad, she had lost confidence in Lampedusa and questioned his ability to serve as a role model.

In its decision, the commission stated that, while it found that Lampedusa’s conduct in placing the ad was “vulgar and inappropriate and demonstrated a serious lapse in good judgment,” the district “failed to prove any nexus whatsoever to respondent’s employment....” It determined that the evidence did not establish Lampedusa was unfit to teach by reason of a temperamental defect or that he engaged in immoral conduct such that he was unfit to teach. It noted that, had the ad come to the attention of any student, teacher, or parent, it “surely” would have impacted his professional life and his ability to serve as a role model. “However, that simply never happened,” it said. It also concluded that there was little likelihood that his conduct impacted the students because none of them learned of the incident. There was no evidence of aggravating circumstances, and Lampedusa’s actions in taking down the ad immediately upon being contacted by the district was evidence of mitigation. It also concluded that there was little likelihood of recurrence since Lampedusa “understands he made a mistake and has learned from it.”

The district filed a petition for writ of mandate. The trial court found that the weight of the evidence supported the commission’s findings. “Lampedusa’s conduct did not affect students or other teachers, and by all accounts he was a competent teacher and Dean of Students,” it said.

The Court of Appeal disagreed, finding that there was *no* substantial evidence to support the commission's determination that Lampedusa was fit to teach. Rather, "the evidence showed an evident unfitness to serve as a teacher, which constituted adequate grounds for termination," according to Sec. 44932(a)(5).

In arriving at this conclusion, the court relied on *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 1969 Cal. LEXIS 204. To establish a teacher's unfitness to teach, "*Morrison* requires a nexus between government employment and alleged employee misconduct stemming from the principle that 'no person can be denied government employment because of factors unconnected with the responsibilities of that employment,'" said the Court of Appeal.

In *Morrison*, the Supreme Court set out a number of factors relevant to a teacher's unfitness to teach, which the Court of Appeal considered in this case.

Regarding the "likelihood that the conduct may have adversely affected students or fellow teachers and the degree of such adversity anticipated," the Court of Appeal noted that, contrary to the commission's findings, "a parent and an educator *did* see the ad." Further, the principal testified that Lampedusa's conduct had caused her to lose confidence in his ability to serve as a role model. There was "substantial evidence that his relationship with her had been sufficiently impaired to render him unfit for service as a teacher or administrator," said the court.

As to the "proximity or remoteness in time of the conduct," the court rejected the commission's finding that it was remote because the conduct had occurred nearly one year before the hearing. Lampedusa placed the ad in late June and was served with dismissal charges on November 10. "Dismissal charges cannot be served on a teacher between May 15 and September 15," instructed the court. Therefore, the service was prompt.

Considering "the type of the teaching certificate held by the party involved," the court recognized that Lampedusa held a secondary school credential and an administrative services credential. It found his public posting of a pornographic ad "inconsistent with teaching middle school students and serving as an administrator."

The Court of Appeal held that the commission erred when it found no evidence of aggravating circumstances surrounding Lampedusa's conduct. Evidence of aggravating circumstances included the fact that Lampedusa posted pornographic material on a public website, admitted that he had posted similar ads in the past, and said he did not believe he had done anything immoral, it found. Further, instead of taking full responsibility for his actions, he testified that parents and students should not have accessed his site. And, while Lampedusa did take down the site, that was not evidence of mitigation, in the court's view, because he did so only after a parent complained.

Regarding the factor of whether the conduct was "praiseworthy or blameworthy," the court found that while seeking a date may not have been blameworthy, "it was extremely blameworthy in the pornographic, obscene manner that he did so."

The court also found there was a “likelihood of recurrence of the conduct.” Lampedusa had posted such ads before and indicated he would do so again. He believed that he did nothing immoral and did not take full responsibility for his actions.

While the commission concluded that there was no evidence to indicate “the extent to which disciplinary action may inflict an adverse or chilling effect upon the constitutional rights of the teacher involved or other teachers,” the court disagreed, citing *City of San Diego v. Roe* (2004) 543 U.S. 77, 2004 U.S. LEXIS 8165, 170 CPER 48. In that case, the city terminated a police officer for selling explicit videos of himself on eBay even though neither the officer nor his employer were identified. The high court found that his free speech rights were not violated. “Thus,” said the Court of Appeal, “it is established that disciplining Lampedusa for publicly posting his ad does not infringe on his constitutional rights or the rights of other teachers.”

In sum, the court found a nexus between Lampedusa’s conduct and his fitness to teach. “Most noteworthy is the fact that he testified that he did not think it would have any impact on his ability to teach his students if any of them had viewed the ad and that he did not view the ad as immoral,” it said.

The court also found that Lampedusa’s immoral and unprofessional conduct justified his dismissal under Sec. 44932(a)(1). “The public posting on a Web site of pornographic photos and obscene text constitute immoral conduct in that it evidences ‘indecent’ and ‘moral indifference,’” it declared, citing *Board of Education v. Weiland* (1960) 179 Cal.App.2d 808, 1960 Cal.App. LEXIS 2299.

The court reversed the judgment and directed the trial court to issue a writ of mandate instructing the commission to set aside its decision and render a ruling consistent with its opinion, “finding Lampedusa’s conduct constituted grounds for dismissal based upon his evident unfitness to teach and his immoral conduct.” (*San Diego Unified School Dist. v. Commission on Professional Competence* (2011) 194 Cal.App.4th 1454, 2011 Cal.App. LEXIS 524.)

U.C. Regents Immune From Liability for Plaintiff's Attorney's Fees

In a case of first impression, the Fourth District Court of Appeal held that the board of Regents of the University of California is immune under the California Constitution from Labor Code Sec. 218.5, which mandates that the prevailing party in an action brought for non-payment of wages, fringe benefits, or pension fund contributions be awarded attorney's fees and costs. In *Goldbaum v. Regents of the University of California*, the court reasoned that, in cases where the subject matter involves internal affairs of the university that do not come within any exceptions to constitutional immunity, payment of an opposing party's fees and costs is also within the regents' constitutional authority to manage its own affairs.

Michael Goldbaum, a professor at the University of California, San Diego, filed a petition for writ of mandate and complaint against the regents. He claimed that UCSD had failed to report his employment for the years from 1977 to 1992 to the University of California Retirement Plan and requested pension benefits for those years. The parties settled the case. As part of the settlement, the regents agreed that Goldbaum would be considered an eligible employee during the disputed period for purposes of calculating his service credit.

Goldbaum then brought a motion requesting an award of attorney's fees and costs under Sec. 218.5. The regents opposed the motion on the grounds that it is constitutionally immune, that Goldbaum's writ was not an "action" within the meaning of the code section, and that Goldbaum was not the prevailing party. The trial court found the regents immune and denied the motion. Goldbaum appealed.

There are three exceptions to the regents' general immunity from legislative regulation, instructed the appellate court. First, the legislature is vested with the power of appropriation. Second, general police power regulations governing private persons and corporations may be applied to the university. Third, the university is subject to legislation regulating matters of statewide concern not involving internal university matters. *San Francisco Labor Council v. Regents of University of California* (1980) 26 Cal.3d 785, 1980 Cal. LEXIS 157, 45 CPER 57. Goldbaum argued that Sec. 218.5 is a general police power regulation governing private persons and corporations and thus applicable to the regents.

The court began its analysis by reviewing a line of opinions that has held that "matters pertaining to wages and benefits are internal university affairs not subject to any of the exceptions to the Regents' constitutional immunity from state regulation." It noted that the court in *San Francisco Labor Council* held unconstitutional an Education Code section enacted to apply solely to the regents, requiring it to fix wages for certain employees at or above the prevailing wage; the court found it could not be construed as a general police power regulation or a matter of statewide concern. In *Regents of University of California v. Aubry* (1996) 42 Cal.App.4th 579, 1996 Cal.App. LEXIS 105, the court

held the regents were not required to pay contractors the prevailing wage for the construction of student and staff housing required by Labor Code Secs. 1770 et seq., which apply to public works, since the projects were not matters of statewide concern but rather “involve internal UC affairs vital to its core educational function.” The regents were found to be constitutionally immune from liability for payment of overtime wages under Sec. 1194 in *Kim v. Regents of University of California* (2000) 80 Cal.App.4th 160, 2000 Cal.App. LEXIS 321, 142 CPER 34. And, in *In re Work Uniform Cases* (2005) 133 Cal.App.4th 328, 2005 Cal.App. LEXIS 1588, the court held the regents are constitutionally immune from Sec. 2802, requiring an employer to pay for work uniforms and their maintenance.

The board of regents claimed it should be found constitutionally immune under these cases, because Goldbaum’s action involved the UCRP, which was determined to be a matter of the university’s internal regulation in *Bunnett v. Regents of University of California* (1995) 35 Cal.App.4th 843, 1995 Cal.App. LEXIS 520, 113 CPER 72. The court did not find these cases controlling however, because unlike the statutes at issue in those opinions, “section 218.5 does not purport to regulate employee pay or benefits.”

The court, however, was also not persuaded by Goldbaum’s argument that Sec. 218.5 is applicable to the regents because the regulation of attorney’s fees has been called an exercise of police power, in reliance on *Roa v. Lodi Medical Group* (1985) 37 Cal.3d 920, 1985 Cal. LEXIS 243. The court distinguished *Roa* and *Calhoun v. Massie* (1920) 253 U.S. 170, 1920 Cal. LEXIS 1458, the case on which the *Roa* court relied, from the matter before it on the grounds that both concerned the government’s power to cap contingency fees, “while section 218.5 does not concern the amount of fees an attorney may charge in wage and benefit litigation.”

The statute is silent as to the regents and is not uniformly applied, observed the court, noting that Sec. 220(b) specifically exempts cities, counties, and other local agencies from Sec. 218.5. “To any extent the statute is arguably an exercise of police power as applied to private persons or corporations, its application to the regents is unjustified as the sweeping exemption of public employers shows the statute may be effectuated without applying it to the Regents,” it reasoned.

The court also considered the particular capacity in which the regents were acting in this case. In *Regents v. Superior Court* (1976) 17 Cal.3d 533, 1976 Cal. LEXIS 303, the court held the board of regents was not exempt from state usury law because it was acting in a capacity no different from a private university, corporation, or individual by extending loans to private borrowers. Here, however, the action was brought against the regents for a determination for eligibility under the UCRP and so “arises out of its status as a *public employer*, and the *subject matter*...pertains to the Regents’ internal affairs not subject to state regulation,” said the court. It also determined that it would be “incongruous” to require the regents to pay attorney’s fees in a case involving wages and benefits where it was constitutionally immune from liability on the underlying action and would be unwarranted under the state’s police power.

The court concluded that “because an underlying action giving rise to attorney’s fees under section 218.5 pertains to wages and benefits, matters of the university’s internal affairs arising from the employer-employee relationship, the determination of whether to pay an opposing party’s fees in such an action is also within the Regents’s broad constitutional grant of authority to manage its own internal affairs.” It affirmed the trial court’s judgment and ordered Goldbaum to pay the regents’ costs on appeal. (*Goldbaum v. Regents of the University of California* [2011] 194 Cal.App.4th 703, 2011 Cal.App. LEXIS 8.)

CFA Suit Claims CSU Changed Presidents' Salary Range Without Public Notice

The California Faculty Association has claimed in a lawsuit that the Board of Trustees of the California State University increased the salary range of its 23 college presidents without proper public notice in January. The university insists that it provided full notice of the change.

At the January meeting of the board, the Committee on University and Faculty Personnel approved the \$350,000 salary of Jeffrey Armstrong, the new president of California Polytechnic State University in San Luis Obispo. The committee is responsible for personnel policies and procedures, and for executive compensation, according to the Rules Governing the Board of Trustees of the California State University.

The problem, according to CFA, is that the published maximum salary for CSU presidents was \$27,351 a month, or \$328,212 annually. CFA was not happy that the salary range for presidents is increasing when the university has announced plans to reduce enrollment, and faculty and staff have suffered financially. The university has trimmed staff by 8.8 percent since 2008, and placed nearly everyone on furlough in 2009-10.

CFA was especially upset that the presidents' pay range was raised without any notice to the public. Neither the agenda item that proposed Armstrong's salary nor the resulting resolution mentioned that the trustees would be raising the top of the salary range. Nevertheless, a week later, the systemwide human resources department issued a pay letter that stated, "Pursuant to the Board of Trustees Resolution..., the salary range maximum for the President classification...was modified in the CSU pay scales effective February 1, 2011." The new salary schedule now lists the higher salary range of \$223,584 to \$350,000.

CSU was "surprised at the lawsuit because the university followed the same procedures for establishing a president's salary as it has been using," CSU spokesperson Mike Uhlenkamp told *CPER*. Uhlenkamp explained that "setting the salary sets the range." CFA points out that the last time the presidents' salary range was raised, in 2007, the proposal to increase the range maximum was publicly announced.

Currently, Armstrong is the only president earning the top salary. Three other presidents earn over \$300,000. Presidents also receive benefits, car and housing allowances, dependent tuition subsidies, and other perquisites. In addition to receiving relocation expenses this year, Armstrong's salary will be supplemented by \$30,000 from the Cal Poly Foundation.

After the range increase, the university learned from Mercer Consulting that the salary and benefits of CSU executives are 26 percent lower than the market rate among executives at 20 comparable universities. The comparison did not take into account perks other than health and welfare and retirement benefits. Mercer also reported that faculty salary and benefits lag the market by only 1 percent.

CNA Gains Raises and Stronger Meal and Rest Break Language

The University of California reached agreement with the California Nurses Association, National Nurse Organizing Committee, on a new 26-month contract in late May. While the contract applies to registered nurses in both student health centers and the five U.C. medical centers, nurses in the medical centers will benefit more from the economic provisions of the pact.

Negotiations between U.C. and the union have been tumultuous over the past decade. Twice, the nurses have notified the university of a strike, and then been blocked by a court order. (See story in *CPER* No. 200, pp. 56-58.) Last year, the university imposed its last, best, and final offer in 2009-10 reopener negotiations.

Negotiations for a full contract began in August 2010. Major sticking points between the parties included meal and rest breaks, staffing during breaks, and patient safety advocacy, in addition to wages and benefits. The university has been pushing for years to restart the employees' contributions to pensions, after both U.C. and its employees took a 20-year break from making any contributions to the fund.

Breaks and Staffing

In a 2009 settlement, the union fought for and won language that required the university to consider the need for coverage for meal and rest breaks when making staffing decisions. The nurses contended that U.C. staffed too thinly to meet state nurse-patient ratios if nurses took breaks to which they were entitled. As a result, CNA charged, nurses often skipped their breaks to ensure sufficient patient care. The union believed the language was too weak and vowed to push for dedicated relief nurses in the next round of bargaining.

The union did not reach its goal in the recent negotiations, but did gain language that requires each unit to "have a mechanism for meal and break relief on each shift which shall be implemented consistent with professional nursing judgment and patient care needs, in order to ensure that required staffing is maintained during meal and rest periods." In addition, the university agreed to language requiring it to "make every effort to ensure that the nurse has an opportunity to take a meal break."

Wages

Nurses at the medical centers will enjoy raises of 3 percent this year and 4 percent each of the next two years, in addition to step increases dependent on years of service. In addition, some new longevity steps were added at several of the medical centers for nurses with lengthy U.C. careers. Nurses at the student health centers unconnected with medical centers, whose compensation is paid from state funds, will receive raises of only 1 to 2 percent over the next 26 months, in addition to step increases.

These salary increases are slightly more than those won by other bargaining units. Patient care technical workers are receiving only 3 percent raises in 2011 and 2012. Health care professionals represented by University Technical and Professional Employees have received 3 percent increases staggered over the last six months, in addition to steps, but have no provisions for increases in 2012.

Benefits

U.C. and its unions have had a history of coordinated consultation over health benefits. Generally, the unions waived the right to bargain as long as every unit got the same deal. In recent years that tradition has begun to unravel, as U.C. began to require employee premium contributions and to push for increases every year.

The new agreement illustrates the tension between the consultation process and the union's concern over escalating employee contributions. The agreement allows the university to increase premium contributions up to 10 percent without bargaining. U.C. is still paying at least 85 percent of nurses' health insurance premiums. It pays more for employees in lower salary ranges.

The union agreed that nurses will begin contributing 3.5 percent of their pay toward pension benefits, beginning July 1. The contribution will rise to 5 percent of pay on July 1, 2012. U.C.'s payment toward pensions will increase to 7 percent of payroll on July 1, 2011, and 10 percent on July 1, 2012. These rates are in effect for most university employees, except for those whose unions have refused to agree, such as the Coalition of University Employees, Teamsters Local 2010. U.C. points out that, until the combined contributions reach 17 percent of pay, the retirement fund's unfunded liability will continue to grow.

Finance Department Has No Duty to Propose Funding for DPA's Recommended 'Like Pay for Like Work' Salary Adjustments

While Government Code Section 19826 may require the Department of Personnel Administration to consider the principle of "like pay for like work" when setting supervisors' salaries, it does not require that the appropriate salaries actually be paid in the absence of sufficient legislative appropriations. In *California Association of Professional Scientists v. Department of Finance*, the Court of Appeal held that the finance department has no duty to seek appropriations to fund salary increases that DPA finds are necessary to comply with Sec. 19826.

Inequitable Salaries

CAPS represents supervisory employees in scientific classifications. Many of those classifications have duties and responsibilities similar to those in higher-paid engineering positions. CAPS challenged the pay rates in those classifications based on Government Code Sec. 19826(a), which requires that DPA set salary ranges "based on the principle that like salaries shall be paid for comparable duties and responsibilities."

In response to CAPS' challenge to the salary ranges of 14 supervisory classifications, DPA found that the duties and responsibilities of the classifications were similar, although not identical, to those of 14 supervisory engineering classifications. It recommended that adjustments be made to the pay ranges of the scientist classifications.

DPA informed CAPS that it would forward its recommendations to the Department of Finance for a determination of whether there were existing salary appropriations available to pay the higher salaries. Section 19826 bars DPA from making salary adjustments that would require "expenditures in excess of existing appropriations."

The finance department responded that the legislature had not appropriated funds for the recommended salary increases. After being informed that the recommended adjustments would not be implemented, CAPS took its claims to court. It asked the court for a declaration that its unit members were entitled to the recommended salary adjustments for the three previous years, and for a writ compelling DPA and the finance department to include funds for the increased salaries in the proposed state budget for the coming fiscal year.

The trial court ruled that DPA was barred from implementing the salary increases because the pay would have exceeded existing appropriations. However, it concluded that DPA and the finance department had statutory obligations under Secs. 19826 and 18500 to try to obtain funding for the increased salaries from the legislature. It ordered DPA to provide the finance department information about the amount of funding needed to pay the recommended salaries. It ordered the finance department to present DPA's information to the legislature for its consideration in setting salary appropriations and to continue to present the information, as long as the increased salaries were justified, until funded.

No Mandate to Seek Funding

Only the finance department appealed. The department contended that the trial court did not have jurisdiction to order it to provide the legislature with information about the recommended salary increases because Secs. 19826 and 18500 impose no ministerial duty on the department to seek sufficient appropriations to fund DPA's recommendations. The appellate court agreed. A court only has power to order a public officer to do an act which he is required by law to do regardless of his own judgment or opinion, it instructed.

Section 19826 imposes duties only on DPA, not the finance department, the court said. The appellate court agreed. It rejected the trial court's reasoning that an interpretation of the statute which did not require the finance department to seek appropriations would undermine the "like pay for like work" principle. The lower court ignored the language conditioning the payment of adjusted salaries on sufficient appropriations, and the governor's and legislature's discretion to decide what funding is appropriate, the appellate court pointed out. In addition, the court found that a different section of the Government Code already requires the finance department to submit to legislative committees the materials it receives from state agencies. Therefore, the trial court's order expanding the reach of Sec. 19826 was improper.

The finance department also persuaded the appellate court that Sec. 18500 imposed no duty to seek funds for DPA's recommended salary adjustments. The statute expresses the legislature's reasons for adopting a civil service system, including the objective of compensating jobs with comparable duties and responsibilities similarly. The statute describes only an objective, the court noted, not a mandatory duty. In addition, the court pointed out, the statute recognizes that employees' rights and interests are subject to the legislature's discretion to determine "the best interests of the state."

CAPS argued that the finance department's ministerial duty was based on two other statutes, Secs. 13322 and 13337. Section 13322 gives the finance department the authority to alter the proposed budget any time before the legislature enacts a budget if the changes are "required in the interests of the State." The court found that this section defeated CAPS' claim because it allows the finance department to change DPA's proposal and does not impose a duty to seek funding for DPA's proposed budget.

Section 13337(a) requires the governor's proposed budget to include "all proposed expenditures of the state provided by existing law or recommended by him or her." The court rejected the contention that the salary adjustments are "provided by existing law" because they are required by Sec. 19826. "This argument ignores how section 19826 operates," said the court. "Section 19826 expressly prohibits DPA from adjusting salaries where no appropriation to fund the adjustment exists. Thus, the new salaries cannot be seen as 'provided by existing law' because existing law prevented their adoption by DPA."

CAPS relied on *State Trial Attorneys Assn. v. State of California* (1976) 63 Cal.App.3d 298, 1976 Cal. App. LEXIS 2014, where DPA's precursor, the State Personnel Board, was ordered to set the salaries of high-level attorneys in the Department of Transportation at a similar level as pay for upper-level attorneys in the Attorney General's office. The court found the case

inapplicable. First, the order in *State Trial Attorneys* was conditioned on whether compliance could be achieved without violating the restriction against exceeding existing appropriations. Second, the court observed, the case did not mention any obligation of the finance department to seek appropriations for DPA's recommended salary adjustments. While the case did theorize that the salaries could be adjusted in anticipation of adequate appropriations, that was superfluous wording, and this court found that any expectation of increased appropriations in the current fiscal climate would not be reasonable.

The court found that the writ requiring the finance department to propose budget increases for DPA's recommended salaries was issued in error. It reversed the trial court's judgment.

(*California Assn. of Professional Scientists v. Department of Finance* (2011) 195 Cal.App.4th 1228, 2011 Cal. App. LEXIS 646.)

Special Fund Employees Not Protected From Furloughs

Taking its cue from the Supreme Court, the First District Court of Appeal upheld furloughs for state employees paid from special funds or federal funding in *Union of American Physicians and Dentists v. Brown*. This is the first of three special fund furlough cases to be decided by the First District. While some of the union's contentions in this case were different from the issues the Supreme Court decided in *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989, 2010 Cal. LEXIS 9757, 201 CPER 47, the appellate court reached the same result.

No General Funds Saved

In November 2008, the state Department of Finance predicted a revenue shortfall of \$11.2 billion for the 2008-09 fiscal year. It warned that the state would run out of cash by February if no preventative action was taken.

In addition to other measures, Governor Schwarzenegger decreed employee furloughs by executive order. Citing the fiscal crisis, he directed the Department of Personnel Administration to "implement a furlough of represented employees and supervisors for two days a month, regardless of funding source," beginning on February 1, 2009. In July, in the face of a worsening economic crisis, he ordered a third furlough day each month for represented employees, "regardless of funding source." The furloughs were to continue through June 30, 2010. The three days of furlough every month produced salary cost savings equivalent to a 15 percent pay cut for employees.

UAPD represents non-management physicians and dentists employed by the state. It sued the governor, the controller, and the directors of DPA and six departments employing its members. The union argued that it was irrational and illegal to furlough unit members who were paid by sources other than the general fund because no general funds would be saved by the furlough program. For example, the federal government funds salaries of state employees who perform Social Security disability determinations, and there are employees paid with special funds that are dedicated to specific purposes.

The trial court found that the furloughs of employees not paid with general funds violated Government Code Secs. 19851 and 16310. The court ordered the governor to cease furloughing employees of federally funded and special fund agencies. The governor appealed.

Before the appellate court issued a decision, the Supreme Court issued *Professional Engineers*, ruling the governor lacked the power to order furloughs of state employees, but that the legislature had ratified the order when it passed the revised Budget Act of 2008 in February 2009. The parties submitted additional briefs in light of *Professional Engineers*. The federal government added its voice in a friend-of-the-court brief.

No Statutory Protection from Furloughs

The trial court had relied on Sec. 19851 to invalidate the furloughs, reasoning that the governor abused his discretion when he changed the normal 40-hour workweek established by the statute. Because the Supreme Court in *Professional Engineers* held that Sec. 19851 relates to overtime compensation and is irrelevant to the validity of furloughs, the appellate court found the trial court's reliance on Sec. 19851 was erroneous.

At the trial court level, the governor had argued that it was rational to furlough special fund employees because special fund moneys can be borrowed under Sec. 16310. But the court had sided with the union, finding that the transfer of money out of the special funds would violate a provision of Sec. 16310 that states, "This section does not authorize any transfer that will interfere with the object for which a special fund was created." There was evidence that agencies such as the Department of Social Services, which is responsible for making Social Security disability determinations, had been operating "less efficiently" after the furloughs were implemented.

The appellate court ruled that the trial court had erred because the statute only prohibits transfers of funds, not other acts that interfere with meeting the objectives of a specially funded agency. In this case, there was no evidence that any funds actually had been transferred from a special fund to the general fund. The mere furlough of employees did not prove a transfer of funds had been made. The closure of agencies three days a month due to furloughs was not evidence of interference caused by any transfer of funds.

The union contended that this conclusion was "elevation of form over substance" because the point of furloughing special fund employees was to create borrowable funds. The court rejected this assertion, saying it was only applying the plain language of the statute.

Professional Engineers Followed

The court gave short shrift to UAPD's argument that the legislature could not have intended to furlough federally funded employees since the furlough program actually causes the state to lose money. It ruled that the finding in *Professional Engineers* that the legislature had ratified the furlough program dispensed with the issue.

In *Professional Engineers*, the Supreme Court observed that the 2009 budget revision reduced funds for compensation by the same amount as would be saved with the furlough program. It focused on the language of the revised 2009 Budget Act that 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 reduction 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....

The Supreme Court concluded that the term “existing administration authority” was most reasonably understood “as embodying a legislative decision to permit the mandated reductions in employee compensation to be achieved through the then existing furlough plan.” It reached this conclusion for three reasons.

First, the budget bill’s legislative history explained that the bill “reflects reductions across all budget areas to reduce employee compensation costs related to furloughs....” In addition, the Supreme Court did not think it was reasonable that the legislature intended the governor to use his only other power to reduce employee compensation — layoffs — if it failed to reach collective bargaining agreements with the unions, especially since the legislative history did not mention layoffs. Third, the court reasoned that the legislature must have recognized that the exigent circumstances made it necessary to implement the furlough program if no agreements were reached with the unions, and that it intended to permit that means of salary savings regardless of whether the governor’s order was valid. The Supreme Court concluded the legislature exercised its own prerogative and authorized the accomplishment of compensation savings using the already existing furlough program that applied “regardless of funding source.”

July Increase in Furlough Days

UAPD challenged the validity of the third monthly furlough day added by executive order in July 2009, an issue not decided in *Professional Engineers*. The union argued that differences in legislative history demonstrated the legislature did not intend to approve the third furlough day.

The court, however, was not persuaded by UAPD’s contentions, since the legislature used the same language in reducing employee compensation appropriations in July as it had used in February. The union did not dispute that the compensation reductions in the 2009 Budget Act were the same as would be saved from the third monthly furlough day. But, UAPD emphasized, the Assembly’s analysis of the budget bill stated, “Rejects the Governor’s proposal to reduce salaries by five percent — thereby maintaining a two-day furlough for all employees.” This language did not sway the court. While the difference in legislative history made the first basis for the Supreme Court’s interpretation of the budget language in *Professional Engineers* inapplicable, the *UAPD* court relied on the two remaining reasons for that interpretation and found that the July expansion of the furlough program to three days was valid.

First Furlough Day

Since it was decided in *Professional Engineers* that the governor’s order exceeded his authority, and the legislature did not act to ratify the order until February 19, UAPD argued that the first furlough day on February 6 was not authorized. It lost the argument.

The court relied on the language in *Professional Engineers* that the legislature ratified the “then existing furlough program.” “[T]he ‘then existing furlough program’ was the program that had been implemented by the Governor on December 19, 2008, and that called for a mandatory furlough of represented state employees from February 1, 2009, through June 30, 2010,” noted the court. “It is not our role to disagree with our Supreme Court’s rulings on this point.”

The court did not agree with UAPD that the statute could operate only prospectively. Legislation is retroactive if it changes the legal consequences of past conduct, the court noted, but the 2009 budget act revision did not change the legal consequences of the furlough program or impose new or different liabilities, according to the court. It merely validated the program and made it legal. Since legislation may be enforced retroactively if it clearly appears the legislature intended retroactive application, the court could see no retroactivity problem here because the Supreme Court found that the legislature intended that the salary savings could be achieved by the furlough plan that was then in place. That plan included the February 6 furlough day, explained the court.

The court rejected UAPD's argument that retroactive validation of the February 6 furlough day would be unconstitutional. The New York case UAPD relied on involved the retroactive removal of a vested right. The court distinguished the case, saying, "Here, the Legislature did not change the rules and violate vested rights when it enacted the 2009 revisions to the 2008 Budget Act. Rather it maintained the status quo by ratifying and giving legal force to a furlough program that was already in place."

The court reversed the judgment invalidating the furlough programs. (*Union of American Physicians and Dentists v. Brown* [2011] 195 Cal.App.4th 691, 2011 Cal.App. LEXIS 587.)

After Reconsideration, Court Reaffirms Prior Ruling That SCIF Furloughs Were Illegal

In December 2008, the governor issued an executive order directing the Department of Personnel Administration to adopt a plan to implement furloughs of most state employees for two days a month, “regardless of funding source.” The California Attorneys, Administrative Law Judges and Hearing Officers in State Employment successfully petitioned a San Francisco court for an order forbidding furloughs for State Compensation Insurance Fund attorneys on the ground that the Insurance Code prohibits the governor from imposing staff cutbacks at the agency. The Court of Appeal affirmed the trial court’s judgment, but the governor petitioned the Supreme Court for review.

The landscape suddenly changed for dozens of furlough lawsuits when the Supreme Court issued its decision in *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989, 2010 Cal. LEXIS 9757, 201 CPER 47. The Supreme Court had granted review in several lawsuits, but transferred them back to the Court of Appeal after issuing *Professional Engineers*.

In CASE’s lawsuit, the Brown administration agreed with the union to dismiss the appeal, but the court declined to dismiss the case because the governor’s authority to order furloughs of SCIF employees is an issue of continuing public interest. After reviewing the case in light of the Supreme Court’s pronouncements, the Court of Appeal stood by its prior ruling that the governor’s furlough order violated Insurance Code Sec. 11873(c). (See story on prior ruling in CPER No. 199, pp. 54-55.)

Reviewing the trial court’s decision for a second time after additional briefing, the appellate court found that nothing in *Professional Engineers* required a change in its prior conclusions. SCIF is a “self-operating” agency of the state, and its moneys are not state funds. Funding for SCIF comes from contributing policyholders, not from the annual budget act. Therefore, when the legislature ratified the furlough order by passing the Budget Act of 2009, it did not make the furloughs applicable to SCIF employees.

Section 11873 provides that SCIF generally is not subject to laws that govern other agencies unless a statute states it applies to the fund. While SCIF is subject to the Dills Act and other Government Code provisions relating to employment, the court found that the specific exemption of fund employees in Sec. 11873(c) from “any hiring freezes and staff cutbacks otherwise required by law” trumped more general laws that conflict.

The court rejected the governor’s argument that the Insurance Code only prohibits the governor from laying off employees, not reducing their hours. The court criticized the governor’s contention as “not sensible.” “Staff is ‘cut back’ whether hours are reduced or employees are terminated,” the court pointed out. And, an exemption from executive branch staff cutbacks is consistent with the statutory scheme and the legislative history, the court reasoned. “[A]s a ‘quasi-governmental entity’ mandated to be self-sufficient,” SCIF, not the governor, has the authority to determine staffing needs, said the court. The enrolled bill report for the statute that

enacted Section 11873(c) explained the purpose of the exemption was “to allow SCIF’s executive leadership to exercise its best business judgment on SCIF’s staffing needs” so that it could control insurance policy costs and provide better service to policyholders. In addition, the court pointed out that furloughing SCIF employees could not meet the objective of the governor’s order — to improve the ability of the state’s general fund to meet its financial obligations. Any cost savings would only benefit the fund maintained exclusively for SCIF.

The court affirmed the trial court’s judgment. (*California Attorneys, Administrative Law Judges and Hearing Officers in State Employment v. Brown* [2011] 195 Cal.App.4th 119, 2011 Cal.App. LEXIS 538.)

Brown Proposes Merger of DPA and SPB

The governor has proposed consolidating the State Personnel Board and the Department of Personnel Administration into a new agency, the California Department of Human Resources. He charges that bifurcation of personnel services between DPA and the SPB “makes it difficult to recruit, hire, promote, classify, discipline, train, and reward...employees.” Since 1995, the Little Hoover Commission, the Legislative Analyst’s Office, and other entities have recommended the merger.

The SPB is a constitutional agency with the responsibility to administer the merit system. DPA, which Brown created 30 years ago, oversees training, benefits, administration of the classification plan established by the SPB, collective bargaining, and other conditions of employment. Brown’s plan provides an example of the difficulty departments have dealing with two agencies. If a unit wants to make an internal reorganization, it must consult with both agencies on classification and layoff issues; with DPA on pay and labor relations questions; and with the SPB on selection, promotions, and transfers.

The SPB would retain its role as an independent board of five members in charge of the merit system. But other than staff who hear discipline, whistleblower retaliation, and personal services contract cases, or who advise the board on policy and audit compliance with the merit system, the SPB’s workforce would be transferred to the new Department of Human Resources. The two departments would be located at the same worksite. The governor hopes to save \$5.8 million annually from personnel reductions once duplicative functions are eliminated.

The Little Hoover Commission approved the plan in late June. Unless the legislature passes a resolution against it, it will go into effect on July 1, 2012. The plan may be found on the Internet at http://www.lhc.ca.gov/reorg/reorg/SBP_DPA/CalHRPlan%20-%20May2011.pdf.

State Wraps Up Contracts

In a few short months, the Brown administration concluded negotiations with the last six unions representing state employees. Some of the unions, like the California Attorneys, Administrative Law Judges and Hearing Officers in State Employment and the California Correctional Peace Officers Association, had been without a contract for four or five years. The memoranda of understanding will expire on July 1, 2013, and feature many of the same terms as collective bargaining agreements reached with several state unions last year. (See stories in *CPER* No. 201, pp. 50-52.; No. 200, pp. 40-43.) Pensions for new hires were no longer on the table, as the Government Code was amended last fall to roll back pension formulas to pre-1999 levels.

Pension Contributions and Pay

Each of the contracts requires employees to make higher pension contributions. In most units, employees will pay an additional 3 percent of their salaries. But, the rate for peace officers represented by the California State Law Enforcement Association will rise only 2 percent of pay. Stationary engineers represented by the International Union of Operating Engineers will hand over another 5 percent of salaries to the retirement fund. All state employees now contribute 8 to 11 percent of their wages to CalPERS.

There are no across-the-board salary increases in any of the contracts. However, in July 2013, the maximum of each pay range will be boosted. In general, the raise will be the same percentage as the unit has agreed to increase pension contributions. Those employees at the top step who are contributing 3 percent more of pay will receive a 3 percent raise.

One exception is CASE members, who will see a 4 percent hike in the top step salary, while paying only 3 percent more toward their pensions. CASE members already had been contributing an extra 1 percent of pay before the current contract. Another exception is correctional officers, who will receive a 4 percent boost to the maximum, but will lose the state's contribution of 2 percent of pay to a defined contribution plan.

Personal Leave Program

Three-day-a-month furloughs ended on April 1, but a new personal leave program began. Employees will be credited with one leave day a month and take a 4.62 percent reduction in pre-furlough pay. Unlike the agreements reached in 2010, the contracts with CCPOA, CSLEA, the California Association of Professional Scientists, and the Professional Engineers in California Government have no expiration date for the personal leave days. CASE members will have to use their days before July 2016, and stationary engineers' days will expire in July 2014. There will be no furloughs during the 12-month duration of the leave program.

Health Benefits

Most employees will receive relief from increased employer contributions to health plan premiums. Generally, the state will pay 80 percent of the premium of the employee and dependents. PECG maintained language that requires a contribution of 85 percent of the

employee's cost. CCPOA unit members will receive smaller contributions this year, but will gain the 80 percent amounts next year.

Time Off

All of the unions agreed to eliminate Columbus Day and Lincoln's birthday holidays, but each employee in the six units received two floating days off. Employees who work on six specified holidays will receive time-and-a-half pay, except for CCPOA unit members who will be paid double.

One controversial item in the CCPOA pact is the elimination of the vacation cap for correctional officers. While most employees can accrue only 640 hours, officers now can accrue unlimited vacation. The elimination of the cap reflects the reality that on average, officers have accumulated 19 weeks of leave, largely because they accrued furlough days that could not be scheduled in their 24 hour-a-day facilities without raising overtime costs.

The governor agreed with each of the unions to ask the legislature for continuous appropriations for the duration of the contracts. The legislature complied, ending the threat of minimum wage payments for represented state employees if it cannot pass a budget by July 1. The MOU bill, which saves about \$110 million in compensation costs in 2011-12, was signed by the governor in May.

Court Must Meet and Confer Before Changing Bumping Rights in Agreement With Another Union

In a complex situation arising from the Trial Court Employment Protection and Governance Act, previously existing demotion and bumping rights of represented management employees were affected by the provisions of a collective bargaining agreement with a union that did not represent management employees. The Court of Appeal held that the court employer should have met and conferred with the Alameda County Management Employees Association before deciding on a course of action. As a result of the decision, if rights of one union's members are affected by proposed provisions in a second union's contract, the court employer must meet and confer with the first union before making a decision to agree with the second union.

The appellate court also held that individual employees who had been laid off or demoted were not entitled to pre-layoff or pre-demotion hearings even though they claimed the actions taken against them were disciplinary.

Layoffs

The Alameda County Superior Court promulgated personnel rules that governed layoff and bumping, among other matters. It also had a layoff policy that provided, "In the event of a layoff, an employee in a classification affected by a reduction in force shall have the following options: Elect to demote to a lower paying class, if the employee previously held tenure in the lower paying class...." This language was similar to the personnel policy.

In January 2009, the court employer reached an agreement with SEIU Local 1021 that newly defined seniority. It included a provision that seniority would be terminated if an employee left the bargaining unit and failed to return to a bargaining unit position within six months.

In 2009-10, the employer experienced a significant reduction in its budget. It laid off 72 employees. Twenty-eight were in the unit represented by the Alameda County Management Employees Association. Others were in the unit represented by SEIU Local 1021.

The parties stipulated that, but for the effect of the SEIU MOU, nine members of ACMEA would have been entitled to transfers or demotions to classifications in the SEIU bargaining unit that they had previously occupied, to the extent they were more senior than the incumbents. When they requested the demotions or transfers, the employer refused on the grounds that they had been out of the SEIU bargaining unit for more than six months. Two others who received layoff notices were able to demote into lower-level classifications.

Several employees requested due process hearings. They claimed their impending layoff or demotion was actually disciplinary, but did not present any supporting facts in their hearing requests. The employer contended the actions were necessary for budgetary reasons and denied they were disciplinary.

ACMEA and 13 employees in the ACMEA unit filed a petition in court charging that the court employer had violated its own personnel policies and the trial court act when it denied the requests for demotion and when it refused to provide due process hearings to the employees. The trial judge, an appellate judge from another district, sided with the employer on all the claims except those of one employee. The judge concluded the personnel policies did not change, only the SEIU contract, although he recognized that the ACMEA members' bumping rights had been lost. He ruled that the employer was bound to follow the SEIU contract because the employer's personnel policies provide that an MOU governs "as to employees occupying positions in classifications covered by the MOU" if the MOU conflicts with the personnel provisions.

ACMEA and 12 employees appealed. ACMEA contended the trial judge misconstrued the trial court act when he found the employer did not unilaterally change its personnel policies by applying the definition of seniority in the SEIU MOU to ACMEA members, and that the judge erred when he found the employer did not violate its own policies by refusing to allow demotions of the individual employees. The union also argued the judge improperly rejected the employees' due process claims.

Meeting and Confering Required

The trial court act requires court employers to meet and confer in good faith with the representatives of a recognized employee organization on matters within the scope of representation. The employer must "consider fully the presentations as are made by the recognized employee organization on behalf of its members prior to arriving at a determination of policy or course of action." If the employer and a union reach agreement, a written memorandum of understanding must be presented to the court employer for adoption. If adopted, the MOU is binding upon the parties.

The parties agreed that the only reason the nine employees were not permitted to demote was because of the SEIU MOU's six-month provision, although they disputed the effect of that contract. The trial judge specifically found that the SEIU definition of seniority had deprived the nine petitioning employees of their seniority rights. The appellate court concluded that the definition of seniority in the SEIU agreement had been applied to ACMEA members.

Since the parties stipulated that the personnel policies on seniority and bumping were matters within the scope of representation under the act, the appellate court found that the employer was required to meet and confer in good faith with ACMEA and consider ACMEA's presentations before changing the seniority and bumping rights of ACMEA unit members.

The appellate court criticized the trial judge's reasoning that seniority is a creature of contract that unions are free to renegotiate. While generally true, the appellate court said, the seniority rights of the ACMEA members arose from personnel policies. Besides, renegotiation by ACMEA of its members' seniority rights was not the issue. Here, the appellate court emphasized, another union renegotiated ACMEA's members' rights.

The Court of Appeal faulted the judge for misreading the personnel policy to require the employer to follow the SEIU MOU in decisions involving ACMEA members, when the policy

provides only that the MOU provisions will govern “as to employees occupying positions in classifications covered by the MOU.” Since the ACMEA members were not in classifications represented by SEIU, the personnel policies did not compel the employer to apply the seniority provisions to ACMEA employees, the appellate court explained.

The employer argued that that it could not honor the protections of the SEIU MOU unless the seniority provisions were applied to prevent ACMEA members from bumping SEIU members from their positions. In addition, it contended, it could only bargain SEIU seniority provisions with SEIU. The appellate court was not persuaded, as it would mean disregarding the personnel policy and imposing provisions of the SEIU MOU on non-SEIU members. It concluded that the employer violated its own personnel policy when it denied bumping rights to the nine employees.

Even if the trial judge were correct, the act prevails over the personnel policies, the appellate court ruled. Applying SEIU MOU provisions to ACMEA unit members would violate the ACMEA members’ statutory rights to choose their own representative and ACMEA’s right to represent its members on matters within the scope of representation. It would also make the SEIU MOU binding on employees and unions who were not party to the MOU. The act makes MOUs binding only “upon the parties,” the court pointed out.

Due Process Not Required

ACMEA challenged the trial judge’s ruling that the employees received sufficient due process prior to their demotions or layoffs. The appellate court agreed with the employer that no due process was required because the layoffs were implemented for budgetary reasons. It relied on *Duncan v. Department of Personnel Administration* (2000) 77 Cal.App.4th 1166, 2000 Cal. App. LEXIS 60, 141 CPER 51. In *Duncan*, the employee was demoted in lieu of layoff during the course of a reduction in force due to budgetary reasons. It was held that he had no right to a pre-layoff hearing because the state’s significant interest in taking quick steps to reduce expenses was stronger than Duncan’s interest in his employment in a higher classification, and the objective criteria used in the reduction in force minimized the risk of an erroneous decision.

The *Duncan* court did recognize that a hearing might be required when a layoff is pretextual. Here, however, ACMEA acknowledged that the layoffs were due to a budget reduction. The parties stipulated that the individuals who were laid off had the least seniority among employees in the classifications selected for layoff, and that their selection for layoff complied with the personnel policies. Since so many employees were laid off, this reduction in force was unlike cases in which only one or two employees are laid off and there are reasons to suggest the layoff was pretextual, the court explained.

The court remanded the case to the trial judge to design an appropriate remedy for the court employer’s failure to meet and confer with ACMEA in good faith. It affirmed the portion of the judgment that held the employer did not violate the due process rights of the employees. (*Alameda County Management Employees Assn. v. Superior Court of Alameda County* [2011] 195 Cal.App.4th 325, 2011 Cal.App. LEXIS 563.)

No Disability Discrimination Where Bipolar Employee Terminated for Threatening Conduct

Misconduct that includes threats or violence against coworkers can be a legitimate, non-discriminatory basis for termination even where the conduct is caused by the employee's disability, according to the Fourth District Court of Appeal. In *Wills v. Superior Court of Orange County*, the court concluded that, in such a situation, "an employer may reasonably distinguish between disability caused misconduct and the disability itself"

Linda Wills, a court clerk, suffered from bipolar disorder. California's Fair Employment and Housing Act prohibits discrimination in employment on the grounds of a mental disability, specifically including bipolar disorder. During a manic episode, Wills threatened to put coworkers on her "Kill Bill" list, scared another coworker with a threatening ringtone, and sent numerous emails to coworkers that some felt to be violent and alarming. Upon returning to work from medical leave, the Orange County court placed Wills on administrative leave to conduct an investigation of coworkers' complaints. At the conclusion of the investigation, the O.C. court terminated Wills, explaining that her conduct violated its employee handbook which prohibited verbal threats, threatening behavior, and violence. Wills wrote a letter responding to the notice of termination in which she claimed that the O.C. court unlawfully discriminated against her because of her mental disability, that she had been harassed by coworkers, and that she was fired in retaliation for complaining about the harassment. The O.C. court suspended her termination and hired an independent investigator to look into her claims. After the investigation was completed, she was terminated.

Wills filed a discrimination complaint with the Department of Fair Employment and Housing. In the complaint, she checked the box for discrimination based on "denial of family/medical leave" only. There was no mention of disability discrimination, retaliation, harassment, or failure to accommodate a disability. The O.C. court wrote a letter to the DFEH in which it refuted Wills' claim that it had denied her family or medical leave. It also explained in detail its reasons for terminating her and its contention that her termination did not constitute disability discrimination.

Wills filed suit alleging six causes of action based on disability discrimination, retaliation, harassment, and failure to accommodate. The trial court dismissed Wills' complaint on the grounds that she had failed to exhaust her administrative remedies as required by the FEHA because her "claim to DFEH made no mention of disability discrimination or hostile work environment but limited itself to denial of leave" under the Family and Medical Leave Act.

On appeal, Wills argued that the O.C. court's letter to the DFEH, by including information about disability discrimination, expanded the permissible scope of the civil action beyond the allegations contained in her claim. She pointed to *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 2009 Cal. App. LEXIS 1659, in which the court determined that the permissible scope of a civil action brought under the FEHA was not limited to the words contained in the administrative complaint but rather to the information discovered or which could reasonably have been discovered during the DFEH's investigation of the complaint. In

Nazir, the plaintiff submitted two questionnaires and a letter to the DFEH describing workplace harassment, which had not been mentioned in the administrative complaint. The court held that this was sufficient to allow the plaintiff to include allegations of harassment in his complaint.

Wills maintained that the O.C. court's letter to the DFEH in which disability discrimination was discussed was analogous to *Nazir's* letter. She contended that the letter brought discrimination on that basis within the permissible scope of her civil action. The Fourth District, while recognizing some merit to the argument, opined that "a rule permitting an employee to satisfy the exhaustion requirement based on information the employer voluntarily provided...may discourage employers from providing a comprehensive response to DFEH's investigation, thereby undermining DFEH's ability to investigate unlawful employment practices."

The court, however, declined to rule on the issue, preferring to assume that Wills had exhausted her administrative remedies on her claim of disability discrimination, since it found that the claim lacked merit in any event. Because the O.C. letter to the DFEH did not mention harassment, retaliation, or any of the issues underlying Wills' other causes of action, the court determined that there was no question but that she had failed to exhaust her administrative remedies as to those claims and that the trial court had properly dismissed them. Her assertion that she had orally told the DFEH interviewer about her disability discrimination claim made no difference to the court.

In support of her claim of disability discrimination, Wills argued that all conduct resulting from a disability is considered part of the disability and not a separate basis for termination. She contended that she established a prima facie case by showing her bipolar disorder caused the behavior for which she was terminated and that the O.C. court knew of her disorder before it terminated her. The O.C. court responded that it did not violate the FEHA because it is entitled to discharge an employee who violates its policy against workplace threats and violence, even if the conduct was caused by a disability.

Because no reported decisions under the FEHA have addressed the issue, both parties relied on federal cases decided under the Americans with Disabilities Act. The court was not persuaded by the Ninth Circuit decisions cited by Wills, finding that they provided no analysis of the relation between disability-caused misconduct and the disability itself, and were poorly reasoned. It also declared that "none considered how to address disability-caused misconduct involving threats or violence against coworkers." It found that *Gambini v. Total Renal Care, Inc.* (9th Cir. 2007) 486 F.3d 1087, 2007 U.S. App. LEXIS 9298, was not on point. In that case, the Ninth Circuit held in favor of a plaintiff who suffered from bipolar disorder and was terminated because she threw papers and swore, at her supervisor, kicked and threw various items, warned her supervisors they would regret their actions, and stormed out of the office after being presented with an improvement plan. The court in this case determined that *Gambini* involved "behavior that frightened coworkers" as distinguished from Wills' conduct of "threats or violence against coworkers."

The court did approve of cases from other circuits, relied on by the O.C. court, which "conclude the ADA does not require an employer to retain an employee who threatens or commits acts of violence against coworkers, even if the employee's disability caused that misconduct." It found

them to be “consistent with the “EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities,” which states that an employer may terminate a disabled employee for violating a workplace conduct standard where the misconduct arose from the disability if the standard is job-related and consistent with business necessity. “For example,” it reads, “nothing in the ADA prevents an employer from maintaining a workplace free of violence or threats of violence....”

“Accordingly,” it concluded, “consistent with the federal courts’ interpretation of the ADA, we interpret FEHA as authorizing an employer to distinguish between disability-caused misconduct and the disability itself in the narrow context of threats or violence against coworkers.” “If employers are not permitted to make this distinction, they are caught on the horns of a dilemma,” it continued. “They may not discriminate against an employee based on a disability but, at the same time, must provide all employees with a safe work environment free from threats and violence.”

The court next took up the issue of the way this case should be analyzed applying the burden-shifting framework of *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 1973 U.S. LEXIS 154. The O.C. court argued that Wills’ misconduct prevented her from meeting her initial burden of proving that she was qualified for the job. The court rejected this argument and concluded that, in a case involving disability-caused threats against coworkers, the misconduct should not be considered as part of the plaintiff’s prima facie case, but rather as part of the second stage where the employer attempts to rebut the plaintiff’s claim of discrimination by showing a legitimate, non-discriminatory reason for its adverse action. This preserves the plaintiff’s right to present evidence showing the employer did not discipline other employees who engaged in the same conduct and that the employer’s stated reason was mere pretext for terminating the employee on a protected ground, reasoned the court.

Applying that analysis to the facts of the case, the court determined that Wills established a prima facie case of discrimination, and that the O.C. court met its burden by showing that it terminated Wills for violating its policy against verbal threats and threatening conduct, a legitimate, nondiscriminatory reason. The court rejected Wills’ contention that the “Kill Bill” and ringtone incidents were intended as jokes. It found no evidence to show that the O.C. court did not honestly believe that she had violated its policy. Wills also failed to provide sufficient evidence to show that her employer had treated any other similarly situated employee more favorably. The court therefore upheld the trial court’s dismissal of Wills’ complaint. (*Wills v. Superior Court of Orange County* [2011] 195 Cal.App.4th 143, 2011 Cal.App. LEXIS 583.)

Employer Must Consider Employee's Ability to Perform Essential Functions of Permanent Light-Duty Position

An employer must comply with California's Fair Employment and Housing Act requirement that it consider reasonable accommodation for a disabled police officer even where the employee has been determined to be 100 percent disabled under the state's workers' compensation laws, according to the Second District Court of Appeal. In *Cuiellette v. City of Los Angeles*, the court also found that the city should have evaluated whether the employee was able to perform the essential duties of the light-duty position he held at the time he was terminated, not those of a police officer in general.

Rory Cuiellette, a Los Angeles police officer, was injured and placed on disability leave, where his workers' compensation claim was resolved with a finding of 100 percent disability. Upon receipt of a note from Cuiellette's treating physician authorizing him to perform "permanent light duty — administrative work only," the city allowed him to return to work in the fugitive warrants unit at a court desk position, a purely administrative assignment. But, upon the advice of a third-party workers' compensation claims administrator, Cuiellette was terminated five days later because he was 100 percent disabled for workers' compensation purposes.

Cuiellette filed suit alleging disability discrimination and failure to accommodate in violation of the FEHA. After he was awarded a \$1,571,500 jury verdict, the city appealed. The appellate court sent the case back to the lower court for retrial on the issue of liability. The trial court found in favor of Cuiellette, and the city appealed again.

The city argued that the trial court erred in finding liability because Cuiellette was unable to demonstrate that he could perform the essential duties of a police officer with or without reasonable accommodation, as required by the FEHA. Those duties include "working in the field making life or death decisions; working any patrol or field assignment; making a forcible arrest; driving a city vehicle under emergency situations; and participating in training exercises simulating an arrest or emergency situation," none of which he could perform.

Under the FEHA, Gov. Code Sec. 12940(m), an employer is required to reasonably accommodate an employee's disabilities. If the employee cannot be accommodated in his or her existing position, and the employee requests reassignment to another position where he or she can perform the essential duties, the employer must make efforts to determine whether such a position is available. The employer is relieved of its duty to reassign a disabled employee only if reassignment would impose an undue hardship on its operations or if there is no vacant position for which the disabled employee is qualified. See, for example, *Spitzer v. The Good Guys, Inc.* (2000) 80 Cal.App. 4th 1376, 2000 Cal.App. LEXIS 421.

The city contended that the court desk position was staffed with sworn police officers who were required to be able to perform the essential duties of a police officer, not solely the essential duties of the court desk position. The appellate court noted, however, that the city had a longstanding policy and practice of maintaining a significant number of *permanent* light-duty positions that it staffed with police officers who could not perform all of the essential duties of a

police officer because of medical restrictions. Therefore, said the court, “the relevant inquiry is whether plaintiff was able to perform the essential duties of the light duty assignment he was given on his return to work and not whether he was able to perform all of the essential duties of a police officer in general.” The city did not challenge the trial court’s finding that Cuiellette was able to perform all of the essential duties of the court desk position, and it did not show or claim that assigning him to the position caused an undue or unreasonable hardship to the Los Angeles Police Department.

“Because plaintiff was qualified to perform the essential duties of the court desk position and was placed in that position pursuant to the LAPD’s accommodation policy then in effect, his removal from that position based on the 100 percent total permanent disability rating plaintiff received in the workers’ compensation proceeding violated the accommodation provisions of section 12940, subdivision (m),” concluded the court. (*Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 2011 Cal.App. LEXIS 477.)

Employer Liable Where Supervisors' Anti-Military Animus Is Proximate Cause of Termination

The United States Supreme Court, in *Staub v. Proctor Hospital*, held that an employer is liable under the Uniformed Services Employment and Reemployment Rights Act of 1994 “if a supervisor performs an act motivated by anti-military animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action.”

USERRA forbids an employer to deny “initial employment, reemployment, retention in employment, promotion, or any benefit of employment” based on a person’s membership in or “obligation to provide service in a uniformed service.” 38 USC Sec. 4311(a). Liability is established “if the person’s membership...is a motivating factor in the employer’s action.” Sec. 4311(c).

Vincent Staub, a member of the United States Army Reserve, worked as an angiography technician for Proctor Hospital. Staub was obligated by the Reserve to attend drill one weekend a month and to train full time for two to three weeks a year. Both Janice Mulally, Staub’s immediate supervisor, and Michael Korenchuk, Mulally’s supervisor, were hostile to Staub’s military service. Mulally scheduled Staub for additional shifts without notice so that he would “pay back the department” for everyone else having to cover for him when he was gone on Reserve time, and she asked a coworker to help her get rid of him. Korenchuk said that Staub’s military obligations were “a bunch of smoking and joking and a waste of taxpayers’ money.” He knew that Mulally was “out to get” Staub.

Mulally issued Staub a corrective action for violating a company rule requiring that he stay in his work area whenever he was not working with a patient. Sometime later, Korenchuk reported to Linda Buck, Proctor’s vice president of human resources, that Staub had left his desk without informing a supervisor in violation of the corrective action. Buck previously had received a complaint from one of Staub’s coworkers about his unavailability and abruptness. Buck relied on Korenchuk’s accusation and, after reviewing Staub’s file, fired him.

Staub contended that there was no company rule requiring him to stay in his work area whenever he was not working with a patient and that, even if there were one, he did not violate it. He challenged his termination through the company’s grievance process, claiming that Mulally had fabricated the reason for the original corrective action because of her hostility to his military service. Buck did not investigate Staub’s charge and refused to change her decision to fire him.

Staub sued the company, claiming that his termination violated USERRA because it was motivated by hostility to his Reserve service obligations. He did not claim that Buck was hostile, but rather that Mulally and Korenchuk were, and that their actions influenced Buck’s decision. At trial, the jury found that Staub’s military status was a “motivating factor” in the company’s decision to terminate him.

On appeal, the Seventh Circuit reversed, holding that Proctor was entitled to judgment as a matter of law. The appellate court found that, under Seventh Circuit precedent, an employer could not be held liable for the animus of a supervisor who was not charged with making the ultimate employment decision unless the non-decisionmaker exercised such "singular influence" over the decisionmaker that the termination decision was the product of "blind reliance." Here, it concluded, Buck's decision was not wholly reliant on the word of Mulally and Korenchuk, noting that she had also considered her conversation with the coworker and reviewed Staub's personnel file before terminating him.

The Supreme Court refused to adopt the Seventh Circuit's reasoning. In construing the phrase "motivating factor in the employer's action," the high court pointed to the similarity between the language of the act and that of Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of race, color, religion, sex, or national origin, and "states that such discrimination is established when one of those factors 'was a motivating factor for any employment practice, even though other factors also motivated the practice.'" It also turned to the background of general tort law for assistance, noting that intentional torts, such as the one alleged here, "generally require that the actor intend the *consequences* of an act, not simply the act itself," citing its decision in *Kawaauhau v. Geiger* (1998) 523 U.S. 57, 1998 U.S. LEXIS 1595.

The court rejected Proctor's argument that, under the act, an employer is not liable unless the technical decisionmaker, Buck in this case, is motivated by discriminatory animus. "Animus and responsibility for the adverse action can both be attributed to the earlier agent (here, Staub's supervisors) if the adverse action is the intended consequence of that agent's discriminatory conduct," it said. "So long as the agent intends, for discriminatory reasons, that the adverse action occur, he has the scienter required to be liable under USERRA." Under tort law, the court continued, the exercise of judgment by the decisionmaker does not preclude the earlier agent's action from being a proximate cause of the resulting termination. Proximate cause requires only some direct relation between the harm and the alleged injurious conduct, and excludes only those "links that are too remote, purely contingent, or indirect," it instructed. "The decision-maker's exercise of judgment is *also* a proximate cause of the employment decision, but it is common for injuries to have multiple proximate causes."

In addition, Proctor's position, if adopted, would mean that an employer could shield itself from liability by vesting employment decisions in an isolated personnel official who is asked to review the employee's personnel file, containing performance assessments that were motivated by discriminatory animus and "*designed and intended* to produce the adverse action," reasoned the court. Such an approach would give "unlikely meaning to a provision designed to prevent employer discrimination."

The court also rejected Proctor's argument that, where the decisionmaker conducted an independent investigation of the employee's allegations of discriminatory animus and rejected them, the prior discrimination is negated. "We are aware of no principle in tort or agency law under which an employer's mere conduct of an independent investigation has a claim-preclusive effect," said the court. The supervisor's biased report may remain a cause of the adverse action

if the investigation does not determine that the action was justified without the supervisor's recommendation.

Here, the court found evidence that Mulally's and Korenchuk's actions were motivated by hostility towards Staub's military obligations, that they had the specific intent to cause Staub to be terminated, and that their actions were causal factors underlying Buck's decision to fire him. Accordingly, it reversed the Seventh Circuit's decision, and sent the case back for further proceedings. (*Staub v. Proctor Hospital* [3-1-11] Supreme Ct. 09-400, ___ U.S. ___, 2011 DJDAR 3222, 2011 U.S. LEXIS 1900.)

PERB Clarifies *Novato, Carlsbad, and Campbell Standards*

In response to an order from the Alameda County Superior Court, the Public Employment Relations Board in *California Correctional Peace Officers Assn. v. State of California (Dept. of Personnel Administration)* reviewed the way it analyzes discrimination and interference claims under the labor relations acts it administers. PERB's decision lays out different standards for stating a prima facie case of discrimination or interference in three distinct scenarios.

Premiums Higher for Union Members

In September 2007, after impasse procedures broke down, the state implemented the terms of its last, best, and final offer to CCPOA, which represents correctional officers and parole agents in state employment. Under the prior agreement, dental benefits had been available to unit members through the CCPOA Benefit Trust Fund, and the state made contributions of \$44.33 monthly for each employee. The LBFO continued the provisions of the expired agreement that called for contributions for dental benefits.

In October 2007, the trust fund administrator sent a letter to the state controller's office requesting that it cease collecting and sending to the fund the dental benefit contributions from non-union member employees. The letter placed responsibility for providing the benefits on the Department of Personnel Administration, the state agency responsible for collective bargaining with state employee unions. DPA notified non-union fair share fee payers of the loss of trust fund benefits and invited them to enroll in a state-sponsored dental plan available to other state employees. The state contributed up to \$93.75 a month in the state-sponsored plan. As a result, CCPOA members with two dependents paid \$41.80 a month toward dental benefits, while non-union members with the same family size paid only \$30.94 monthly.

CCPOA filed an unfair practice charge alleging that the state violated the Dills Act by providing enhanced dental benefits at a reduced cost to non-union members. When a board agent dismissed the charge, CCPOA appealed to the board. PERB upheld the dismissal of the discrimination allegation, but found that the charge stated a prima facie case of interference. The case was remanded to the general counsel for issuance of a complaint on the interference allegation.

CCPOA then obtained an order from a superior court directing that PERB issue a complaint on the discrimination allegation as well. In compliance with the court's order, the board vacated its opinion in PERB Dec. No 2106-S; in No. 2106a-S, it clarified three standards for finding a violation of the statutory prohibitions that make it unlawful for an employer to "impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by" the statute.

In its new decision, the board reviewed the standards the National Labor Relations Board uses in discrimination and interference cases and how those standards have been applied by California courts in cases arising under the Meyers-Milias-Brown Act. It noted that the National Labor Relations Act has separate sections setting forth the prohibitions on discrimination against employees for exercise of their rights and interference with employee rights. The NLRB has

formulated different tests for determining whether an employer has committed unlawful discrimination or interference. Two of those tests are very similar, and have been used interchangeably in interference and in some discrimination cases.

Few cases in California discuss discrimination and interference under the MMBA. After examining those cases, PERB concluded that the California courts have applied the same standards as have been used in discrimination and interference cases under the NLRA.

PERB, however, has formulated its standards differently. In early decisions, it noticed that, unlike the NLRA, the statutes it administered prohibited discrimination and interference in the same section. In *Carlsbad Unified School Dist.* (1979) Dec. No. 89, 41 CPER 58, the board adopted a single standard for all discrimination and interference cases. It later carved out a different standard for reprisal cases — where an employer discriminates against an employee in retaliation for participating in protected activity — in *Novato Unified School Dist.* (1982) Dec. No. 210, 54 CPER 43. In reviewing its precedential decisions, PERB found that over the years, the standards have been confused. It expressly overruled its decision in *City of San Diego* (2005) Dec. No. 1738-M, 173 CPER 96, where two standards were conflated. The board proceeded to set out three standards and specify the circumstances under which they will be used.

The *Novato* discrimination standard applies in cases “where an employer is alleged to have taken an adverse action against an individual employee because of the employee’s participation in protected activity.” Once the charging party shows that the employer’s action was motivated at least in part by the employee’s protected activity, “the burden shifts to the employer to prove that it would have taken the action even if the employee had not engaged in protected activity.” PERB further clarified that an objective test is applied to judge whether an adverse action has been taken.

The *Carlsbad* interference standard will be used where an employer is alleged to have interfered with the rights of employees, or restrained or coerced employees in the exercise of their rights. “To establish a prima facie case,” the board instructed, “the charging party must demonstrate that the employer’s conduct harms or tends to result in harm to employee rights. Once the prima facie case is established, the burden shifts to the employer to justify its conduct.” Where the harm is slight, and the employer justifies its conduct based on operational necessity, the interests of the employer and the employees are balanced to determine if there has been an unfair practice. “If the harm is inherently destructive of employee rights, the employer’s conduct will be excused only on proof that it was occasioned by circumstances beyond the employer’s control and that no alternative course of action was available.”

In a third category of cases, the board will apply the standard established by the courts in *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416, 1982 Cal.App. LEXIS 1569, 53 CPER 2. This discrimination standard applies where an employer is alleged to have discriminated between two groups of employees because one of the groups participated in protected activity. “To establish a prima facie case, the charging party must show that the employer engaged in conduct that could have harmed employee rights to some extent,” PERB explained. Once this is established, the burden shifts to the employer. If there is little harm to employee rights, and the employer offers justification based on operational necessity, the

interests of the employer and the employees are balanced. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof it was due to circumstances beyond the employer's control and there was no alternative course of action.

The board observed that the *Carlsbad* and *Campbell* standards "are nearly identical and will in most cases lead to the same result." It explained that it was bound to follow the *Campbell* court in cases arising under the MMBA.

In assessing CCPOA's allegations, the board found that the *Novato* standard was inapplicable, since no charge of reprisal against an individual employee was made. It applied the *Carlsbad* and *Campbell* standards.

Using the *Carlsbad* standard for the charge of interference, the board found that providing benefits at a lower cost to non-union members while excluding union members from this option tends to result in at least slight harm to employees who choose to exercise their right to join a union. A reduced benefit cost available to non-union members may influence an employee's decision to join the union, it said. Accordingly, the board held the charge stated a prima facie case of interference with employee rights.

The board used the *Campbell* standard to assess the charge that alleged discrimination between two groups of employees. Under that standard, the board found that CCPOA had stated a prima facie case of discrimination for the same reasons as it found a sufficient interference charge.

The board cautioned that its ruling is limited to finding that the allegations stated a prima facie case. The determination whether DPA's action was justified will be resolved once a complaint is issued. It reversed the dismissal of the unfair practice charge and remanded it for issuance of a complaint.

In her dissenting opinion, Member McKeag observed that CCPOA members enjoyed the same dental benefits before and after the state implemented its last best offer. It was the trust fund's refusal to offer benefits to non-union members which prompted DPA to take the only acceptable course of action. Therefore, she concluded, the state did no harm to employee rights. (*California Correctional Peace Officers Assn. v. State of California [Dept. of Personnel Administration]* [3-1-11] No. 2106a-S.)

FLSA Anti-Retaliation Provision Applies to Both Oral and Written Complaints

In *Kasten v. Saint-Gobain Performance Plastics Corp.*, the United States Supreme Court held, by a vote of six to two, that the Fair Labor Standards Act's anti-retaliation provision protects employees who file oral as well as written complaints. Justice Stephen G. Breyer wrote the decision of the court. Justice Antonin Scalia wrote a dissenting opinion in which he was joined by Justice Clarence Thomas. Justice Elena Kagan did not participate.

Kevin Kasten claimed that he was terminated in retaliation for making an oral complaint directly to the company about the location of its time clocks. Kasten complained that, because the clocks were positioned between the area where employees took on and off their work-related protective gear and their actual work area, they did not receive credit for the time spent putting on and taking off their work clothes, in violation of the act's requirements. Kasten alleged that he complained to his shift supervisor, a human resources employee, his lead operator, the human resources manager, and the operations manager in accordance with the company's internal grievance procedure. He claimed he was disciplined and then terminated for this activity.

The company denied that Kasten made any significant complaint about the time clock location, and maintained that he was terminated solely because he failed to clock in and out after repeated warnings.

The trial court dismissed Kasten's case on the grounds that the FLSA does not protect oral complaints. On appeal, the Seventh Circuit agreed. The Supreme Court granted certiorari in light of a split of opinion in the circuit courts of appeal on the issue.

The act, at 29 USC Sec. 215 (a) (3) forbids employers "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint" alleging a violation of the act. Breyer specified in his opinion that the sole issue to be decided by the court was "whether the statutory term 'filed any complaint' includes oral as well as written complaints within its scope."

The Decision

The majority began its analysis by looking at the text of the statute. It found that the word "filed" had different meanings in different contexts. An examination of various dictionary definitions, federal regulations, and contemporaneous judicial usage revealed that, while the term was more often used in connection with written complaints, it was sometimes used in reference to oral complaints as well. And, "even if the word 'filed,' considered alone, might suggest a narrow interpretation limited to writings, the phrase 'any complaint' suggests a broad interpretation that would include an oral complaint," wrote Breyer. Other appearances of the word "filed" in the act also did not resolve the question. Looking to other statutes that contain anti-retaliation provisions also was not helpful because they use somewhat different language. "The bottom line is that the text, taken alone, cannot provide a conclusive answer to our interpretive question."

However, the majority concluded that Congress' intention that the anti-retaliation provision should cover oral complaints as well as written was indicated by "several functional considerations."

First, the FLSA was enacted to prohibit "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers," it instructed. Enforcement of its standards is achieved by means of information and complaints received from employees seeking to vindicate rights. The act's anti-retaliation provision makes the enforcement scheme effective by preventing "fear of economic retaliation" from keeping workers quiet, said the court, citing *Mitchell v. Robert DeMario Jewelry* (1960) 361 U.S. 288, 1960 U.S. LEXIS 1957. "Why would Congress want to limit the enforcement scheme's effectiveness by inhibiting use of the Act's complaint procedure by those who would find it difficult to reduce their complaints to writing, particularly illiterate, less educated, or overworked workers?" reasoned Breyer. "President Franklin Roosevelt pointed out at the time that these were the workers most in need of the Act's help." The court also cited statistics showing that illiteracy rates were particularly high amongst the poor in the years prior to the passage of the FLSA, and for many years thereafter.

In addition, limiting protection from retaliation to employees who make written complaints would restrict the flexibility of government agencies charged with the act's enforcement. They would not be able to use "hotlines, interviews, and other oral methods of receiving complaints," said the court. Requiring written complaints could also impinge on the use of informal grievance procedures to achieve compliance.

As additional support for its position, the court noted that, in *NLRB v. Scrivener* (1972) 405 U.S. 117, 1972 U.S. LEXIS 146, it broadly interpreted the National Labor Relations Act's anti-retaliation provision to protect workers who simply participated in a National Labor Relations Board investigation. It concluded that the similar enforcement needs of the FLSA argue for a broad interpretation of the word "complaint."

The court agreed with Saint-Gobain that an additional objective of the act is to establish an enforcement system that is fair to employers as well, and that an employer needs to have fair notice an employee is making a complaint that could later be the basis of a claim of retaliation. But it did not agree that notice had to be in writing to be fair. "To fall within the scope of the anti-retaliation provision," the court declared, "a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection. This standard can be met, however, by oral complaints as well as by written ones."

The court's second "functional consideration" was that certain federal administrative agencies charged with enforcement powers, such as the Department of Labor and the Equal Employment Opportunity Commission, consistently have taken the view that the words, "filed any complaint," include both written and oral complaints. "These agency views are reasonable," said the court. "They are consistent with the Act."

Saint-Gobain's argument that the "rule of lenity" required that the statute be given a lenient interpretation did not persuade the court. The rule primarily applies to criminal statutes, and only comes into play when, after applying traditional rules of statutory construction, ambiguity remains. The court did not find that, after applying those rules, the statute remains sufficiently ambiguous to call for the application of the rule in this case.

Alternatively, Saint-Gobain claimed that the anti-retaliation provision applies only to complaints filed with the government, and, because Kasten complained to a private employer, his complaint did not meet the statutory prerequisite. The high court refused to consider this argument because Saint-Gobain failed to mention it in response to the petition for certiorari.

The Dissent

Justice Antonin Scalia, joined by Justice Clarence Thomas, would have affirmed the lower court's judgment on the grounds that, in his opinion, the FLSA's anti-retaliation provision "does not cover complaints to the employer at all."

The essence of Scalia's argument is that the word "complaint" when used in a legal context has a specialized meaning — "a formal allegation or charge against a party, made or presented to the appropriate court or officer," quoting from *Webster's New International Dictionary* (2d ed.1934.)

He found that the specialized meaning should apply here for several reasons. First, every other use of the word "complaint" in the FLSA refers to an official filing with a government body, he noted. Second, the word appears coupled with "filing," which suggests a degree of formality consistent with legal action. Third, the phrase "filed any complaint," appears in the statute next to other protected activities — "institu[ting] or caus[ing] to be instituted any proceeding under or related to the chapter," "testify[ing] in any such proceeding," and "serv[ing]...on an industry committee" — all of which involve an interaction with governmental authority. Finally, before 1977, only the administrator of the Wage and Hour Division of the Department of Labor, a government agency, could enforce the retaliation provision. "It would seem more strange to require the employee to go to the administrator to establish, and punish retaliation for, his intra-company complaint, than to require the Administrator-protected complaint to be filed with the Administrator in the first place," Scalia wrote. (*Kasten v. Saint-Gobain Performance Plastics Corp.* [5-26-11] Supreme Ct. 09-834, __ U.S.__, 2011 U.S. LEXIS 2417.)

Sheriff Entitled to Qualified Immunity From Retaliatory Action Against Policymaker

An elected official who retaliated against an employee for exercising his right to free speech was entitled to qualified immunity under the “policymaker exception” set out by the United States Supreme Court in *Elrod v. Burnes* (1976) 427 U.S. 347, 1976 U.S. LEXIS 109, 30 CPER 45, and *Branti v. Finkel* (1980) 445 U.S. 507, 1980 U.S. LEXIS 4, according to the Ninth Circuit Court of Appeals. In *Bardzik v. County of Orange*, the appellate court determined that the county sheriff could not be held liable under 42 USC Sec.1983 for retaliating against the reserve division commander after he openly supported the sheriff’s opponent in an election. The sheriff was not, however, immune from liability for retaliating against the employee after he was removed from the reserve division commander position.

Michael Carona, sheriff of Orange County, promoted Lieutenant Jeffrey Bardzik to reserve division commander. Carona asked Bardzik “to take command of the Reserve Division, clean it up and bring it back to respectability,” and made him a captain. Less than two years later, Bardzik openly supported Bill Hunt, Carona’s opponent in his run for reelection. Carona asked Bardzik why he was supporting Hunt and said, “What were you thinking? You know where you were going in this department.” Carona transferred Bardzik to court operations, a position which involved less responsibility, less possibility for overtime pay, and was generally regarded as a dead-end job where the sheriff sent employees with whom he was unhappy.

Carona continued to retaliate against Bardzik after his transfer. He denied Bardzik a pay raise and directed that his rating on his evaluation be downgraded from “exceeds expectations” to “meets expectations.” Bardzik was not allowed to interview for chief of police positions and was subjected to two internal investigations instigated by Carona supporters, which were later dismissed as unfounded.

Bardzik sued Carona under Sec. 1983, claiming that these acts of retaliation violated his First Amendment right to free speech. The district court denied Carona’s motion for summary judgment, and he appealed.

“The First Amendment protects the rights of citizens to criticize a government official, to support a candidate opposing an elected official, or to run against an elected official,” the Ninth Circuit explained. “A citizen does not check these rights at the door when he accepts a government job,” it continued. “Ordinarily, an elected official cannot fire or retaliate against an employee for his political opinions, memberships or activities.”

However, the court cautioned, the general rule is subject to the “policymaker exception,” fashioned by the Supreme Court in *Elrod* and *Branti*, “recognizing that an elected official must be able to appoint some high-level, personally and politically loyal officials who will help him implement the policies that the public voted for.” Where this exception is applicable, an elected official may dismiss these same officials “if they are no longer loyal, if they oppose his reelection, or simply if the official would prefer to work with someone else,” instructed the court.

In order to determine whether Carona's actions were immune from liability, the court analyzed the duties of the reserve division commander to determine if they fit the definition of policymaker considering a number of factors identified in *Fazio v. City of San Francisco* (9th Cir. 1997) 125 F.3d 1328, 1997 U.S. App. LEXIS 27289, 127 CPER 27. Those include "vague or broad responsibilities, relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders."

After considering all of these factors, the court found it a "close question" but concluded that Bardzik was a policymaker. It found that four factors favored Bardzik, while five favored Carona, including influence over programs, recognized as the "most critical" factor in *Walker v. City of Lakewood* (9th Cir. 2001) 272 F.3d 1114, 2001 U.S. App. LEXIS 25169. In addition, Bardzik had broad responsibility, frequent contact with elected officials, technical competence, power to control others, "and actually *did* impede the Sheriff's agenda," said the court.

On the other hand, the court found Bardzik did not have a relatively high salary compared to others in the department, did not have authority to speak in the name of policymakers, and was not known to the public. As to the "responsiveness to partisan politics and political leaders" factor, the court found this to be inconclusive. While "initially Bardzik appeared to be more of a civil servant than a political appointee," said the court, as he rose through the ranks, "his promotions coincided with changes in Department politics."

The court also considered and found persuasive another factor not listed in *Fazio* — that "Bardzik actively sought to undermine the Sheriff's policies." It noted the Supreme Court explained in *Elrod* that one purpose of the policymaker exception is to ensure "that representative government not be undercut by tactics obstructing the implementation of policies [of elected officials], policies presumably sanctioned by the electorate." Here, the evidence showed that Bardzik tried to take badges away from Carona's political allies and attempted to send a memorandum to the reserves regarding the legal propriety of campaign solicitations. Further, he "openly criticized the Sheriff's decisions as unethical on- and off-duty."

The court held that because Bardzik was a "policymaker," Carona did not violate the First Amendment by demoting Bardzik and transferring him to court operations. It ruled Carona was entitled to qualified immunity.

The Ninth Circuit dismissed the district court's reasoning that even if Bardzik were a policymaker, Carona would need to show that retaliating against him "served a vital government interest." The appellate court noted that it has "never held that an official cannot fire a politically disloyal policymaker because the policymaker has accused the official of corruption." Further, its own precedent forecloses such an argument, said the court, citing *Fazio*. There the court held that if a plaintiff is a policymaker, it could not consider the plaintiff's claim that his interest in free speech outweighed the defendants' interest in running an efficient office. "A plaintiff's status as a policymaker is dispositive," pronounced the court.

However, the court found Bardzik ceased to be a policymaker once he was transferred to court operations, where his duties did not meet any of the *Fazio* criteria for the policymaker exception.

Because prior case law clearly established that Bardzik's court operations position was not policymaking, Carona was not entitled to qualified immunity for his retaliatory actions after that time. (*Bardzik v. County of Orange* [9th Cir. 2011] 635 F.3d. 1138, 2011 U.S. App. LEXIS 6242.)

Court Defers to Finding of Agreement on Pension Retroactivity, But Vacates Arbitrator's Award

The parties may have agreed that a richer pension formula would apply retroactively, but an arbitrator's award enforcing that agreement violated the public policy embodied in the Dills Act, announced the Court of Appeal in *California Statewide Law Enforcement Assn. v. California Department of Personnel Administration*. Because the legislation ratifying the agreement to grant regulatory enforcement officers' safety retirement benefits was silent about whether the benefit would apply to prior service, the court found that the retroactivity portion of the agreement cannot be enforced unless and until the legislature approves it.

Union's Deal with Davis

The retirement retroactivity case grew out of negotiations between DPA and CSLEA, which wanted the service of some of its bargaining unit members recognized as safety service members in the Public Employees Retirement System, rather than as miscellaneous service members. Safety retirement benefits were calculated based on 2.5 percent of a member's final compensation, rather than the 2 percent factor used to figure miscellaneous pensions.

DPA agreed to move most of the miscellaneous classifications to the safety category effective July 1, 2004. The written agreement, reached when Gray Davis was governor in 2002, did not indicate whether the new benefit formula would apply to prior service in positions that had been newly denominated as safety classifications. But a memo issued by DPA in October 2002 stated that the formula would apply to such service prior to July 1, 2004. By 2004, however, Arnold Schwarzenegger had become governor. On July 15, 2004, DPA abruptly changed its position and notified the union that it would not grant credit for safety retirement purposes to service that was in the miscellaneous category at the time it was earned.

Arbitrator Bonnie Bogue found the parties had agreed that credit for safety service would be applied retroactively. The only witness from either party who had a contrary understanding, a CalPERS analyst, was not at the bargaining table. (See story in *CPER* No. 192, pp. 50-53.)

Because the new safety classifications did not meet the statutory definition of safety service and the new benefit required appropriation of funds, DPA maintained that legislative approval was required under the Dills Act. The 2002 implementing legislation, S.B. 183 (Burton, D-San Francisco), however, did not speak to the issue of retroactivity. DPA argued that the legislature had not approved the retroactive aspect of the agreement, which therefore could not be enforced.

Arbitrator Bogue rejected the argument. Although evidence showed that costing data supplied during the legislative process quoted a \$17.1 million estimate, and stated the price assumed prospective application, a May 21 Department of Finance Bill Analysis cautioned, "to the extent prior State miscellaneous service is transferred to State safety service, the cost of this bill would increase significantly." The possibility of retroactive application was made known to the legislature, the arbitrator observed. She explained further, "The fact that CalPERS provided

actuarial analyses that failed to reflect accurately the Agreement DPA had negotiated cannot have the effect of modifying DPA's agreement with [CSLEA]."

DPA argued that retroactivity of the benefit would be against public policy because the legislature had not been sufficiently informed that the benefit was retroactive. Arbitrator Bogue found this question to be outside her jurisdiction, which the contract limited to interpreting and enforcing the terms of the collective bargaining agreement.

It is this question that DPA raised in its petition to vacate the award. CSLEA countered by filing a petition to confirm the award. The trial court sided with CSLEA, and DPA appealed.

Specter of Millions of Dollars

The appellate court began its opinion, "Many millions of dollars are at stake in this case." Clearly, the state budgetary crisis was on its mind as it considered the legal arguments.

DPA did not challenge the arbitrator's finding that it had agreed with the union to retroactive application of safety service credit, and the court deferred to this finding. The issue before the court was whether the agreement could be enforced, since the legislature did not expressly approve the retroactive aspect of the agreement to convert miscellaneous members to safety members of the retirement system.

DPA pointed out that the Dills Act requires disclosure to the legislature of all the terms of collective bargaining agreements within its ambit. It requires DPA and the union to jointly prepare a memorandum of understanding for the legislature. If any provision of the MOU requires expenditure of funds, it is not effective unless approved by the legislature. Clearly, the retroactivity of safety service credit would require an expenditure of funds.

DPA contended that the legislature only ratified the provisions granting safety member benefits effective July 1, 2004. It argued that the decision in *Department of Personnel Administration v. California Correctional Peace Officers Assn.* (2007) 152 Cal.App.4th 1193, 2007 Cal.App.LEXIS 1100, 185 CPER 50, governed this case. In *DPA v. CCPOA*, a term appeared in two sections of the agreement. An arbitrator found that the parties had agreed to change the provisions of the agreement, but the written agreement failed to reflect the change in the other section. Although the written MOU was approved by the legislature, the arbitrator reformed the MOU to conform to the parties' agreement. The court held the arbitrator in *CCPOA* had exceeded her powers by altering the agreement that the legislature had ratified because it violated the public policy set forth in the Dills Act.

While the court did not find that Arbitrator Bogue modified the agreement reached between DPA and CSLEA, that distinction made no difference: "[T]o the extent that the arbitrator's award mandates the agreement be enforced without unequivocal legislative approval, it violates public policy for the same reasons as in *DPA v. CCPOA*." Arbitrator Bogue's addition of an express term to the MOU was no different than the deletion of a term of the MOU by the arbitrator in *DPA v. CCPOA*.

The court refused to find that the legislature approved the unexpressed agreement to confer retroactive safety service credit to CSLEA members. The purpose of the bill was to enable some bargaining unit members to qualify for safety retirement benefits. Because it was silent about prior service, the court said, “[w]e cannot say that the Legislature approved the unwritten agreement to bestow the safety member benefits retroactively.”

The fact that the legislature could have been aware of the retroactivity, due to a warning in the enrolled bill report about the potential further expense if DPA decided to apply the benefits to prior service, was not sufficient for the court. While there is no question that DPA had the authority to make that determination, the Dills Act still requires that the legislature approve the expenditure of funds. The court noted a statute passed in 2008 requires the legislature to have actuarial information before approving a pension change.

The fact the legislature previously had approved retroactive credit for other units when it enhanced their benefits also did not sway the court. Even if such benefits are almost always conferred, it does not mean that the legislature intended to do so this time, said the court. The legislature had to be informed expressly that the agreement was retroactive, be provided an analysis of the cost of the retroactive application of the agreement, and then vote to approve the agreement and expenditure. Since the prerequisites were not satisfied, the court reversed the part of the judgment that confirmed the retroactivity portion of the arbitrator’s award. (*California Statewide Law Enforcement Assn. v. California Department of Personnel Administration* [2011] 192 Cal.App.4th 1, 2011 Cal.App. LEXIS 84, rev.den. 4-27-11.)

Arbitration Log

ATTENTION ATTORNEYS AND UNION REPS

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- **Discharge – Attendance**
- **Bereavement Leave**

Stanford Blood Center and SEIU Loc. 715, United Stanford Workers (2-4-10; 17 pp.)

Representatives: Bradley W. Kampas (Jackson Lewis LLP) for the employer; Antonio Ruiz (Weinberg Roger & Rosenfeld) for the union. *Arbitrator:* William E. Riker.

Issue: Was the grievant discharged for just cause?

Employer's position: (1) The grievant was discharged for just cause for chronic excessive absenteeism.

(2) The grievant had notice of the attendance policies when hired in 2006; received a written warning in May 2008, for 13 absences in 39 work days; was told his absences were detrimental to the employer's operations; and received a final warning in July for 8 absences in one month. In September 2008, after 8 more days of absence, he was terminated.

(3) The grievant's claim that his September absences were due to his uncle's death is irrelevant because bereavement leave only covers close family members. Also that claim was not made until the arbitration hearing.

Union's position: (1) The employer did not have just cause for termination.

(2) Had the employer conducted a full and fair investigation, it would have known his September absences were excused bereavement leave because the uncle was "like his father," and his supervisor had approved his absence.

(3) The employer did not warn he would be terminated if he extended his approved September leave for additional days.

Arbitrator's holding: The grievance is denied.

Arbitrator's reasoning: (1) The employer applied progressive discipline. After several notices about attendance, the employer issued two formal warnings in 2008 advising he could be terminated if his absenteeism continued. The grievant had no rational excuse for ongoing excessive absences.

(2) The union claims the employer failed to investigate and discover that the grievant's relationship with his uncle qualified him for bereavement leave. However, the union should give notice of a claim of mitigating factors during the grievance process, rather than waiting until the arbitration hearing. The union's duty is similar to the employer's obligation to justify termination on charges in the discipline notice and not on subsequent additions, so that both parties have notice of the issues in dispute.

(3) The relationship with the uncle was that of "surrogate parent" under the bereavement leave clause; however, the issue is excessive absence and not entitlement to bereavement leave.

(4) The grievant extended his bereavement because he was sick. The grievant told his supervisor he would be absent for the funeral, and was told he would be on unpaid leave as he had no leave balance. Although previously warned he could be terminated for unapproved absences, the grievant failed to request sick leave before extending his absence after the bereavement leave.

(5) Given his attendance record, failure to improve after progressive discipline, and the brief period of his employment, no mitigating factors justify reducing the discipline or providing a "last chance" opportunity.

(Binding Grievance Arbitration)

- **Layoff**
- **Seniority**

City of Auburn and Stationary Engineers Loc. 39 (3-22-10, 13 pp.) *Representatives:* Carl Fessenden (Porter Scott) for the employer; Leslie Freeman (Weinberg, Roger & Rosenfeld) for the union. *Arbitrator:* Paul D. Staudohar (AAA Case No. 74-390-L-00692-09-01).

Issue: Did the employer violate the MOU when it laid off the grievant?

Union's position: (1) The city violated the contract when it laid off the grievant and denied her the right to bump a less-senior employee to regain the position she had formerly occupied.

(2) The grievant had worked as an accounting technician in the finance department until she transferred to an administrative assistant position in the police department, a position that over time became more computerized, involving use of Excel spreadsheets, creating and maintaining files, compiling data, and other tasks. She completed an AA degree in business administration in 2006. The grievant was competent in various computer applications.

(3) When she was laid off in 2009, she had five years seniority and was entitled to bump a less-senior and less-educated employee who occupied the accounting technician position she had

formerly occupied. Although the city had reorganized its finance services, it had not created a new job description for the accounting technician position.

(4) The “test” the city proposed to determine the comparative computer skills of the grievant and the less-senior technician was biased, so the grievant was justified in refusing to take it. The MOU does not allow layoff by “relative ability” but by seniority absent evidence of a special skill justifying retention of a less-senior employee. The city has not demonstrated that the less-senior employee had “special skills” necessary to override the grievant’s seniority rights to her former position.

City’s position: (1) The grievant is not entitled to bump into the accounting technician position in the new department because she had not previously held that position. The former accounting technician position was transformed under the city’s reorganization, and the duties were changed substantially to include sophisticated IT skills that were not required of the position when the grievant held it. A new job description for the revised position was not adopted because of the high cost of conducting the necessary review, given the city’s budget crisis.

(2) Even if the position is the same, the contract allows the city to retain the less-senior employee because she possesses the specialized IT skills, based on past work experience and on-the-job training, which allows her to withstand layoff. The city has likewise rejected the effort of another more-senior employee to bump the incumbent because she also did not possess the special skills required to fill the current position.

Arbitrator’s holding: The grievance is denied.

Arbitrator’s reasoning: (1) The contract calls for layoff by seniority when there are two or more employees in the same class, except where a less-senior employee possesses “special skills necessary to the city.” The question is whether the grievant also had the special qualifications that the incumbent possessed so that her seniority would prevail.

(2) Although the accounting technician job title remained intact, the job itself was substantially restructured after the grievant transferred out, as a result of the IT system overhaul and transfer of duties. Although the grievant has good computer skills, that is different than operating a “network” that the employee in the position must handle.

(3) While the grievant had more formal education, the issue is skills, not academics. The incumbent learned skills through interaction with the consulting firm that developed the new computer system. She had completed special training courses in IT and web design, and had 10 years prior IT experience. Therefore, she had the special skills necessary to perform the complex duties of the position, whereas the grievant did not. The city was correct in deciding that the incumbent’s superior IT skills justify retaining her despite the grievant’s greater seniority.

(Binding Grievance Arbitration)

- **Procedural arbitrability**

Berkeley Unified School Dist. and Berkeley Council of Classified Employees, AFT Loc. 6192 (8-16-10; 19 pp.). *Representatives:* Ingrid A. Meyers (Dannis, Woliver & Kelley) for the employer; Stewart Weinberg (Weinberg, Roger & Rosenfeld) for the union. *Arbitrator:* Bonnie G. Bogue (CSMCS Case No. ARB-09-0410).

Issue: Is the grievance procedurally arbitrable?

District's position: (1) The grievance is not arbitrable because it was not filed within 30 days of the incident, or knowledge of the incident, that prompted the grievance, and it was not moved through the grievance procedure in a timely manner.

(2) An initial grievance, claiming work out-of-class, was filed in January 2008, although the grievant was aware of the facts since 2007. The union failed to move the grievance to the next step until August 2009. The district properly denied that grievance as untimely.

(3) In September 2009, the union filed a new grievance alleging work out-of-class. It was properly denied for being filed more than 30 days after the new event in January 2009 allegedly requiring out-of-class work.

(4) The union did not appeal the district's level 2 response denying the 2009 grievance within the 10 days allowed; therefore, the grievance is not arbitrable.

Union's position: (1) The 2008 grievance was timely, even though not filed in 2007, because it covered at least one 30-day period prior to the grievance being filed. The union did not move the grievance to the next step because it had received no response from the district. Even had the grievant received the response, the district's denial was ambiguous because it offered to hold the grievance in abeyance while further action was taken.

(2) The 2009 grievance alleges the district assigned new duties that are not in the grievant's job description. The failure to pay him out-of-class for these ongoing duties is a continuing contract violation, so that the grievance filed in September was timely. The grievance was moved through the steps of the procedure in a timely manner.

Arbitrator's holding: The grievance is not procedurally arbitrable.

Arbitrator's reasoning: (1) The only grievance the union attempted to appeal to arbitration is the second one filed in 2009, so only the arbitrability of that grievance is before the arbitrator.

(2) The district's level 2 response was dated October 8, but no postmark or other evidence shows when it was sent to or received by the union. Allowing for delay in receipt caused by a weekend and Monday holiday, the presumption against forfeiture of a grievance justifies assuming the union received the response October 13. The union had 10 days from that date to appeal, so the October 22 appeal was timely.

(3) Because the 2008 grievance had failed, the union invoked the contract clause allowing a new grievance on the same subject only if there are new grounds. The new grievance was based on

the only new occurrences after January 2008 — hiring a new employee in January 2009. The grievant claimed he worked out-of-class to supervise and train her.

(4) The grievant's supervisor told him he was not to supervise her, nor was he to train her, but should only answer questions and be a "team player." The grievant claimed he did train her because only he was present on a regular basis.

(5) The union's "continuing violation" theory is rejected. That principle, allowing a grievance to be filed more than 30 days after a violation first occurs if the violation continues, is not applicable to the facts of this case. Assuming the assistance the grievant provided constituted training, there is no evidence that level of assistance was required for nine months after the new employee was hired, so it did not occur within 30 days before the grievance was filed.

(Binding Grievance Arbitration)

- **Discharge – Off-Duty Misconduct of Deputy Sheriff**
- **Discharge – Violence and Threats of Violence**
- **Evidence – Prior Statements to Police**
- **Evidence – Deceased Witness**

County of Sacramento and Sacramento County Deputy Sheriffs' Assn. (11-30-10; 25 pp.).
Representatives: James Woods, Deputy County Counsel, for the employer; Steven W. Welty (Mastagni, Holstedt, Amick, Miller & Johnsen) for the union. *Arbitrator:* Katherine J. Thomson (CSMCS Case No. ARB-09-0348).

Issue: Did good cause exist to terminate the grievant as a deputy sheriff?

County's position: (1) The county had good cause to terminate the grievant for failure of good behavior outside of duty hours, causing discredit to the sheriff's department, when he failed to intervene in a violent fight between his sister and wife, assaulted his mother and threatened to kill her, and also assaulted his sister.

(2) A deputy is held to the highest standards of behavior; temperament is crucial to performance of his duties.

(3) Testimony of the grievant's mother is credible when consistent with statements she made to police; her claim at the arbitration of memory loss is not credible. Statements made to the police by the sister, whose suicide prevented her testifying at the arbitration, are admissible under California law.

(4) The grievant's plea to a lesser charge of disturbing the peace does not mean the mother's and sister's statements to police are not credible. The criminal conviction is not relevant, as it occurred after the employer's internal affairs findings were completed.

(5) The grievant was a substandard employee based on performance evaluations.

Union's position: (1) The employer has not proved that he battered his mother; physical evidence does not support that allegation and she could not recall at the arbitration that he had done so. Her prior statements to police are both inconsistent and hearsay. Under the MOU, hearsay can be used only to explain or supplement direct testimony. Her statements do neither.

(2) The mother was not a credible witness. Her inconsistent statements to police are suspect, intended as retaliation in a family dispute; her claim she feared the grievant is not credible since she asked him to come back shortly after the incident.

(3) The police initially interviewed the mother and sister together, so the mother's later statements and testimony were tainted.

(4) The county did not prove the grievant prevented his mother from intervening or that he failed to intervene in the fight; rather, he pulled his wife out of the fight.

(5) The county did not prove the grievant battered his sister. Her police statements are inadmissible hearsay. Her description of her injuries was not corroborated by the photos and other evidence.

(6) Testimony of the grievant and his wife is credible and consistent with contemporaneous statements made prior to their arrest and with their police statements.

(7) Termination is not justified because criminal charges were reduced to a plea for an infraction; the grievant had no prior discipline; prior performance was good, while the recent negative evaluation is suspect.

Arbitrator's holding: Good cause did not exist for termination. Discipline is reduced to a 30-day unpaid suspension.

Arbitrator's reasoning: (1) Most of the county's evidence is in out-of-court statements by the mother and sister. The deceased sister could not be cross examined. Cross-examination of the mother was not meaningful as she claimed not to remember much of the incident or what she told police.

(2) The mother testified she could not recall the grievant forcibly restraining her from intervening or saying they should let the wife and sister "fight it out." Nor could she recall him assaulting her or threatening to kill her. Her poor memory may be caused by distress over her daughter's suicide, as she claims, or by reluctance to testify against her son. It also could mean the allegations in her and the sister's statements to the police were untrue.

(3) The mother's statements to police, admissible as prior inconsistent statements, are problematic – they were taken nine days after the incident because they had not reported the incident at the time. The first interview was of the mother and sister together with the sister doing the talking, so in later statements to other officers she may have been repeating what she

heard the sister say. The mother's statements were internally inconsistent, showing she did not have a clear memory near the time of the incident.

(4) The sister's police statements included improbable allegations about the fight. She said she had apologized to the brother and his wife before they left, which is unlikely if she had been attacked. Because of her suicide, she could not be cross-examined, leaving many questions about the credibility and reliability of her police statements.

(5) Both women's allegations are suspect because they disliked the grievant's wife. They are prone to exaggeration, such as unsubstantiated claims the grievant had attempted suicide, which they told police to show he was "unstable" and dangerous.

(6) The mother's arbitration testimony did not substantiate most of the allegations, because she claimed no present memory. There is insufficient evidence that the grievant, rather than farm work, caused her bruises, and there was no bruising to support her claim that the grievant choked her.

(7) The grievant's version is more credible. During the very brief altercation, he was holding a baby, had one arm in a cast and was trying to hand the baby to his mother before he could pull his wife away from his sister. The wife's and grievant's description of the "hold" the sister had on the wife is more credible than the implausible explanations in the sister's or mother's police statements describing the wife as the aggressor.

(8) The allegation he threatened to kill the mother is not credible. His use of the words "should kill" or "could kill" carries a different implication than "will kill". His words were an expression of anger and not a threat. Since the mother and sister did not report the incident for nine days, instead repeatedly inviting him to come to their property to collect his animals, the claim that they felt threatened is not credible.

(9) The county bolstered its termination decision by a recent poor performance evaluation. The grievant was not shown it until the arbitration, when he rebutted some charges. He was not given the opportunity to correct performance problems, stemming in part from personal problems that affected his prior record of good work performance over several years, with no prior discipline.

(10) The evidence does not show that he battered his sister or mother, threatened his mother, or failed to try to stop the fight, so his conduct is less egregious and does not justify termination. The grievant was not innocent in the conflict — his behavior before and after the fight showed a serious lapse of judgment and risked further escalation. Conduct of a law enforcement officer, at work or away, must be beyond reproach. A 30-day suspension will make clear the seriousness of his misconduct that reflects poorly on himself and the county.

(Binding Grievance Arbitration)

- **Prevailing Rates**
- **Contracting Out**

Del Norte County Unified School Dist. and Intl. Bro. of Electrical Workers, Loc. 551 (4-19-11; 11 pp.) *Representatives:* Scott Kronland, Emily White (Altshuler Berzon) for the union; Douglas N. Freifeld (Fagen Friedman & Fulfrost) for the employer. *Arbitrator:* Philip Tamoush (CSMCS Case No. ARB-10-0344).

Issue: Did the district violate its Community Benefit Agreement by approval of the Telephone Installation Worker classification and/or prevailing wage rate?

Union's position: (1) The district and IBEW entered a "Community Benefit Agreement" to create a construction technology academy, which provides work opportunities for residents and provides that work, to the extent possible, should go to union-represented workers. The district accepted the lowest bidder to perform construction work under that agreement. The district and the contractor determined that certain low-level work was to be performed by telephone installation workers (TIW) or customer services technicians. When IBEW could not provide TIWs because they did not represent employees at that low skill level, the contractor hired other employees to do the installation and paid them at the eighth step of the TIW rate, as determined by the Department of Industrial Relations in a 1999 prevailing rate study.

(2) The contractor hid its intent to hire and/or pay persons at the TIW prevailing rate, which it determined to be \$19.36. The work is not low-level TIW work, but high level work, such as done by Sound and Communication Installers (SCI) under the IBEW-represented classification/ rates.

(3) The parties entered an MOU when attempting to resolve the classification and pay issue, under which the contractor was to request higher-skilled workers, represented by IBEW. There never was a meeting of the minds that the contractor could pay employees at the lower, TIW, non-represented rate. Any analysis of the work shows it should be paid at the higher SCI level.

District's position: (1) Although TIW rates were not mentioned in the MOU, they were implied.

(2) At least 25 percent of the work is at the TIW level and the TIW rate is appropriate. The contractor was willing to pay higher than the first-step TIW rate as determined by the DIR, and did pay at the eighth step.

(3) IBEW understood the kind of work that would be performed, but could not provide TIWs when requested; therefore the contractor was free to use non-union employees and pay them at the rate it had determined was the appropriate prevailing wage.

Arbitrator's holding: The grievance is granted.

Arbitrator's reasoning: (1) The parties had a formal understanding that the contractor could employ union or non-union employees and that the contractor had authority to pay them in accordance with the kind and classification of work required, such as hiring SCIs but paying them as TIWs for work performed at the TIW level.

(2) The parties never had a meeting of the minds on either the level of the work or the appropriate pay rate. While they do not dispute which work should be designated TIW level, based on the contractor's determination, they do dispute the wage rate for performing such work.

(3) The MOU required the payment of prevailing wages. The decision to pay the TIW rate for installation work was a financial decision of the contractor and district. Since the DIR no longer sets prevailing rates for work that can be performed by more than one classification, the district had the authority to set the rate rather than use the 1999 DIR prevailing wage rate.

(4) The contractor may utilize any union referrals, and pay them at the prevailing SCI (an IBEW classification) rate for work the individual performs at the higher level, or at the TIW (same as the Customer Services Technician II CWA classification) rate for work performed at the lower level. The appropriate TIW rate is \$28.39, as determined from CWA/Verizon contracts.

(5) The district violated the Community Benefit Agreement. Back pay is ordered for the difference between the TIW rate it paid and the rate under current CWA/Verizon contracts.

(Binding Grievance Arbitration)

Public Employment Relations Board Orders and 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](#)

[EERA CASES](#)

[HEERA CASES](#)

[MMBA CASES](#)

DILLS ACT CASES

Unfair Practice Rulings

No violation of act where meeting determined bidding status of newly created positions: State of California (CDCR).

(California Correctional Peace Officers Assn. v. State of California [Dept. of Corrections & Rehabilitation] No. 2156-S, 1-19-11, 5 pp. + 7 pp. B.A. dec. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: The charge failed to include sufficient allegations of interference with protected rights and of a unilateral change in a past practice, and was appropriately dismissed.

Case summary: The charge failed to allege that the department interfered with the rights of a chapter president by failing to notify him of a meeting at Corcoran State Prison during which the bidding status of certain newly created positions was decided. Officers of the Corcoran chapter were notified of the meeting and were in attendance. The failure to notify the president does not establish conduct that interfered with the chapter president's rights.

Nor is there support for the allegation that CCPOA was denied the right to choose its own representatives to attend the meeting. The charge included no facts which showed that department management had chosen which CCPOA representatives would attend.

CCPOA also failed to establish that the department unilaterally changed a long-standing past practice that used local negotiations to determine which positions are biddable and which are

non-biddable management positions. The charge did not show that CCPOA and Corcoran management ever negotiated a percentage split of biddable and non-biddable positions.

Novato, Carlsbad, and Campbell standards clarified by PERB: State of California (DPA).

(California Correctional Peace Officers Assn. v. State of California [Dept. of Personnel Administration], No. 2106a-S, 3-1-11, 19 pp. By Member Wesley, with Chair Dowdin Calvillo; Member McKeag dissenting.)

Holding: PERB Dec. No. 2106-S is vacated. The board will assess whether allegations state a prima facie case of discrimination and/or interference by applying three distinct standards: one for reprisals against individual employees; one for interference with employees' rights, and one for discrimination between two groups of employees. This case is summarized in the General section of this issue of *CPEER*.

EERA CASES

Unfair Practice Rulings

Charging party alleges right to association's financial reports for immediately preceding fiscal year: Rio Teachers Assn.

(Lucas v. Rio Teachers Assn., No. 2157, 1-21-11, 7 pp. By Member Wesley, with Chair Dowdin Calvillo and Member McKeag.)

Holding: The charging party's allegation that the association failed to provide her the 2009 financial reports under Sec. 3546.5 was timely filed. Claims of non-compliance with that section for fiscal years 2000 through 2008, when the charging party was not a member of the association, were untimely.

Case summary: The charging party requested that the association provide her the financial reports required by Sec. 3546.5 for the current fiscal year as she had for the prior nine years. She filed an unfair practice charge seeking an order compelling production of the reports. A board agent dismissed all allegations concerning fiscal years 2000 through 2008 and found that the continuing violation theory did not apply.

The board affirmed the partial dismissal. Alleged violations of Sec. 3546.5 are processed as unfair practice charges, and the six-month statute of limitations period applies. To be timely, a charge alleging such a violation must be filed within six months of when the charging party knew or should have known that the employee organization failed or refused to provide the requested financial report for the immediately preceding fiscal year. Therefore, the allegations in

the charge filed on February 16, 2010, are untimely with regard to the failure to provide financial reports for the 2000-2008 fiscal years.

Like the board agent, PERB found that the continuing violation doctrine did not apply where the alleged unlawful conduct outside the limitations period consists of acts that are separate and independent from the timely allegation. Each year in which the association failed to make available the financial report required by Sec. 3546.5 constitutes a separate and independent act. Therefore, the alleged failure to produce the 2009 report does not render the allegations for the prior nine years timely.

Even if timely, the board added, the duty to produce the financial reports is owed to the board and to employees who are members of the employee organization during the immediately preceding fiscal year. Because the charging party was not a member at the time the 2000-2008 reports were to have been prepared, the charge with regard to those years fails to state a prima facie case.

Finally, the board found that principles of equitable estoppel did not apply because the charging party failed to point to any concealment or misrepresentation by the association that hindered her ability to act within the statutory period. Because there was no evidence that the matter was subject to a grievance procedure, equitable tolling did not apply.

Charge of retaliation untimely: Charter Oak USD.

(Bonner v. Charter Oak Unified School Dist., No. 2159, 1-27-11, 2 pp. + 8 pp. B.A. dec. By Member Miner, with Chair Dowdin Calvillo and Member McKeag.)

Holding: The charge alleging that the district forced the charging party into retirement in retaliation for her protected activities was untimely filed.

Case summary: In February 2007, the charging party was served with a notice of unprofessional conduct and unsatisfactory performance based on numerous complaints the district received from staff members and students. She alleged that the district was motivated to take this action by its need to reduce its staff, not by her alleged misconduct. She claimed that she did not have the evidence of the district's decision to reduce staff until March 2008.

A board agent determined that because the charge was not filed until 19 months after the notice of unprofessional conduct, the charge is untimely. The time limits begin to run when the party has notice of the conduct that constitutes the unfair practice, not when the charging party discovers the legal significance of the conduct. The fact that the charging party was unaware of PERB's existence until 2008 did not toll the statute of limitations.

The board affirmed the B.A.'s dismissal of the charge.

Increase in healthcare premiums after expiration of contract not unilateral change: Sonoma County Office of Education.

(*SEIU Loc. 1021 v. Sonoma County Office of Education*, No. 2160-E, 2-1-11, 6 pp. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: Because the parties' collective bargaining agreement did not obligate the employer to maintain a specific level of healthcare benefits, the increase in premiums after the contract expired was not a unilateral change.

Case summary: The parties' collective bargaining agreement expired on July 1, 2009, while they were negotiating a successor contract. During negotiations, the union proposed that SCOE pay 100 percent of the cost of health benefits; SCOE proposed to cap its contribution at the Kaiser-linked 2008-2009 rates. The parties had not reached agreement when the Kaiser rates increased on October 1, 2009. For the October and November 2009 pay periods, SCOE deducted from employees' pay checks the premium amount above the 2008-2009 rates.

The union alleged that SCOE made a unilateral change when it deducted the increased cost of the health benefit premium after the parties' collective bargaining agreement had expired. The board, however, found that the language of the agreement established 100 percent the 2008-2009 Kaiser rates as the status quo at the time the contract expired. Therefore, SCOE was not required to pay any subsequent increase in health benefit premiums unless and until the parties agreed to do so.

PERB found the union presented no factual allegations such as bargaining history or past practice, to support its interpretation of the contract language that SCOE agreed to pay health premium increases. Unlike in those cases where the employer's failure to pay an increase in health benefit premiums during negotiations was held to be an unlawful unilateral change, the language in the parties' agreement did not oblige SCOE to provide a certain level of benefits. Instead, it stated an employer contribution amount.

Representation Rulings**Reconsideration denied in decision not to sever most campus police officers and reserve officers from existing unit: Victor Valley CCD.**

(*Victor Valley Community College Dist. and Police Officers Assn., Victor Valley Community College Dist.-Police Dept. and California School Employees Assn., and its Chap. 584*, Ad-No. 388a, 2-17-11, 3 pp. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: The board denied the request of the association to reconsider the dismissal of the association's petition to sever most of the campus police officers and campus reserve officers from the existing bargaining unit.

Case summary: The Police Officers Association, Victor Valley Community College District-Police Department filed a petition to sever most, but not all, of the campus police officers and campus reserve police officers from the existing bargaining unit represent by the California School Employees Association. The association expressly excluded two individuals it believed did not hold the proper certification to meet requirements for peace officer status under the Penal Code.

In finding the proposed unit to be inappropriate, the board determined that those two officers' classification would remain in the existing unit represented by CSEA, resulting in the same classifications in both the proposed and existing units. This would adversely affect the efficiency of operations in the district by forcing the district to bargain with two different units over the same classifications. The board also found it lacked jurisdiction to require the district to comply with the association's interpretation of the Penal Code regarding the two officers at issue.

In its reconsideration request, the association contended the board erred by failing to determine that the two excluded officers were not peace officers under the Penal Code. The board denied the request under PERB Reg. 32410, where reconsideration is granted only if the decision of the board contains prejudicial errors of fact or the party has newly discovered evidence not previously available and which could not have been discovered beforehand. Citing *San Leandro USD* (2007) PERB No. 1924a, the board found that restating arguments made on appeal does not meet the criteria for reconsideration set forth in Reg. 32410. Accordingly, the request for reconsideration was denied.

HEERA CASES

Unfair Practice Rulings

Reconsideration motion granted and make-whole remedy in board order amended: U.C. (Davis).

(Coalition of University Employees v. Regents of the University of California [Davis], No. 2101a-H, 2-24-11, 10 pp. dec. By Chair Dowdin Calvillo, with Members McKeag and Miner.)

Holding: The union's request for reconsideration was partially granted because the board's order should have included a make-whole remedy discussed in the decision.

Case summary: In *Regents of the University of California (Davis)* (2010) Dec. No. 2101-H, 199 CPER 81, U.C. contended the contract did not require it to notify CUE when the duties of a vacated position were reclassified out of the unit, but only when it proposed to move filled positions out of the unit. The board found the university committed an unlawful unilateral change when it failed to give notice to the union before deciding to replace a unit position with a non-unit position. The charging party requested reconsideration of the decision on three grounds.

The charging party argued that, in addition to finding the university made an unlawful unilateral change, the board should have found unlawful interference. Since the charging party did not make its interference argument on appeal, and did not identify prejudicial errors of fact or newly discovered evidence, the board denied the request for reconsideration of this issue.

The charging party claimed that the order was not clear concerning whether U.C. was required to restore all bargaining unit positions it had removed or replaced when it implemented its erroneous interpretation of the contract. The board denied this request for reconsideration because the order clearly limited its reach to three identified positions; expanding the order would violate long-standing precedent barring the board from issuing advisory opinions or granting declaratory relief.

The charging party's last contention was that the decision discussed a make-whole remedy but did not mention it in the order. The board agreed it had erred. Citing prior case law that treated an error in a board order as newly discovered evidence which was appropriate for reconsideration, the court granted the request for reconsideration and modified the order to articulate the make-whole remedy.

Duty of Fair Representation Rulings

Duty of fair representation dismissed as untimely: CSU Employees Union, SEIU Loc. 2579.

(Kyrias v. CSU Employees Union, SEIU Loc. 2579, No. 2175-H, 3-25-11, 6 pp. By Chair Dowdin Calvillo, with Members McKeag and Miner.)

Holding: The allegation that the union breached its duty of fair representation when it failed to make a timely request to take the charging party's grievance to arbitration refers to conduct that occurred more than six months prior to the filing of the charge.

Case summary: The charging party filed a grievance alleging that her employer, Sonoma State University, violated the collective bargaining agreement when it moved her to another job. When the university denied her grievance, she asked the union to request arbitration.

In her unfair practice charge, the charging party alleged that the union breached its duty of fair representation when it failed to timely request arbitration.

The board found the charge was untimely filed because the charging party knew that the union had not filed an arbitration request more than six months before the charge was filed.

In her amended charge, the charging party asserted that during the limitations period, the union informed her that it was still making efforts on her behalf and that it had told the university it had intended to request arbitration. The board found these allegations did not show that the union breached its duty of fair representation during the six-month period. In fact, the board noted, the amended charge asserted that these actions were an attempt to cure the union's DFR breach.

Bonus granted to non-represented employees only did not discriminate against union-represented bargaining unit: U.C. Regents (Irvine).

(*Coalition of University Employees v. Regents of the University of California [Irvine]*, No. 2177-H, 3-29-11, 9 pp. By Chair Dowdin Calvillo, with Members McKeag and Miner.)

Holding: The university did not discriminate against CUE-represented employees when it granted non-represented employees a \$600 bonus. Nor did this interfere with employees' protected rights to be represented by the union.

Case summary: The employee organization alleged that the university discriminated against CUE-represented employees and interfered with their protected rights when it (1) paid a \$600 bonus to non-represented employees without offering the same bonus to CUE-represented employees, and (2) announced the bonus via email and posted this information on the campus website.

The board analyzed this case under the *Campbell* standard, articulated in *State of California (Dept. of Personnel Administration)* (2011) No. 2106a-S. This test is applied when a charge alleges discrimination between groups of employees based on one group's protected activity. Here, the board found that the university did not discriminate against CUE-represented employees because resignation from the union would not have made them eligible for the bonus; all represented employees are excluded from the bonus program whether or not they are members of an employee organization that represents their bargaining unit. Therefore, the board reasoned, to be eligible for the bonus program, a represented employee would have to move to a non-represented position or convince a majority of the other employees to decertify the exclusive representative. For this reason, the university's grant of a benefit exclusively to non-represented employees did not constitute discrimination under the *Campbell* standard.

Nor did the charge allege any other facts to suggest that payment of the bonus to non-represented employees could cause harm to CUE-represented employees' rights. Because represented employees are not eligible for the bonus, there was no suggestion that represented employees would lose that benefit if they engaged in protected activity.

The board also found that the charge failed to establish that the university indicated the bonus could not be gained through collective bargaining. Although CUE alleged that the university "refused to entertain any proposal from CUE that included bonuses or salary increases," the charge did not allege that CUE made a proposal including bonuses that the university rejected.

The board found that the bonus payment to non-represented employees did not interfere with the rights of CUE-represented employees. The email and website posting concerning the bonus was protected employer speech. They did not contain a threat of reprisal or force or promise of benefit, which would have removed it from First Amendment protection. The university's statement did not imply that represented employees would not receive benefits if they continued to be represented by the union.

MMBA CASES

Unfair Practice Rulings

Finding retaliation for protected activities, charging party reinstated with full back pay: County of Riverside.

(Brewington v. County of Riverside, No. 2090-M, 12-31-09, 44 pp. By Member Neuwald, with Acting Chair Dowdin Calvillo and Member McKeag.)

Holding: The county retaliated against the charging party by taking adverse action, including termination, against him because he engaged in protected activities.

Case summary: As a county employee, the charging party had concerns regarding the use of non-licensed engineers directing the work of licensed engineers. He and others expressed this concern to management. The board found this was protected activity. He also engaged in protected activity when he sought the assistance of SEIU concerning similar complaints and filed an unfair practice charge with PERB. The charging party's actions were known to county management.

The charging party suffered no adverse action when he was issued a counseling memo that threatened future disciplinary action because it simply informed him of the county's performance expectations; it did not identify performance deficiencies and was not a document that would cause a reasonable person to consider it to have an adverse action on his employment.

A subsequent memo that made changes to the charging party's working conditions, including altering his hours and placing other restrictions on his interactions, was an adverse action. The board found a nexus between this memo and the charging party's protected activities based on temporal proximity, departure from established procedures and standards, the cursory nature of the investigation into his misconduct, and the failure to offer legitimate justification for the imposition of new and onerous restrictions on his working conditions.

The initiation of a misconduct investigation constitutes an adverse action, the board said, even though discipline did not result, because the county failed to prove it acted reasonably; its conduct was based on distorted facts and was pretextual.

A directive that began by stating there was reason to believe the charging party was abusing sick leave and telling him to submit a medical certificate was not an adverse action. Nor was the docking of his pay, which was later corrected. The decision to place the charging party on administrative leave was based on the same pretextual considerations and unlawful motivation as the misconduct investigation. The termination that followed was based on the same allegations and other unsupported and inadequately investigated allegations. It likewise was retaliatory.

The county's refusal to postpone an investigative interview due to absence of the charging party's attorney was not an unfair practice, as the MMBA does not provide rights to counsel. The county failed to establish, as a defense, that it would have taken the adverse actions against the charging party had he not engaged in protected activities. Most of the percipient witnesses to his alleged misconduct did not testify.

The board ordered the county to rescind the charging party's termination, expunge his record of disciplinary memos, offer him reinstatement, and make him whole for lost wages and benefits, including back pay. The board rejected the county's contention that PERB is barred by the state constitution from ordering it to take certain administrative actions or expend funds. The board may exercise its authority to remedy unfair practices.

Contractual right to participate in arbitration did not survive expiration of MOU.

(Hitchcock v. County of Orange, No. 2155-M, 1-18-11, 4 pp. By Member McKeag, with Chair Dowdin Calvillo and Member Wesley.)

Holding: Because the charging party was terminated after the expiration of the memorandum of understanding, he did not have a right to participate in arbitration, and his claim that the county's failure to arbitrate his grievance was unlawful interference was appropriately dismissed.

Case summary: The charging party alleged that the county violated the MMBA by denying him the opportunity to participate in an arbitration. The retaliation claim was untimely because the charging party was terminated 15 months before the charge was filed.

With regard to the interference allegation, the board affirmed the board agent's conclusion that the charging party had no right to participate in an arbitration because the MOU had expired. Although the charging party served as the local union chapter president before the contract expired, his termination, the grievance filing, and his request for arbitration all occurred after the MOU expired. Since the charging party was terminated after the MOU expired, his contractual right to arbitrate his termination never accrued, the board concluded.

Parties' request to withdraw exceptions and vacate ALJ's proposed decision granted: City of Hughson.

(Operating Engineers Loc. Union No. 3 v. City of Hughson, No. 2158-M, 1-25-11, 2 pp. By Member Wesley, with Chair Dowdin Calvillo and Member McKeag.)

Holding: Having settled their dispute, the exceptions filed by the city were withdrawn, the proposed decision of the administrative law judge vacated, and the case dismissed with prejudice.

Case summary: The union filed an unfair practice charge alleging that the city unilaterally changed an established policy by refusing to compensate an employee for performing out-of-class work. An administrative law judge found a violation.

After the city filed exceptions to the proposed decision, the parties notified the board that they had settled their dispute and prepared a joint stipulation to withdraw the exceptions and dismiss the case with prejudice. The parties also sought to vacate the ALJ's proposed decision.

In the best interest of the parties and consistent with the purposes of the MMBA, the board granted the parties' requests.

Lead person not acting with apparent authority when he circulated petition to limit union's access rights: West Contra Costa County Healthcare Dist.

(SEIU-United Healthcare Workers West, Loc. 2005 v. West Contra Costa County Healthcare Dist., No. 2164-M, 2-24-11, 10 pp. By Member Miner, with Chair Dowdin Calvillo and Member McKeag.)

Holding: The charging party failed to allege sufficient facts to show that a lead person who exercised some supervisory authority was acting or appeared to be acting on behalf of the employer when he circulated a petition calling for restrictions on SEIU's access rights during a decertification election.

Case summary: In March 2009, the National Union of Healthcare Workers filed a petition with PERB to decertify SEIU-United Healthcare Workers West, Loc. 2005, as the exclusive representative of a unit of district employees. Allen, a lead housekeeper, prepared and circulated a petition claiming that SEIU staff members were harassing workers on their breaks and in the lunchroom. Allen asked the district to bar SEIU staff members from the break rooms. The district declined to do so.

SEIU alleged in its charge that the district unlawfully interfered with its rights conveyed by the MMBA because Allen was acting with apparent authority of the district when he circulated the petition seeking to restrict the union's access rights.

The board disagreed and upheld the dismissal of the charges. It found that SEIU failed to allege that Allen's "laundry list of duties as a lead worker" were sufficient to create a reasonable basis for employees to believe that he had apparent authority to act on behalf of the district. Specifically, the board held that, while Allen performed some supervisory duties, there was no reasonable basis to believe he had authority to circulate a petition on behalf of the district seeking to limit SEIU's access rights. Nor were facts alleged indicating that the district knew of or consented to Allen's actions. To demonstrate apparent authority, there must be a showing that the actions of *the district* created a reasonable belief that the district authorized Allen to act on its behalf in performing the challenged activity, circulating the petition.

**Burden on charging party to provide clear, concise statement of facts to board agent:
Antelope Valley Hospital Dist.**

(*Hayes v. Antelope Valley Hospital Dist.*, No. 2167-M, 2-25-11, 4 pp. + 18 pp. B.A. dec. By Member Miner, with Chair Dowdin Calvillo and Member McKeag.)

Holding: Despite assistance by the board agent, the charging party failed to allege sufficient facts to provide a clear and concise statement of the facts in support of his unfair practice allegations.

Case summary: The charging party alleged that, in violation of the MMBA, the district failed to process his grievances, did not provide a mediator to assist in the settlement of his grievances and punished him for promoting a union. He also alleged that he was not provided with requested information.

A board agent dismissed the charge. First, he found that the charging party failed to provide a clear and concise statement of the facts and conduct said to constitute the unfair practice. He also found the unfair practice charge was untimely filed because he failed to allege specific dates the district allegedly violated the MMBA. Additionally, the B.A. noted that nothing in the MMBA requires the employer to provide the employee with a mediator; the charge that the district failed or refused to process his grievances did not allege a violation of the MMBA.

The B.A. found no allegation in the charge demonstrating that the employer knew the charging party was engaged in activity in support of a union and, even if such knowledge were shown, there were no facts establishing a causal connection between protected activity and the employer's insistence that the charging party sign a last-chance agreement. The B.A. also determined the charging party lacked standing to allege that the district violated the act by failing to provide him with relevant information.

On appeal, the board upheld the B.A.'s dismissal. It noted that, while the board agent must assist the charging party in setting out his or her charge, the burden to provide a clear and concise statement of the facts rests with the charging party. In this case, the board agent communicated with the charging party on numerous occasions and allowed him to amend his charge five times. The charging party's assertion that he would provide further evidence "should it be needed" does not fulfill his obligation to provide sufficient facts for the board to determine if a prima facie case has been alleged.

**Unilateral change charge dismissed where personnel commission's ruling is not repugnant
to the purposes of the MMBA: City of Guadalupe.**

(*SEIU Loc. 620 v. City of Guadalupe*, No. 2170-M, 2-28-11, 2 pp. + 15 pp. B.A. dec. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: The personnel commission's final and binding ruling was not repugnant to the purposes of the act and, therefore, the board deferred to its ruling.

Case summary: The city implemented mandatory furloughs for a three-month period. SEIU filed a grievance. In accordance with the final step of the grievance procedure, the dispute was submitted to the personnel commission, which ruled in favor of the city.

The union then filed an unfair practice charge alleging a unilateral change. A board agent dismissed the charge, finding that PERB must defer to the commission's decision if it was not repugnant to the provisions of the MMBA because the commission met the elements of a binding process of dispute resolution. The B.A. applied the equitable tolling doctrine and found that the statute of limitations was tolled while the union pursued its grievance under the parties' bilaterally agreed-on dispute resolution procedure which culminated in the commission's final and binding ruling.

The B.A. found that the board was permitted to review the commission's ruling only to determine whether it was repugnant to the MMBA. She found that the issue before the commission and the issue raised in the unfair practice were factually parallel, the commission's proceedings were fair and regular, and that both parties agreed to be bound by the commission's decision as evidenced in the language of their MOU.

On appeal, SEIU argued that the commission's decision was not based on the facts presented at the hearing but instead on economic concerns. The board found it had no authority to conduct an independent review of the personnel commission's decision and that SEIU had failed to demonstrate that the commission's decision was repugnant to the MMBA.

No unilateral change in calculation of retiree health benefit contributions: County of Sonoma.

(Sonoma County Law Enforcement Assn. v. County of Sonoma, No. 2173-M, 3-1-11, 20 pp. By Member Miner, with Chair Dowdin Calvillo and Members McKeag and Wesley.)

Holding: The county did not unilaterally change the manner by which it calculated retiree health benefit contributions.

Case summary: The charging party alleged that the county unilaterally changed the manner in which retiree health insurance contributions are calculated from a policy of tying such contributions to those made on behalf of current bargaining unit employees to a policy of tying retiree contributions to those made on behalf of unrepresented management employees. An administrative law judge determined that the county had violated the MMBA, but on appeal, the board reversed the proposed decision.

First, the board found that the county had a practice for over 20 years of making contributions for retiree health benefits that differed from those paid on behalf of current bargaining unit

employees. Therefore, PERB reasoned, the association knew or should have known of the county's practice of paying the same contributions for retirees as it did for administrative management employees long before the board of supervisors passed its resolution in April 2007. Therefore, the charge was untimely.

Even if the charge were timely, the association did not prove a unilateral change. The board found that the language in the parties' MOU was ambiguous. Disagreeing with the ALJ's credibility determination, the board concluded that the bargaining history indicated the contract did not link retiree health insurance benefits to those of current bargaining unit employees.

The association failed to establish that the county breached an established past practice, the board also found. While the association believed the practice was to link retiree benefit contributions to those of bargaining employees, it failed to rebut the evidence indicating that the actual contributions paid for retirees mirrored the contributions paid to unrepresented management employees.

Allegations fail to support charge that layoff was retaliation for protected activity: County of Contra Costa.

(Bruno v. County of Contra Costa, No. 2174-M, 3-25-11, 10 pp. By Member Miner, with Chair Dowdin Calvillo and Member McKeag.)

Holding: While the charge alleged that the charging party engaged in protected activity and suffered an adverse action when she was laid off, the charge did not allege the administrators who made the decisions that culminated in the layoff were aware of her protected activity or acted in retaliation for her protected activity.

Case summary: The charging party worked as a part-time public health nurse. After she became a union steward, she allegedly began to receive negative feedback from her supervisor. She filed two grievances against her supervisor. After a complicated chain of events, she was laid off in December 2008. She filed a charge alleging that the layoff was in retaliation for her protected activity.

There is no dispute that the charging party engaged in protected activity when she filed the grievances against her supervisor. Nor is it disputed that the charging party's layoff was an adverse action. However, upholding the board agent's partial dismissal of the charge, the board found no direct evidence that the decision to eliminate the charging party's position and lay her off was based on her protected activity. The charge failed to show that the persons responsible for making the administrative decisions that led to her layoff had any knowledge of the charging party's protected activity. Even if employees in the personnel department were aware of her protected activity, the board added, the charge failed to allege facts demonstrating a nexus between the decisions that led to the layoff and the charging party's protected activity.

The board rejected new allegations made by the charging party on appeal because the allegations concerned events that predated the dismissal letter, and there was no showing why the allegations could not have been made earlier.

Representation Rulings

Charge challenging county's refusal to recognize union as exclusive representative under local rules untimely filed: County of Riverside.

(Committee of Interns & Residents/SEIU v. County of Riverside, No. 2176-M, 3-29-11, 11 pp. By Chair Dowdin Calvillo, with Members McKeag and Miner.)

Holding: The charge alleging that the county's denial of the union's request for recognition violated the MMBA and the county's local rules was filed more than six months after the county denied the union's request. Subsequent communication from the county merely reiterated its prior position and was not a continuing violation.

Case summary: The charging party sought to represent resident physicians employed at the county's regional medical center. The county refused to recognize the charging party as an employee organization under its employee relations resolution. An administrative law judge issued a proposed decision finding that the county unreasonably had refused to register the charging party as an employee organization. The ALJ ruled that the charge was timely filed because the county's continued refusal to register the charging party within the six-month statute of limitations period was a continuing violation.

On appeal, the board rejected that conclusion. It found that the county's later actions were merely reiterations of the position it had taken outside the limitations period and, therefore, were not continuing violations. PERB was not convinced by the charging party's assertion that the county's initial refusal to recognize it as an employee organization was too vague to put it on notice of the county's position. While the county did not explain its rationale in great detail, it clearly stated that the request for recognition was denied for failure to comply with the local rule.

PERB rejected the charging party's contention that, under the doctrine of equitable tolling, the statute of limitations should be tolled while it pursued a writ of mandate against the county in superior court. Equitable tolling does not apply every time a charging party pursues an alternative remedy, the board said. It only applies when the charging party has used mutually negotiated dispute resolution procedures contained in a written agreement with the opposing party.

Duty of Fair Representation Rulings

DFR charge not supported by clear, concise statement of facts: SEIU-United Healthcare Workers West, Loc. 2005.

(*Hayes v. SEIU-United Healthcare Workers West, Loc. 2005*, No. 2168-M, 2-25-11, 4 pp. + 16 pp. B.A. dec. By Member Miner, with Chair Dowdin Calvillo and Member McKeag.)

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

Case summary: The charging party alleged that SEIU breached its duty of fair representation by the manner in which it processed his grievances. A board agent dismissed the charge. The board argued, finding that the charging party failed to provide a clear and concise statement of the facts and conduct said to constitute the unfair practice.

The board agent found that SEIU did not breach its fair representation duty by assigning a particular representative to the charging party's case or prohibiting him from speaking to other union stewards about his grievances. The union's failure to respond to the charging party's inquiries about the status of his grievances, and its failure to notify him of his representative's separation from the union, were "troubling," but did not amount to more than mere negligence. The B.A. noted that negligent conduct breaches the duty of fair representation only when it completely extinguishes the employee's right to pursue his claim. The charging party failed to provide a clear and concise statement of facts that he was denied or even prejudiced by his representative's actions or inactions.

The board agent also found the charging party lacked standing to allege the union violated sections of the MMBA that relate to the collective bargaining relationship between the employee organization and the employer.

The board affirmed the B.A.'s dismissal of the charge.

No DFR breach alleged in charge: SEIU Loc. 1021.

(*Crandell v. SEIU Loc. 1021*, No. 2169-M, 2-25-11, 3 pp. + 9 pp. B.A. dec. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: The charging party failed to allege sufficient facts to support his allegation that the union breached its duty of fair representation by failing to arbitrate his suspension and termination. His amended charge was not timely filed.

Case summary: The charging party alleged that SEIU breached its duty of fair representation by failing to file a grievance or arbitrate his suspension. A board agent dismissed the charge, finding that the charging party failed to provide a clear and concise statement of the facts and conduct said to constitute the unfair practice. Allegations of fact must be contained in the statement and attachment to the charge. It is not sufficient to incorporate by reference allegations in other

charges filed with the board. The B.A. also found the unfair practice charge was untimely filed with respect to failing to arbitrate the suspension, as the charging party was suspended more than eight months prior to filing the charge.

In addition, the board agent found that SEIU did not breach its fair representation duty by exercising its discretion in determining how far to pursue the charging party's grievance. The grievant did not allege any facts to suggest that the union arbitrarily ignored his grievance. The allegation that the union failed to represent the charging party before the civil service commission also was dismissed. A union's duty of fair representation does not extend to a forum, like the civil service commission, which does not control the exclusive means to a particular remedy. The charging party did not allege that he could not represent himself before the commission.

The B.A. also concluded that the charging party lacked standing to allege that the City and County of San Francisco, his employer, unilaterally changed the manner by which it assigned staff in the workers' compensation division. An individual employee lacks standing to allege a unilateral change on behalf of the union.

The board affirmed the B.A.'s dismissal of the charge. It rejected the charging party's contention that he had been provided insufficient time to file an amended charge. His unexplained delay in retrieving the warning letter from his post office box did not extend the time for filing an amended charge. The charging party was aware that the board agent could grant him an extension of time to file the amended charge, but failed to make a timely request.

Limitations period runs from knowledge, not understanding, of union's action claimed to be DFR breach: SEIU-United Healthcare Workers West.

(Scholink v. SEIU-United Healthcare Workers West, No. 2172-M, 3-1-11, 3 pp. + 7 pp. B.A. dec. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: Because the six-month statute of limitations began to run when the charging party learned of the letter of understanding executed by SEIU and his employer, not at a later date when he understood the significance of the agreement, the charge is untimely.

Case summary: The charging party alleged that SEIU breached its duty of fair representation when it executed a letter of understanding with his employer, Salinas Valley Memorial Healthcare System. The letter of understanding required the charging party to register with the American Registry for Diagnostic Medical Sonography as a condition of employment.

The board agent dismissed the charge as untimely. The charging party had learned of the letter of understanding six months and a day prior to the filing of the charge. The B.A. rejected the charging party's assertion in his amended charge that the statute of limitations began to run after that date, when he learned the ramifications of the letter of understanding. Relying on established

PERB case law, the B.A. concluded that the charging party's failure to understand the legal significance of actions until a later date did not excuse an otherwise untimely filing.

On appeal, the charging party contended that the date he learned of the letter of understanding as set out in the original charge was incorrect and that that he actually learned of the agreement on the later date cited in the amended charge. The board noted that the charging party failed to indicate in the amended charge that he was correcting an erroneous date in the original charge. Because the charging party had sufficient opportunity to correct his purported mistake, the board said, there was no good cause to consider his claim on appeal.