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Letter From the Editor



Dear *CPER* Readers:

In the midst of signature-gathering for five initiatives that would eliminate collective bargaining or restructure pension plans of public employees, it is hard to remember a time when the public sector was seen as a positive contributor to the national economy. This issue's excerpt from an upcoming book by Fred Glass, communications director of the California Federation of Teachers, relates the events and social movements leading to the first collective bargaining statutes in California. He asserts that the biggest impediment to public sector bargaining laws was not political conservatism. In upcoming issues, *CPER* will preview two other chapters from his book, *From Mission to Microchip: A History of the California Labor Movement*.

Returning to the events of the present, Christopher Platten (Wylie, McBride, Platten & Renner) explains why pension changes for current employees — proposed by the mayor of San Jose and others — likely will not be found to be justified by claims of fiscal emergency. Stay tuned for a legal defense of the plans by Jonathon Holtzman (Renne Sloan Holtzman Sakai) later this fall.

While two more courts have ruled that pension plans must disclose names, pension amounts, and workplace history of retirees, if requested, there still is a realm of private information ... even for public employees. An article by Frances Rogers (Liebert Cassidy Whitmore) explores the possible theories of liability for a public entity that inadvertently discloses private information.

The Recent Developments section illustrates that education reform continues to generate news. There is uncertainty about whether and how California will try to comply with the No Child Left Behind Act, and the Los Angeles Unified School District has revised its rules for school takeovers. Meanwhile, the Public Employment Relations Board has allowed charter school teachers to be added to an existing unit of teachers by a petition for unit modification.

And, if your schooling was long ago or did not include a good civics class, you may have forgotten how many rights are preserved by the First Amendment. Don't miss an explanation of the Petition Clause as applied in a case where an employee alleged retaliation for filing a grievance and a lawsuit against his public employer. Also in this issue of the journal, a reminder of some of the good things about being a public employee: recent court decisions show how the constitution protects your rights to free association and to due process, even when your employer's policies say you do not have a right to a hearing.

Katherine Thomson

Editor, *CPER*

CPER Journal Online

Declarations of Fiscal Emergency: A 'Dead on Arrival' Means of Limiting Public Pension Costs and Impairing Local Agency MOUs.

By Christopher E. Platten, Wylie, McBride, Platten & Renner



While Tea Party activists and elected Republican officials around the country continue their assault on public sector labor unions, a less melodramatic attack on the primacy of contract law and the constitutional protections against impairment of contract is making the rounds of normally genteel legal discussions in California.^[1] The principal focus of this attack has been the long-discredited but now recycled notion that by the mere declaration of a "fiscal emergency," local agencies may act to reduce or eliminate negotiated terms of employment, specifically pension obligations. Ostensibly seeking to protect the public fisc, local mayors, council members, and county supervisors appear poised to spend lavishly on a generalized legal stratagem that rests on fragile legal support.

In the City of San Jose, for example, Mayor Chuck Reed has urged the city council to declare a "fiscal emergency" and place before voters a measure to amend the city charter to drastically reduce pension benefits for retirees, active employees, and prospective employees. The mayor blames the climbing costs of employee benefit programs, "exacerbated by the economic crisis," for cuts to public services. Although San Jose boasts a AAA bond rating, Reed's claim of fiscal emergency and drastic demand for elimination of pension and medical benefits has gained him national media attention. While the *San Jose Mercury News* continues to call for collective bargaining as a means of addressing the costs of employee benefits, it remains to be seen whether the city council prefers to accede to the mayor's demand, thus setting the stage for a veritable cyclone of litigation

The fact is that since the passage of Proposition 13^[2] in 1978, limitations on the taxing power of local and state governments have warped the ability of local governments to provide services both demanded and required. This situation has been compounded by an almost decade-long recessionary economy brought on by the effects of globalization, a reduced manufacturing base, elimination of financial market regulation, burst dot.com and real estate bubbles, declining private sector unionization, and a historically astonishing transfer of wealth from the working people to the super rich. In reality, California's local governments are being squeezed by *structural* revenue droughts, not by unanticipated pension costs resulting from negotiated pension formulas sought, in many instances, by the very managers now complaining about rising costs.

Without the political will to challenge the pre-existing conditions animating this structural revenue decline, and lacking a national policy providing for universal health care to control unrestrained health costs, elected leaders of local agencies appear baffled as to alternatives. In the minds of some, the answer to this political economy is simple: tighten the expenditure spigot by unilateral action pursuant to a declaration of fiscal emergency to reduce otherwise fixed labor costs.

But both the United States and California constitutions prohibit local governments from enacting legislation or engaging in conduct that impairs contracts.^[3] And both United States Supreme Court precedent and California Supreme Court case law make clear that where the government's self-interest is at stake, deference to a legislative assessment is not warranted. Indeed, as Justice Blackmun opined more than 34 years ago in *United States Trust Company of New York v. New Jersey*^[4]:

If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all....[A] State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors....[A] State is not completely free to consider impairing the obligations of its own contracts on par with other policy alternatives.

Moreover, nearly a century of law makes clear that the term "emergency" is limited in scope. Under California statutory and case law, an "emergency" is an unforeseen situation not of the government's

making and not synonymous with a general public need. Judicial deference is not accorded to local government action founded on a mere declaration of necessity for preservation of public health and welfare.^[5] Finally, at least with respect to pension contributions and benefits, the “vested rights doctrine,” which arises from the constitutional protections of the Contracts Clause, establishes an “overriding constitutional proscription”^[6] against government action aimed at eliminating or reducing retirement formulae or benefits.

These well-defined and important constitutional barriers to local government reduction of public employee conditions of employment suggest that self-interested declarations of emergency may prove to be brittle, albeit expensive, legal gimmicks.

The Vested Rights Doctrine Protects Against Unilateral Reductions in Retirement Benefits.

The right to compensation already earned, specifically pensions, has been held to be vested and thus protected under prohibitions against impairing contractual obligations in the United States and California Constitutions.^[7] This vested contractual right to pension benefits accrues upon acceptance of employment.^[8] A public employee’s entitlement to a pension “is among these rights clearly ‘favored’ by the law.”^[9] Indeed, the courts recognize that public employee pension benefits serve a public purpose since these benefits serve “as an inducement to enter and continue in public employment”^[10] and “provide agreed subsistence to retired public servants who have fulfilled their employment contracts.”^[11] While “an employee does not earn the right to a full pension until he (sic) has completed the prescribed period of service,...he has actually earned some pension rights as soon as he has performed substantial services for his employer.”^[12] “By entering public service an employee obtains a vested contractual right to earn a pension on terms substantially equivalent to those then offered by the employer,”^[13] and to earn additional pension benefits under improved terms implemented during continued employment.^[14] In short, employees have vested rights not merely to preserve the pension benefits already earned, but to continue to earn benefits under the same terms previously promised.

The recent decision of the Second District Court of Appeal in *County of Orange v. Assn. of Orange County Deputy Sheriffs*^[15] summarized these basic principles comprising the vested rights doctrine when it affirmed the dismissal of an action brought by the Orange County Board of Supervisors. The court’s opinion indicates the power and reach of the vested rights doctrine. The county claimed that the enhanced retirement formula for prior years of service adopted in 2001 violated the California Constitutional prohibition on extra compensation.^[16] In addition, the county asserted that its action in 2001 violated the municipal debt limit in Art. XVI, Sec. 18(a), of the California Constitution because applying the enhanced retirement benefit formula to prior years of service immediately created an unfunded actuarial accrued liability (UAAL), which was “an enforceable debt” greater than the county’s revenues in 2001. The court rejected these arguments noting that the county’s assault on the vested rights doctrine was 70 years too late.^[17] Further, the court found that calculations of UAAL were premised on estimates, assumptions, and projections^[18] — not the stuff of enforceable obligations.

So the county lost on all counts. Perhaps the county’s best argument was one outside the purview of a court:

The County emphasizes its current difficult financial situation and the “ruinous fiscal irresponsibility” of the prior board of supervisors. Imprudence, however, is not unconstitutional.^[19]

Recently, the California Public Employees’ Retirement System (CalPERS) issued a position paper setting forth in summary form the fundamentals of the vested rights doctrine protecting the pension promises made to public employees.^[20] The general rules are:

Rule 1: Employees are entitled to benefits in place during their employment. Generally speaking, benefits may be increased but not decreased without employee consent.

Rule 2: Employees are only entitled to amounts reasonably expected from the contract.

Rule 3: Only lawful contracts with mutual consideration are protected by California’s contracts clause.

Rule 4: Future employees have no vested rights to the current statutory scheme.

Rule 5: Retired and inactive members have vested rights to the benefits promised to them when they

worked. They generally do not have a right to beneficial changes made after employment terminates.

Rule 6: The vested rights of active employees may be unilaterally modified only under extremely limited circumstances. The modifications must be “reasonable,” meaning that alterations of employees’ pension rights must bear some “material relation to the theory of a pension system and its successful operation.” Further, changes that result in a disadvantage to employees should be accompanied by comparable new changes.

For purposes of discussing how to control future pension costs, it bears repeating that future employees have no vested right to any particular retirement benefits or to continuation of current retirement plans prior to their employment.^[21] Thus, provided an employer has not bargained away its rights, it will be free to alter retirement benefits that will be provided for future employees, until those employees commence employment.^[22]

Nor may vested rights be bargained away. ^[23] Memorandums of Understanding may not abrogate fundamental constitutional rights, such as retirement benefits.^[24] But vested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system sufficiently flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system.^[25] “[Such] modifications must be reasonable,” and must satisfy a two-part test: (1) any resulting disadvantage to a member must be accompanied by a comparable, offsetting advantage; and (2) the modification of the pension rights “must bear some material relation to the theory of a pension system and its successful operation....”^[26]

The vested rights doctrine remains a formidable barrier to the unilateral reduction in labor costs for retirement benefits, and perhaps other costs, under a declaration of fiscal emergency.^[27]

Budgetary Pressures Do Not Amount to an “Emergency” Permitting Unilateral Changes in Terms of Employment

While it may be easy for a local agency to declare a fiscal emergency, that does not make it so. Cases determined long ago, in similar times of economic stress, make clear that the declaration of a fiscal emergency is neither Cartesian in principle (“I declare, therefore I am”), nor talismanic in effect.

In *San Christina etc. v. San Francisco*,^[28] the state Supreme Court adopted a definition of emergency as follows:

“An unforeseen occurrence or combination of circumstances which calls for immediate action or remedy: [a] pressing necessity, [an] exigency.”...It is the meaning of the word that obtains in the mind of the lawyer as well as in the mind of the layman.

That case, as well as the 1921 case of *Burr v. San Francisco*,^[29] involved review of the San Francisco Board of Supervisors’ invocation of a provision of their charter (Sec. 13 of Art. III of Ch. 1) permitting the dollar limitation on the rate of taxation to be *temporarily* suspended “in case of any great necessity or emergency.” In *San Christina* and in the 1926 case of *Spreckels v. San Francisco*,^[30] the supervisors invoked the charter provision and increased the rates of taxation to raise additional revenues in fiscal 1911 in order to pave, grade, and repair streets; reconstruct buildings; purchase land or equipment for the fire, police, and school departments; and continue the enforcement of sanitary measures.^[31] The cited necessity in enacting the ordinance was the need for funds to remedy the destruction caused by the Great Earthquake of 1906. In *Burr*,^[32] the emergency was strictly economic; San Francisco needed more money for increased operations caused by both increased municipal obligations (e.g., higher salaries) and a burgeoning population.^[33]

While accepting the proposition that whether an emergency existed was a question of fact to be determined initially by the supervisors, the courts held that the board’s determination was not conclusive and was subject to judicial review.^[34] In the view of California’s attorney general, these cases collectively established the following propositions:

An emergency is an extraordinary occurrence or combination of circumstances that could not have been foreseen or expected at the time a budget was adopted and which calls for immediate and sudden action of a drastic but temporary kind. The action undertaken must relate to redressing the emergency itself and must not be intertwined with other matters of a nonemergency nature, must be temporary in nature and not continuous. *In addition, the*

In the intervening 90 years, both case law[36] and various statutory enactments[37] have embraced these propositions in a variety of factual contexts where legislative declarations of emergency have been reviewed and reversed.

In the context of public sector labor law, the First District Court of Appeal examined the definition of “emergency” within the meaning of the Meyers-Milias-Brown Act[38] in *Sonoma County Organization Etc. Employees v. County of Sonoma*. [39] The Court of Appeal held that a series of work stoppages by public employees constituted an emergency exempting the county from the obligation to “meet and confer” prior to adopting an ordinance authorizing department heads to place employees participating in an “intermittent work stoppage” on “administrative unpaid absence.”[40] Construing the provisions of the MMBA as permitting an exception to the duty to bargain “in cases of emergency,”[41] the court explained that the term “emergency” “...has long been accepted in California as an unforeseen situation calling for immediate action.”[42] “Not only must urgency be present, the magnitude of the exigency must factor.”[43] “Emergency is not synonymous with expediency, convenience, or best interests, and it imports ‘more....than merely a general public need.’ Emergency comprehends a situation of ‘grave character and serious moment.’”[44] It is “evidenced by an imminent and substantial threat to public health or safety.”[45]

Under this strict definition of emergency, the court in *Sonoma* found that the intermittent work stoppages, involving employees at various county worksites, was more than mere irritation or inconvenience because the job action mainly targeted the county’s public health facilities.[46] The centerpiece of the union’s job actions was the county’s community hospital.[47] Accordingly, the court had little difficulty finding that the “unpaid administrative leave” ordinance was properly adopted without prior bargaining. The exigent circumstances were created, not by the county’s hand, but by the union’s actions and imperiled the provision of health services at the community hospital, thus endangering public health and safety.[48]

With respect to statutorily enabled emergency powers, the California Emergency Services Act[49] [CESA] grants the governor and local agencies limited powers in the event of a duly declared emergency. A local government’s powers under the CESA are more limited than those conferred on the governor, but include the power to “promulgate orders and regulations necessary to provide for the protection of life and property, including orders or regulations imposing a curfew within the designated boundaries where necessary to preserve the public order and safety.”[50] To trigger these powers, the local agency must declare a valid emergency as defined by the CESA:

(c) “Local emergency” means the duly proclaimed existence of *conditions of disaster or of extreme peril to the safety of persons and property within the territorial limits of a county, city and county, or city, caused by such conditions* as air pollution, fire, flood, storm, epidemic, riot, drought, sudden and severe energy shortage, plant or animal infestation or disease, the Governor’s warning of an earthquake or volcanic prediction, or an earthquake, or other conditions, other than conditions resulting from a labor controversy, *which are or are likely to be beyond the control of the services, personnel, equipment, and facilities of that political subdivision and require the combined forces of other political subdivisions to combat*, or with respect to regulated energy utilities, a sudden and severe energy shortage requires extraordinary measures beyond the authority vested in the California Public Utilities Commission.[51] [Emphasis added.]

As was demonstrated in *County of Sonoma*, it is conceivable that in very extreme situations, the consequences of a severe fiscal crisis could produce a clear risk to public health and safety, establishing an emergency under the CESA. For example, in *California Correctional Peace Officers Assn. v. Schwarzenegger*[52] the governor proclaimed a state of emergency based on inadequate resources to deal with overcrowding in the state’s prisons to justify sending inmates to private prisons. The Court of Appeal held that whenever “a condition of extreme peril to the safety of persons and property exists ‘within the state,’ even [where the basis for that condition arose from] an area under the exclusive control of the state government,” circumstances exist to proclaim a state of emergency.[53] As was the case in the *County of Sonoma* decision, the court found that the chronic overcrowding in state prisons led to direct and immediate risk to the public due to the increased likelihood that staff and released prisoners would spread infectious disease, and that overburdened wastewater systems could potentially contaminate ground water.[54]

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It is difficult to conceive how under either *Sonoma County* or *California Correctional Peace Officers Assn.*, a substantial threat to public health or safety would result if retirement benefits and other fixed labor costs to current employees and retirees are not constrained. A declaration of risk to the health and safety of local agency residents due to labor costs is much too thin compared to the emergencies found in these two cases. It is difficult to conceive of what specific events could occur that would pose direct and severe risks to the health and welfare of residents thereby justifying the declaration of an emergency resulting in unilateral changes in wages and benefits. Chronic budget deficits caused by retirement or labor-related expense, or currently by revenue shortfalls, do not constitute a disaster or condition of extreme peril under the CESA.

Put bluntly, local agencies have options: negotiating changes to labor contracts, eliminating redundancies, streamlining and cutting existing services, consolidating services and agencies, regionalizing service agencies, raising additional revenue, seeking aid from other government sources, or bankruptcy.[55] A local agency fiscal crisis permitting the unilateral imposition of changes to employee and annuitant compensation and benefits is contemplated by neither the CESA nor by existing case law.

The Constitutional Prohibition Against Impairment of Contracts Severely Restricts Unilateral Changes in Terms of Employment.

The contract clause analysis is the same under both the California Constitution and the United State Constitution because the California Supreme Court uses the federal contract clause analysis to determine whether a statute violates the parallel provision in the California Constitution.[56]

The prohibition against impairment of contracts is not absolute since “its prohibition must be accommodated to the inherent police power of the State” to protect the vital interests of the people.[57] Accordingly, when faced with an issue of impairment of contract, the first question concerns whether the governmental action substantially impairs a contractual relationship.[58] The more severe the impairment to contract, the higher the level of scrutiny applied by a court in assessing the constitutionality of a government’s action.[59]

In its decision in *United States Trust Co. v. New Jersey*,[60] the United States Supreme Court outlined the principles to be applied under the Contract Clause when evaluating the enforcement of governmental action impairing governmental contractual obligations. The basic statements in Justice Blackmun’s majority opinion are clear and easily grasped: “If a State regulation constitutes a substantial impairment, the State, in justification must have a significant and legitimate public purpose behind the regulation.”[61]

“Once a legitimate public purpose has been identified, the new inquiry is whether the adjustment of ‘the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation’s] adoption’... *Unless the State itself is a contracting party*, “[a]s is customary in reviewing economic and social regulation,... courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.” When a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets. When the State is a party to the contract, ‘complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State’s self-interest is at stake.’[62]

In other words, “[a] governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.”[63] “A local agency therefore, is not free to consider impairing the obligations of its own contracts — including wages and benefits — on a par with other policy alternatives. Moreover, a change of circumstances will not justify a substantial impairment unless it was unforeseen and unforeseeable.[64] And when an impairment works a “severe, permanent and immediate change in contractual rights,...the impairment requires a “compelling state interest,” as well as necessity to meet constitutional muster.[65]

These principles have been applied in subsequent labor contract cases to prevent unilateral reduction in wages and benefits, or the negation of contract promises for future increases. In a prior case involving the County of Sonoma,[66] speaking for a unanimous court, Justice Stanley Mosk applied the principles of the holding in *United States Trust Co. v. New Jersey* to a challenge by labor organizations to a statute passed in reaction to enactment of Proposition 13. The statute declared null and void any agreements by local agencies reached under the MMBA to pay cost-of-living increases in excess of that granted to state

employees. The California Supreme Court found a substantial impairment of contract rights because, “there was a ‘severe, permanent and immediate change’” in the employees’ wages.[67]

Important to the California Supreme Court’s holding in the case of *Sonoma County Organization of Public Employees* was the distinction made between the facts presented and the facts in *Subway-Surface Supervisors Assn. v. New York City Transit Authority*. [68] In that case, a New York court found a statute deferring a wage increase in a union contract did not violate the Contract Clause. The union involved had conceded that the “fiscal emergency was so severe that the city could be forced to cease operating if the crisis was not relieved.” [69] Even given those facts, however, the California Supreme Court still “seriously [questioned] the New York court’s rationale.” [70]

In *United Firefighters v. Los Angeles*, [71] the Second Appellate District Court found unconstitutional a charter amendment that placed a 3 percent cap on cost-of-living adjustments to police and firefighter pension benefits of those hired prior to enactment of the amendment. The Court of Appeal decision identified pension benefits as vested rights under the Contract Clause, examined and explained the heightened scrutiny applied to a governmental impairment of its own contract obligations, and held that the charter amendment was unconstitutional because it modified the retirement system benefit for employees and annuitants. [72] Moreover, the court rejected the city’s argument that the cap on benefits was justified by an unforeseen loss of revenue upon the enactment of Proposition 13. The court relied on the reasoning in *Pasadena Police Officers Assn. v. City of Pasadena*: “in the absence of a clear and unequivocal declaration in the pension provisions that benefits are payable only to the extent of available funds from specified contributions, the liability to pay promised pension benefits is a general obligation of the city.” [73]

Similar holdings have issued from the Ninth Circuit Court of Appeals in public sector labor contract cases. In *University of Hawaii Professional Assembly v. Cayetano*, [74] the court held that the state’s action in unilaterally deferring collectively bargained employee pay on six occasions, ostensibly to address a budget deficit, was an unconstitutional impairment of contractual rights. Central to the court’s holding was its finding that the state “knew of the budgetary crisis at the time the collective bargaining agreement was negotiated.” [75]

From these decisions, it follows that absent a severe imminent threat to the ability of a governmental agency to function at all, the mere budgetary pressure of contracted wages and benefits alone will not suffice as an exigent circumstance immune from prohibition under the Contract Clause. The declaration of a fiscal emergency, coupled with either unilateral changes in contract wages and benefits or proposed charter amendments to vested pension benefits, interferes with basic constitutional protections, absent a demonstrated specific necessity, temporary in scope and reasonable to fulfill a compelling public purpose. The Supreme Court decision in *Sonoma County* makes clear that budgetary stress induced by even unforeseen changes in revenue sources, not caused by the state nor contemplated at the time wages and benefit agreements were formed, is insufficient to overcome the barriers of the Contract Clause.

In the Final Analysis, It Is a Question of Political Economy

Labor law exists within the crucible of the forces at play in the political economy. This is self-evident in public sector labor law and collective bargaining. The fiscal challenges facing the state and local governments are neither contrived nor impossible to solve. But they do arise within the constraints, prohibitions, privileges, and rights of the federal and state constitutions.

In the short term, there are fixes to the problem created by the financial meltdown of the stock market and its subsequent reduction in pension assets and consequential rise in contribution costs. However, quick-fix alternatives, like “declarations of fiscal emergency,” solve little and wrongfully create and foster the appearance of a crisis with no palpable or perhaps lawful solution. It will take people of good will and serious mind to agree on changes to benefits for future employees, cost-sharing provisions and wage reallocations in collective bargaining for current employees, governmental reorganization and propositions for enhanced revenues. [76]

Since the enactment of Proposition 13 and its progeny, all Californians have danced a slow dance with the ultimate consequences of that measure. We must all now decide whether to change the tune or not. In the end, the voters, not the lawyers, must determine whether the government services they want are worth the cost.

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[1] California League of Cities press release dated July 29, 2011, <http://www.cacities.org/index.jsp?zone=locc&preview>.

[2] Art. XIII A.

[3] Article I, section 10 of the United States Constitution, the "Contract Clause," states that "[n]o State shall ...pass any...[l]aw impairing the Obligation of Contracts." Article I, section 9 of the California Constitution similarly provides that a "law impairing the obligations of contracts may not be passed."

[4] (1977) 431 U.S. 1, 26.

[5] See, e.g., *Crown Motors v. City of Redding* (1991) 282 Cal.App.3d 173, 179.

[6] *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 915-916.

[7] *Allen v. Board of Administration* (1984) 34 Cal.3d 114, 120; *Betts v. Board of Administration* (1978) 21 Cal.3d 859; *Miller v. State of California* (1977) 18 Cal.3d 808, 814.

[8] *Allen v. Board of Administration*, *supra*.

[9] *Hittle v. Santa Barbara Employees Retirement Assn.* (1985) 39 Cal.3d 374, 390.

[10] *Quintana v. Board of Administration* (1976) 54 Cal.App.3d 1018, 1021.

[11] *Carman v. Alvord* (1982) 31 Cal.3d 318, 325 n. 4; see also, *Bellus v. City of Eureka* (1968) 69 Cal.2d 336, 351.

[12] *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 855.

[13] *Betts v. Board of Administration*, *supra*, 21 Cal.3d at 866 ("An employee's contractual pension expectations are measured by benefits which are in effect not only when employment commences, but which are thereafter conferred during the employee's subsequent tenure."); *Miller v. State of California*, *supra* at 817; and *United Firefighters v. City of Los Angeles* (1989) 210 Cal.App.3d 1095, 1102. See also, *California Teachers Assn. v. Cory* (1984) 155 Cal.App.3d 494, 506.

[14] *Legislature v. Eu* (1991) 54 Cal.3d 492, 530 ("We conclude that incumbent legislators had a vested right to earn additional pension benefits through continued service...."); *Pasadena Police Officers Assn. v. City of Pasadena* (1983) 147 Cal.App.3d 695, 703 ("[T]he employee has a vested right not merely to preservation of benefits already earned pro rata, but also, by continuing to work until retirement eligibility, to earn the benefits, or their substantial equivalent, promised during his prior service.") A former employee does not, of course, have a vested right to benefits granted after the employee leaves employment, *id.*; however, employees have a reasonable expectation that existing benefits will not be diminished for future employment service. *United Firefighters*, *supra*, 210 Cal.App. 3d at 1107-1108.

[15] (2011) 192 Cal.App.4th 21, 41-48.

[16] Art. XI, Sec. 10.

[17] 192 Cal.App.4th at 42, n 4 and 43-45, citing, *Sweesy v. L.A. etc. Retirement Bd.* (1941) 17 Cal.2d 356.

[18] (1982) 192 Cal.App.4th at 34-37, relying on 65 Ops.Cal.Atty.Gen. 571, 572.

[19] 192 Cal.App.4th at 39.

[21] *Legislature v. Eu* (1991) 54 Cal.3d 492, 534; *California Association of Prof. Scientists v. Schwarzenegger* (2006) 137 Cal.App.4th 371, 383; *Claypool v. Wilson* (1992) 4 Cal.App.4th 646, 670; *San Francisco Fire Fighters v. City and County of San Francisco* (1984) 152 Cal.App.3d 113, 120; *Whitmire v. City of Eureka* (1972) 29 Cal.App.3d 28, 34; *Estes v. City of Richmond* (1967) 249 Cal.App.2d 538, 545.

[22] Vested pension rights include the scope of an employee's contribution obligation as provided for by the pension plan. *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 130. And the vested rights doctrine has been extended by the courts to other benefits as well. See, e.g., *Thorning v. Hollister School Dist.* (1992) 11 Cal.App.4th 1598 (school board could not eliminate retiree health benefits provided to board members under prior board policy); *California League of City Employee Assn. v. Palos Verdes Library Dist.* (1978) 87 Cal.App.3d 135 (employees have a vested right to certain longevity pay benefits already earned). But see, *San Bernardino Public Employees Assn. v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1223-1224 (employment terms and conditions contained in expired MOU of fixed duration cannot "become permanently and irrevocably vested" and may be changed upon expiration of the MOU).

[23] See *San Bernardino Public Employees Assn. v. City of Fontana*, *supra*, 67 Cal.App.4th at 1225; *Wright v. City of Santa Clara* (1989) 213 Cal.App.3d 1503, 1506.

[24] *San Bernardino Public Employees Assn. v. City of Fontana*, *supra*, 67 Cal.App.4th at 1225.

[25] *IAFF v. City of San Diego* (1983) 34 Cal.3d 292, 300-301. See also, *Claypool v. Wilson*, *supra*, 4 Cal.App.4th at 664.

[26] *Olson v. Cory* (1980) 27 Cal.3d 532.

[27] This article does not examine other potential theories to defend against unilateral reductions in labor costs, e.g., promissory estoppel.

[28] (1914) 167 Cal. 762, 773, quoting *Webster's International Dict.*; accord *Spreckels v. San Francisco* (1926) 76 Cal.App. 267, 272.

[29] (1921) 186 Cal. 508, 514.

[30] (1926) 76 Cal.App. 267, 272.

[31] *San Christina*, *supra*, 167 Cal. at 765; *Spreckels*, *supra*, 76 Cal.App. at 270-271.

[32] (1921) 186 Cal. 508.

[33] *Ibid.*, at 511-512.

[34] *San Christina*, *supra*, 167 Cal. 768-772; *Burr*, *supra*, 186 Cal.

[35] 65 Cal. Ops. Atty. Gen., 151, 157 (1982) (emphasis added).

[36] *Marshall v. Pasadena USD* (2004) 119 Cal.App.4th 1241, 1257-1258 ("emergency" defined as unforeseen situation calling for immediate action not synonymous with best interests); *Los Osos Valley Associates v. City of San Luis Obispo* (1985) 30 Cal.App.4th 1670, 1680-1682 (emergency may not be a cloak "to destroy constitutional rights"); see also, *Holtz v. Superior Court* (1970) 3 Cal.3d 296, 305 (the courts have narrowly circumscribed the types of emergency that will exempt the public entity from liability for violation of constitutional prohibitions); *Rose v. State of California* (1942) 19 Cal.3d 713, 730 (affirming reversal of trial court's grant of summary judgment due to question of fact whether "true emergency" existed to justify government conduct) and *Smith v. County of Los Angeles* (1989) 214 Cal.App.3d 266 (government's conduct constituted a "choice," not an emergency).

[37] See, e.g., Pub. Res. Code, Sec. 21060.3; Pub. Contract Code, Sec. 1102; and Gov. Code Sec. 8558.

[38] Gov. Code, Secs. 3500-3510.

[39] (1991) 1 Cal.App.4th 267.

[40] *Id.*, at 272.

[41] Gov. Code Sec. 3504.5(a).

[42] *Sonoma County Organization Etc. Employees v. County of Sonoma*, *supra*, 1 Cal.App.4th at 276.

[43] *Ibid.*

[44] *Ibid.*

[45] *Ibid.*; see generally *Rutherford v. State of California*, 188 Cal.App.3d 1267, 1280 (no emergency where rainfall-caused problem fell over a year before construction work at issue commenced).

[46] *Sonoma County Organization Etc. Employees v. County of Sonoma*, *supra*, 1 Cal.App.4th at 277-279.

[47] *Id.*, 1 Cal.App.4th at 278.

[48] *Id.*, 1 Cal.App.4th at 278-279, citing *County Sanitation Dist. No. 2 v. Los Angeles County Employees Assn.*, 38 Cal.3d 564, 586-586 (court may enjoin job action of public employees “whose absence from their duties would clearly endanger the public health and safety”).

[49] Gov. Code Secs. 8558-8668.

[50] Gov. Code Sec. 8634.

[51] In addition to the requirements set out above, the CESA describes a local emergency declaration that may be made under its provisions as being made with regard to a temporary condition. See, Gov. Code Sec. 8630. In addition, the CESA requires the local agency to review the basis for the emergency declaration every 14 days, but not less than every 21 days, and the governing body must terminate the local emergency at the earliest possible date. *Ibid.*

[52] (2008) 163 Cal.App.4th 802.

[53] *Id.* 163 Cal.App.4th at 813.

[54] *Id.* 163 Cal.App.4th at 818-820.

[55] See, 11 USC Secs. 901 et. seq.

[56] *Campanelli v. Allstate Life Ins. Co.* (9th Cir. 2003) 322 F.3d 1086, 1097, citing *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805.

[57] *Energy Reserves Group, Inc. v. Kansas Power and Light Co.* (1983) 459 U.S. 400, 410.

[58] *Id.*, 459 U.S. at 411.

[59] *Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 245.

[60] (1977) 431 U.S. 1.

[61] *Ibid.*

[62] *Id.*, 431 U.S. at 22-26 (emphasis supplied).

[63] *Id.* at 26.

[64] *Id.* at 31-32.

[65] *Allied Structural Steel Co. v. Spannaus*, *supra*, 438 U.S. at 242.

[66] (1979) 23 Cal.3d 296.

[67] *Id.*, at 309.

[68] (1978) 375 N.E.2d 384.

[69] *Sonoma County Organization of Public Employees v. County of Sonoma*, 23 Cal.3d at 312.

[70] *Ibid.* Justice Mosk's opinion noted that less than a month after the *Subway-Surface* case was decided, the same New York court found an unconstitutional impairment of contract where a statute requiring maternity care to be included in insurance policies could not be applied to policies previously issued which were renewable at the insured's option. *Id.*, 23 Cal.3d at 313, citing, *Health Ins. Assn. of America v. Harnett* (1978) 44 N.Y.2d 302, 376 N.E.2d 1280, 1287.

[71] (1989) 210 Cal.App.3d 1101.

[72] *Id.*, 210 Cal.App.3d at 1106.

[73] 147 Cal.App.3d 695, 704, fn. 3. Accord, *Bellus v. City of Eureka* (1968) 69 Cal.2d 336, 348-352.

[74] (9th Cir. 1999) 183 F.3d 1096.

[75] *Id.*, 183 F.3d at 1107. See also, *Massachusetts Community College v. Commonwealth* (1995) 420 Mass. 126, 137-139, 649 N.E.2d 708; *Carlstrom v. State* (1985) 103 Wash.2d 391 (furlough plan violated Contract Clause); and *Buffalo Teachers Federation v. Tobe* (2d Cir. 2006) 464 F.3d 362.

[76] As a result of recently negotiated agreements between statewide labor organizations and the Brown Administration, in part, the State of California pays less as a percentage of payroll today than it did in the early 1980s. <http://www.letstalkpensions/myths-and-facts>.

CPER Journal Online

The Rise of Public Sector Unionism

CPER is pleased to give readers a first look at an upcoming book by **Fred Glass**, communications director for the **California Federation of Teachers**. His book, *From Mission to Microchip: A History of the California Labor Movement*, from which this article is excerpted, will be published by Heyday Books. In upcoming issues, CPER will publish two more chapters that cover the history of public sector labor relations. Glass also teaches for the San Francisco City College Labor and Community Studies Department. And he wrote and directed *Golden Lands, Working Hands*, a 10-part video series on the history of California labor. Glass lives in Berkeley.



By Fred Glass

The 1960s saw the rise of a powerful movement for unionism by workers employed in public service jobs. It was fueled by the example of the civil rights movement, with its courageous moral stand and non-violent civil disobedience tactics. Like farm workers, public sector unionists received tangible support from strong private sector unions. But more than anything else, public sector unionism benefited from the prosperity of a society that, through a mature labor movement and voter support for government services, provided the people of the United States with the most equitable distribution of wealth it has achieved before or since.

The expansion of government programs at all levels in the 1960s was the result of a consensus in place since the New Deal that a strong economy depended on investing in a robust public sector to provide education, safety, health and security for the general population. It was a society that could afford to be organized, and in which living traditions of collective struggle helped make sure that it was.

The first post-World War II generation of teacher unionists benefited from these prevailing social attitudes and the government programs that implemented them. Veterans like Milton Spinner and Howard Mackey (World War II) and Raoul Teilhet (Korean War) went to college and became educators themselves, thanks to the G.I. Bill, which paid for their enrollment.

Social workers coming into the workforce a generation later received the same educational benefit, due to growth in state public universities receiving federal subsidies that kept tuition costs modest — or even, as in California, free. Like teachers, social workers occupied an employment niche somewhere between working class and professional. Also like teachers, however, that meant they received compensation similar to that of workers, despite training closer to that of professionals. The combination of a college-educated public workforce with compensation levels and workplace rights below unionized private sector standards was a key ingredient in public worker organizing.

Although the upsurge of unionism among public workers was the greatest of any group of workers since the 1930s, the backgrounds and aspirations of public employees were not homogeneous. Professionals and semi-professionals, such as teachers, social workers, librarians, and nurses, whose work required lengthy, specialized schooling, shared little at first glance with blue collar public employees like police and firefighters, trash collectors, school secretaries, and street maintenance and building construction workers. But what they all wanted — a greater say in how their jobs were run, better pay and benefits, and ultimately the right to bargain collectively to achieve these goals — produced enough glue to help overcome distinctions between “middle class” and “working class” occupations. These common themes propelled a movement.

Due to public employees’ service-oriented worldview and relatively high levels of post-secondary education — not to mention large concentrations of women in many job categories — many private sector union leaders thought that they were “unorganizable.” A considerable number of public workers agreed with that perspective. It was a stance reinforced by legal barriers and public opinion that frowned on

collective action by public employees. No less an authority than Franklin Delano Roosevelt had justified the exclusion of public workers from the National Labor Relations Act because of “the special relationship and obligations of public servants to the public itself and to the government.”

Employee associations provided some avenues of representation for public workers without collective bargaining and affiliation with organized labor. The leadership of these associations typically argued, as did management, that unionism was inappropriate for the public sector. Their arguments often resonated with members for whom unions symbolized the working class world their college education was supposed to help them escape.

Nonetheless, the tide ran toward union representation. Private sector union density in the non-farm workforce topped 35 percent. California workers enjoyed some of the highest pay scales in the country, and public employees — especially those whose family members and neighbors were among the organized workforce — couldn’t help but notice. As Southern California union leader Elinor Glenn observed:

You couldn’t convince a nurse or a teacher that she should get less than a carpenter. But the carpenter had this powerful collective bargaining tool, he was recognized, he had a contract. He deserved it, and they deserved it.

Public Worker Unions

Public employee union organizing stretched back to the 19th century. But those unions, unsupported by national or state collective bargaining laws, tended to represent workers in one local agency, such as the Los Angeles Department of Water and Power, where the International Brotherhood of Electrical Workers Local 18 had been in place since before 1900. DWP workers had even gone on strike in 1944. The ability of these unions to advocate for their members depended on firm relationships with their agency administrators and local elected officials. This meant that collective bargaining remained inherently unstable.

Public sector workers had made several sustained efforts to form unions between World War I and World War II. Returning veterans, reentering the workforce from the battlefield, brought with them a no-nonsense attitude that said, “We’ve sacrificed for our country. We’re not going to stand for anyone messing with our rights, and we deserve to be treated well and paid well for the work we do.”

But a series of public employee strikes in 1919 created a backlash against unionization. In particular, a well-publicized walkout of Boston police against low pay and unhealthy conditions, which unleashed a brief crime wave, gave anti-labor politicians the opportunity to pass laws forbidding public sector organizing and collective bargaining across the country. These laws had a chilling effect on workers, and on the American Federation of Labor, which, for the most part, ignored public sector workers for the next 15 years.

In 1935, the federation granted a charter to the American Federation of State, County, and Municipal Employees (AFSCME). The Congress of Industrial Organizations (CIO) chartered two public employee unions in 1937, the United Federal Workers of America, and the State, County and Municipal Workers of America. These small left-led unions relied on direct-action mobilization and connections with larger CIO unions to advocate for their members, but achieved only scattered successes.

Following World War II, public workers attempted to organize again, and many participated in the strike wave of 1945-46. Protesting low pay, teachers in St. Paul, Minnesota, won substantial improvements after they walked off their jobs. Among the half-dozen citywide general strikes in 1946 was one centering on public employees in Rochester, New York, who had invited AFSCME to organize them.

The CIO, hoping to take advantage of the post-war militant mood, merged its two public employee unions into the United Public Workers of America in 1946. At its peak, UPWA claimed a hundred thousand members. Los Angeles was one stronghold of this union, which organized large numbers of minority blue collar workers in public hospitals, sanitation, and the post office. But the CIO expelled the UPWA in 1950, and helped to destroy it with raiding and “red baiting.” After the national union turned in its charter in 1952, a number of the UPWA’s locals survived for a time as stand-alone unions, but more often the remnants were absorbed by other unions, and occasionally by public employee associations.

Employee Associations

The associations did not collectively bargain, and fell along a range of attitudes toward unionism from indifferent to fiercely opposed. But they gave members an organizational structure for pressuring state and local governments on their behalf in other ways. Three of the oldest and largest of the statewide public employee associations were the California Teachers Association, which stretched through predecessor groups back to 1863; the California School Employees Association, founded in 1926, to represent the interests of non-teaching or classified school workers; and the California State Employees Association, established in 1931. The associations advocated for their members around personnel policies and retirement issues, and provided a number of low-cost services, including group insurance, legal representation, credit unions, and discount purchases.

The California School Employees Association gave its members clout in legislative deliberations on the Education Code, and persuaded the Public Employment Retirement System to accept classified school employees. CSEA worked through its local school district chapters to encourage merit-based personnel policies and worker representation on civil service-like personnel commissions to determine job classifications. The CTA performed similar services for teachers (enrolled in the separate State Teachers' Retirement System). The State Employees Association brought together diverse groups of state workers for legislative advocacy. Other associations, practicing comparable activities on a local scale, existed for county and municipal employees.

A Growing Sentiment for Unionization

By the 1960s, many public employee associations harbored a growing sentiment for unionization. The people who shared these feelings were greatly encouraged by President John F. Kennedy's signature in 1962 on Executive Order 10988, establishing the right of federal workers to engage in collective bargaining.

In 1959, the firefighters were the first group of California public employees to gain a law, officially allowing them to organize, through the efforts of their union, the California Federation of Fire Fighters, affiliated with the International Association of Fire Fighters. But the law was silent on collective bargaining. And, in line with national IAFF policy, the Fire Fighters Act prohibited strikes.

Minimal organizing and representation rights came with the George Brown Act in 1961, after pro-union forces within the California State Employees Association pushed for the law. But the Brown Act did not mandate elections to represent units of workers, nor collective bargaining; it was not a "little NLRA," as some public union militants hoped to see.

George Brown had run for the Assembly after working as a civil engineer in the Los Angeles Department of Water and Power, where he had been a member of one of the city's oldest employee organizations, the Engineers and Architects Association, and served for a time as its business agent. IBEW Local 18's leadership supported his candidacy on one condition: he carry a bill enabling organizing and collective bargaining for public employees. Not all unions were on board this bill. In fact, what kept the Brown Act from creating a California public sector NLRA was not conservative legislative opposition, but fierce lobbying from the Building Services Employees International Union, AFL (later SEIU). George Hardy and other BSEU leaders were not opposed to public employee collective bargaining. They just believed that they were not yet strong enough to win representation elections against the employee associations.

The Brown Act did signal shifts, both in legislators' willingness to consider broadened rights for public employees and among the most progressive public employees toward unions. In some cases, the existing associations were resistant to change, and their members formed new organizations to challenge them. In others the pro-union workers were able to take over leadership and begin to transform the old associations into unions from within. These various paths eventually led public employees through direct action and unionization to the creation of collective bargaining laws.

Social Workers Out Front

In the wake of public welfare amendments to the Social Security Act signed two years before by President Kennedy, thousands of social workers — a large number of whom were newly minted college graduates — were hired by social service agencies throughout the country. Together with this massive influx of federal funding, allocated through the state social welfare department to the counties, there were new standards for hiring (college degrees), and a mandate to provide — not deny — real services to help the poorest working people. The intent was that welfare recipients should not simply scrape by economically,

but be enabled to get jobs through training. An enormous jump in paperwork accompanied these changes for the new social work hires.

In August 1963, a dozen social workers in the Los Angeles County Department of Charities formed a "Social Workers Action Committee." They were members of Building Service Employees International Union Local 434, a county employee union that included some social workers, but mostly various other classes of workers employed by Los Angeles County hospitals.

The Social Workers Action Committee's goals included a pay increase and reduction in caseloads, paperwork, and worker-to-supervisor ratios. The Committee also had a broader vision: work together with welfare rights groups, which were emerging from the civil rights movement, to advocate for reform of public assistance agencies. They decided the best way to accomplish these things was to form a separate social workers union. They approached Elinor Glenn, now the general manager of BSEU Local 434.

The former UPW leader supported organizing, and appreciated audacity. David Novogrodsky, who worked with Glenn as a BSEU researcher in Los Angeles in the early 1960s, recalled, "She had a reputation as being the 'shit house organizer' because she would hold her meetings in the women's bathroom, where the management people, who were all men, just didn't feel [they] could walk through that door." Glenn was sympathetic to the social workers' desires, but pragmatically wanted some accountability too. So she issued a challenge to the group: organize 500 workers and she would grant them a charter for their own union local.

There were precedents for this request. Around 1960, Glenn had convinced George Hardy to issue a separate charter for Los Angeles County workers — Local 434, which grew to 7,000 members, including nurses, social workers, janitors, and others. She parted paths at that time with Sidney Moore, who stayed with the sanitation workers in Local 347 as it became an all city workers union.

Glenn procured the promised charter in August of 1964 for BSEU Local 535, but not without some extended persuasion by the social workers. "She didn't really want to let the social workers go," explained Novogrodsky. So he and an AFL-CIO organizer, Ed Lingo, came up with a plan. At a regional labor education conference attended by Glenn and other BSEU leaders, Novogrodsky had the SWAC activists, including David Crippen, very visibly attach themselves to the AFSCME district director. "Wherever Sam would go, there would be David." The message was clear: if BSEU didn't give the social workers their own union local, they would bolt to AFSCME. Said Novogrodsky, "Within a couple days we heard from Elinor that Hardy was going to issue a charter for Social Workers Union Local 535."

SWAC was bolstered by a group that came over from the Los Angeles County Employees Association. Like SWAC, the "Social Workers Standards Committee" was a small island of social workers in a sea of other county employees; it pre-existed SWAC. Members were mostly young, and their ideas about how to achieve their professional goals were evolving rapidly. Local 535's activist arguments made sense to them. Novogrodsky, who had gone to work for AFSCME briefly at the time, was nonetheless still in close touch with SWAC, providing advice. At this point, he said, "We held up the charter that we had worked so hard to get until we could get half the names from the Social Workers Standards Committee and half from the Social Workers Action Committee. We made sure it was a merger rather than a takeover."

Inside a year, the 535 membership reached one-thousand. Novogrodsky was hired as executive director and demanded, in early 1966, that the county bargain with them: "We wanted bona fide collective bargaining, like they had in the automobile industry." They asked for the same raise, \$100, for all county social workers. In addition, they told the county representatives that the Bureau of Public Assistance should be "liberated" from the Department of Charities. Initially the county representatives agreed to a 10 percent increase, and to bargain, according to a letter from the superintendent of charities, on "everything from caseloads to coffee breaks." But at the end of May, the county backed away from the agreement, precipitating a strike.

It lasted 17 days, and established a starting salary of \$600 a month. A week later, the county authorities once more reneged on the agreement, and attempted to punish strike leaders and activists. The workers went back out, this time until July 4. The local's attorneys filed suit and prevailed, reinstating fired strike leaders and forcing the county to honor its agreement. Within a year and a half, the County Department of Charities had been reorganized, with stand-alone departments for county hospitals and public welfare.

Local 535's activists were busy with their own activities, but found time to lend their occupational expertise to fellow California workers in need. Soon after the Delano grape strike began, the Kern County welfare department denied benefits to striking farm worker families. Local 535 members, led by Pearl Hazelwood, started a support committee. It traveled every couple weeks or so to Delano, where its members steered farm workers through the claims system, a unique form of solidarity only the social workers could offer.

The young union, expanding outside Los Angeles, helped Santa Barbara workers strike for higher salaries and a grievance procedure that same year. The following February, Sacramento social workers struck to gain collective bargaining rights, and stayed out for the longest public sector strike in United States history: 280 days. They were led by Bob Anderson, a Compton social worker who left his agency office during the Santa Barbara strike to help and never went back.

In late-spring 1967, in the midst of the Sacramento strike, social worker union delegates from across California met in the state capital. They were greeted at the airport by strikers and brought to the Sacramento Labor Temple. Here, at a three-day meeting, the social workers established SEIU 535 as a statewide local, and organized themselves into a joint council together with fast-growing SEIU locals representing other public employees.

Marty Morgenstern was a guest speaker at the convention from a new social workers alliance, and a member of a New York social workers union that had been out on strike in 1965. He made clear the determination of the social workers' union movement to fight for the rights of welfare clients alongside the rights of social workers.

From coast to coast, the welfare system stinks. The agencies have developed into bureaucracies that only distribute paper; they don't give a damn for the people, but we do. We, unlike the agencies, aren't wedded to the paper work, and we want to work with the people, to be part of the change that has to come.

Morgenstern was the only staff person of the National Federation of Social Service Employees, which included both militant social worker unions and some local associations. It included his own New York Social Service Employees Union, as well as one in Baltimore headed by Kim Moody, Local 535 (the only AFL-CIO affiliate), and others in Chicago and elsewhere. Morgenstern later became president of the New York union, which affiliated with AFSCME.

The Sacramento strike was difficult (more than 200 picketers were arrested, and 183 lost their jobs) and unsuccessful, but it drew sharp attention to the need for a collective bargaining law for public employees. It also helped convince workers in other Northern California counties that this was a union willing to fight for them, and they joined by the hundreds: sometimes as individuals, and at other times affiliating entire local employee associations. As Novogrodsky noted, "It shook everything up. Other public workers looked at what happened and said, 'If these social workers could do it, so could we.'" Fired Sacramento strikers scattered around the state and went to work for other local social service agencies. Many of these helped organize their new workplaces.

Even with the loss of such a large number of leaders, the Sacramento social workers voted for representation by Local 535 when challenged by AFSCME. Local 535 soon gained chapters in Santa Clara, Alameda, and elsewhere. SEIU picked up other units of Sacramento county workers, although most opted for AFSCME. This rivalry, and worker militancy, became the pattern across the state, as the two unions vied for the allegiance of unaffiliated local associations of public workers.

The relationship between the unions could also be supportive. Twenty-seven-year-old Tom Rankin found that out when he became a social worker in Contra Costa County, across the bay and north from San Francisco. Rankin had just earned his masters degree in history at U.C. Berkeley. In school, he helped organize a graduate student union and was active in the anti-Viet Nam War movement, getting arrested in draft protests in Oakland. After graduation in 1967, he fell into county employment as a social worker; the county's social services department needed the workers, and Rankin needed work. "It was sort of a professional job, and paid okay; it was actually more appealing as a social movement," Rankin recalled. He hadn't been working long before other Contra Costa County workers, affiliated with AFSCME, struck for higher wages.

The secretary treasurer of AFSCME Local 1675, Henry Clarke, asked for and received strike sanction from the Contra Costa Central Labor Council. Rankin's 535 chapter, with about 200 members, discussed

whether to honor the picket lines: “We had our own demands, too, for a salary increase,” Rankin remembered years later. But their decision to walk out mostly revolved around support for AFSCME. According to Rankin, “Solidarity was assumed; it took no struggle or debate to convince 535 members to be part of the strike.”

The sense of social movement unionism that motivated the social workers’ actions during the AFSCME strike extended into their work lives and their interactions with their clients. After work, Rankin and others would help organize welfare rights demonstrations or join United Farm Worker pickets in front of a Safeway grocery store. Following the strike, his coworkers elected Rankin president of their Local 535 chapter. Rankin, however, soon ended his brief career as a social worker, going on to work as an organizer and advocate for various public employee unions before hiring on as research staff at the California Labor Federation. He later served as Federation president.

Legal at Last

In 1968, the California legislature passed the Meyers-Milias-Brown Act, formally legalizing collective bargaining for public workers. Much as the National Labor Relations Act had been enacted in 1935 in response to powerful worker movements, the MMBA put into place rules to channel the militant activism of public workers within legal boundaries. It was almost the “little NLRA” public employee unionists had been seeking for years.

However, the MMBA had limitations. It established local bargaining authority, but not statewide units; it left the details to local determination, and specifically excluded public education employees. It also had no enforcement mechanisms, leaving problems to be sorted out with raw power or by the courts. But it did say clearly that public employers had to meet and confer “in good faith,” and agreements had to be reduced to writing or contracts. As such, according to David Novogrodsky, “It was a license to organize.”

The MMBA forced the associations to understand there now was no stopping the union train. They had to win elections and to bargain collectively. As Novogrodsky put it, “The things they had to do were the things unions had to do.” The law also helped the already existing unions — especially AFSCME and SEIU — to believe they could win elections against the associations. And they won a lot of them.

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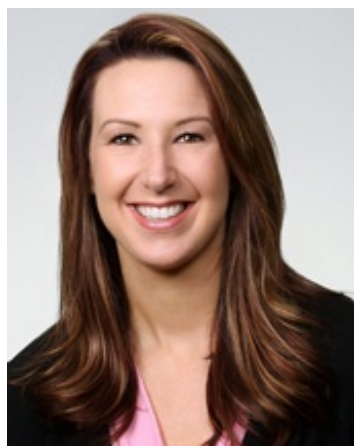
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CPER Journal Online

No Negligence Cause of Action Against an Employer for Inadvertent Disclosure of Employees' Private Information....But Other Causes of Action May Exist

By Frances Rogers, Liebert Cassidy Whitmore



Can a public employer be held liable for negligence because the employer accidentally disclosed the names, addresses, telephone numbers, marital status, and Social Security numbers of 1,750 former employees? An Illinois appellate court does not think so in what may be the first published decision to hold there exists no common-law negligence claim against an employer for disclosure of such personal information.^[1] However, California courts may entertain other legal theories of liability.

The Chicago public schools, governed by the Board of Education of the City of Chicago, retained a printing company to print, package, and mail a COBRA open enrollment list to 1,750 former employees to inform them that, as COBRA participants, they could change their insured benefit plans. The package, however, ended up containing the names of *all* 1,750 former employees, as well as each of their addresses, Social Security numbers, marital status, medical and dental insurers, and health insurance plan information. When the board learned of the disclosure, it sent a letter to the former employees asking them to return the COBRA list or destroy it, and offered them one year of free credit protection insurance.

The former employees filed individual and class action lawsuits alleging various state and federal causes of action including: (1) violation of the common-law right to privacy; (2) negligent infliction of emotional distress; (3) negligence; (4) breach of fiduciary duty; and (5) violation of their federal constitutional rights. The trial court granted, and the Illinois appellate court affirmed, the dismissal of plaintiffs' claims against both the board and the printing company.

The essential elements of common-law causes of action for negligence and negligent infliction of emotional distress are: the plaintiff must establish that the defendant owed a *duty* to the plaintiff; the defendant breached that duty; the plaintiff was damaged; and the damage was proximately caused by the defendant's breach. In some cases, a violation of a law or statute designed to protect human life and property may be used by a plaintiff to prove the essential elements of a negligence cause of action.

The court in this case examined the Health Insurance Portability and Accountability Act.^[2] HIPAA is a series of statutes that restrict dissemination of individually identifiable personal information of patients. Covered entities include insurers, medical providers, and in some instances, employers administering their own health plans. There is, however, no private cause of action for violation of HIPAA, meaning an employee cannot file a suit seeking private damages.

In this case, however, the plaintiffs argued that the board violated HIPAA and, therefore, breached a duty owed to plaintiffs for purposes of their negligence cause of action. The court disagreed, finding that HIPAA excludes from its protections "employment records held by a covered entity in its role as employer."^[3] The court held that names, address, telephone numbers, Social Security numbers, and so forth held (and disclosed) by the board were not within the protection of HIPAA. The court further declined to recognize a new common-law duty of the board to safeguard the plaintiffs' personal information simply by virtue of the information's sensitive nature. For similar reasons, the court rejected a cause of action for breach of fiduciary duty.

The court next examined plaintiffs' constitutional claims. To establish a public entity's liability for violation of a right guaranteed by the U.S. Constitution, the plaintiffs had to allege that they were deprived of a constitutionally protected right and that deprivation was caused by a municipal policy, custom, or practice. The court, with scant analysis, held that plaintiffs could not sustain a cause of action for violation of a right

The court also addressed the plaintiffs' cause of action for invasion of privacy based on a theory of intrusion. The theory requires a showing of unauthorized intrusion into seclusion that is highly offensive to a reasonable person on a private matter, and which causes anguish and suffering to the plaintiff. The court declined to find a cause of action here because there was a lack of authority defining Social Security numbers as "private," and because things such as names and date of birth are generally matters of public record.

What is more curious are those claims the court did not address, including the plaintiffs' cause of action for violation of their Fourth Amendment rights (which the plaintiffs apparently abandoned) and their claim for violation of the Illinois constitutional right to privacy, which was dismissed by the trial court but not appealed by the plaintiffs.

What does this mean to California public employers? First, California Government Code Sec. 815.6 provides that, if a public entity is under a mandatory duty imposed by statute or regulation designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury caused by its failure to discharge the duty unless it is shown it exercised reasonable diligence. If a plaintiff can establish that his or her current or former employer has a statutory duty not to disclose his or her name, address, telephone number, date of birth, or even Social Security number, there may be a negligence cause of action for a public employer unless it is shown the employer exercised reasonable diligence. HIPAA is probably not that statute, as the Illinois court decided in this case. However, there may be other California or federal statutes that could be interpreted as imposing that duty.

Second, a California Court of Appeal recently held that names, addresses, and telephone numbers of employees held by an employer *are protected* by the California constitutional right to privacy because this necessarily threatens the sanctity of the home and right to be free of intrusion. That decision is now up on appeal to the California Supreme Court, and cannot be relied on at this time.^[4] Nonetheless, there are also other California decisions that contemplate a state right to privacy in personally identifiable information.^[5]

It may be unlikely a negligence cause of action will be sustained against a public employer who discloses personal information about an employee. However, as the digital age advances and brings with it a flurry of identity theft, legal theories will rapidly evolve seeking to impose liability on employers who intentionally or inadvertently release personal information of current or former employees that may expose the employee to harm.

For this reason, California public employers should be wary of, and protect against, inadvertent disclosure of personal information of current and former employees to avoid being the defendant in the next lawsuit that tests the bounds of these developing legal theories.

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[1] *Cooney v. Chicago Public Schools* (2010) 407 Ill.App.3d 358, 943 N.E.2d 23.

[2] 42 USC Sec. 1320d-6.

[3] *Cooney v. Chicago Public Schools* (2010) *supra*, at 361, citing 45 CFR Sec. 160.103.

[4] *County of Los Angeles v. Los Angeles County Employee Relations Commission* (2011) 192 Cal.App.4th 1409, cert. granted Jun. 15, 2011.

[5] See *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 26 Cal.Rptr.2d 834, 106 CPER 61; *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 53 Cal.Rptr.3d 513; *Planned Parenthood Golden Gate v. Superior Court* (2000) 83 Cal.App.4th 347, 99 Cal.Rptr.2d 627.

CPER Journal Online

Due Process Requires Good Cause Exception for Untimely Termination Appeals

Even if a public employer's process for challenging discharge contains no exception for late-filed claims, due process requires that a good cause exception be read into the procedures, the Court of Appeal ruled in *Hall-Villareal v. City of Fresno*. The court also ruled that the city could not deny a post-termination hearing on the grounds that the terminated employee had filed an application for retirement benefits.

In Search of a Representative

Joy Hall-Villareal was given a notice of proposed termination from her position as clerk with the Fresno Police Department in February 2009. After her Skelly hearing, she was served an order of termination on April 6, 2009. Two days later, she submitted an application for retirement benefits.

Hall-Villareal contacted her union to request representation in an appeal of her termination. When no one responded for several days, she made an appointment with an attorney for April 21. Unfortunately, the attorney cancelled the meeting and rescheduled it for the next day. On April 22, Hall-Villareal filed her appeal, but it was one day late.

The city's civil service board rejected her appeal as untimely. Hall-Villareal filed a petition asking the court to order the city and its civil service board to hold a hearing. The city argued that the civil service board had no jurisdiction over her case because she already had filed for retirement benefits and because she had filed an untimely appeal. The trial court ruled in favor of Hall-Villareal, and the city appealed.

Hearing Required Despite Retirement

The court rejected the city's contention that Hall-Villareal's retirement divested the civil service board of jurisdiction to hear the appeal. The court found no support in either the city's civil service laws or judicial precedent.

The court acknowledged that the civil service board created by a charter city like Fresno has only the jurisdiction granted to it by the charter. The Fresno charter allows a discharged employee "reasonable time" to respond to charges and ask for a hearing. The civil service board's procedures establish a period of 15 days for an employee who is served with an order of removal to demand a hearing. The court reasoned that Hall-Villareal had the right to demand a hearing because she had been served with an order of removal. It found that the charter gave the board the power and duty to decide the appeal.

The city pointed out that courts in prior cases had found a civil service board lacks jurisdiction once an employee retires. It cited *County of Los Angeles Dept. of Health Services v. Civil Service Com. of County of Los Angeles* (2009) 180 Cal.App.4th 391, 2009 Cal.App. LEXIS 2033, 198 CPER 28, and *Zuniga v. Los Angeles County Civil Service Com.* (2006) 137 Cal.App.4th 1255, 2006 Cal.App. LEXIS 410. In *Zuniga*, the employee had been suspended, but retired before the civil service hearing. The hearing occurred, and the suspension was upheld. The employee asked the court to overturn the commission's decision. The Court of Appeal decided that the employee's petition failed because the commission had no jurisdiction to hear the matter after the employee retired.

In *County of Los Angeles* the employee had been discharged and had begun her appeal hearing before she filed her retirement papers. When the hearing officer later found in her favor, the county asked the court to vacate the decision because she already had retired. Despite the fact that the county employee had been discharged, rather than suspended, that court read *Zuniga* to hold that once an employee has retired, her "future status as an employee by definition is no longer at issue."

While the *County of Los Angeles* holding was not based on the specifics of the Los Angeles civil service rules, the *Hall-Villareal* court distinguished the case on that basis. Finding that the City of Fresno's rules allow an employee to return to employment after retirement, it concluded that Hall-Villareal's retirement did not divest the civil service board of jurisdiction to hear her appeal. It also summarily rejected the city's contention that once she was terminated, she was no longer an employee with appeal rights.

The city did not contend that Hall-Villareal did not have good cause for filing her appeal one day late. Instead, it argued that its civil service procedures allowed no exceptions to the filing deadline for appeals. The court pointed out that although the board's procedures did not provide for late filing, the city charter allows a discharged employee "a reasonable time" to file an appeal.

The court's primary ruling, however, was that due process required a good cause exception to be read into the procedures because Hall-Villareal's fundamental, vested right to continued employment was at issue. It cited a long line of cases, including *Civil Service Com. v. Velez* (1993) 14 Cal.App.4th 115, 1993 Cal.App. LEXIS 261, 99 CPER 20. It rejected the city's attempts to distinguish the cases on the basis of statutory language.

The city alternatively contended that Hall-Villareal could not claim good cause for late filing because she already had retired. In response, the court reiterated its finding that retiring did not cut off Hall-Villareal's appeal rights.

Because it did not have the trial court's statement of the reasoning for its decision, the appellate court assumed the lower court had found good cause for the late filing. It found substantial evidence that Hall-Villareal's search for a representative, the short delay, and the lack of prejudice to the city supported a finding of good cause for the late appeal.

The court rejected Hall-Villareal's request for attorney's fees, as it did not find the city's reliance on *Zuniga* and *County of Los Angeles* was arbitrary or in bad faith. (*Hall-Villareal v. City of Fresno* [2011] 196 Cal.App.4th 24, 2011 Cal.App. LEXIS 679.)

CPER Journal Online

Disciplinary Procedures of FBOR Apply to Charter City; PERB Has Initial Exclusive Jurisdiction Over Refusal to Meet and Confer

A charter city's claim that it need not comply with procedures established by the Firefighters Procedural Bill of Rights Act for appeals of discipline under the "home rule" doctrine was rejected in *International Association of Firefighters Local Union 230 v. City of San Jose*. The Court of Appeal found the union's motion to compel arbitration of the city's refusal to bargain over the procedures was proper, since the Public Employment Relations Board has initial exclusive jurisdiction over arguable unfair labor practices.

New Law

The FBOR became effective in 2008. Among other provisions, it established that employees' appeals of disciplinary actions must be conducted "in conformance with rules and procedures adopted by the employing department or...agency" that comply with the Administrative Procedure Act, including a requirement that appeals be heard by an administrative law judge of the state Office of Administrative Hearings.

Article 44 of the memorandum of agreement between IAFF and the city required the parties "shall meet and confer or negotiate" on any article or subsection affected by a state or federal law that "impose[s] additional obligations" on the city. The city refused to meet based on its belief that implementation of the law was not subject to negotiation.

The union filed a petition with the trial court to compel arbitration of the dispute. It contended the new law presented a need to develop new procedures that would comply with the act. The union asserted that the San Jose City Charter prescribed arbitration as the method of resolving the dispute concerning whether the city was required to meet and confer over disciplinary procedures under Article 44. Section 1111 of the charter stated that disputes "pertaining to wages, hours, or terms and conditions of employment which remain unresolved after good faith negotiations...shall be submitted to a three-member Board of Arbitrators upon declaration of impasse."

The city countered that the FBOR could not preempt its administrative appeal procedures because it was a charter city. It also contended that only PERB had jurisdiction to determine whether it was required to meet and confer over the matter. Alternatively, the city claimed the dispute was not covered by the MOA's arbitration procedure because it involved the threshold legal issue of whether the FBOR applied to the city. It sought a judgment that the city could not legally be compelled to implement provisions of the FBOR.

The trial court denied the city's motion for judgment on the legal issue. It also denied the union's petition to compel arbitration on the grounds that PERB had exclusive jurisdiction of the dispute, that the petition was moot, and that a prerequisite for arbitration — that the parties had declared impasse — had not been met. It also awarded attorney's fees and costs to the city. Both parties appealed.

Not Moot

The appellate court rejected the city's contention that the case was moot because the MOA had expired and the parties were bargaining a new contract. The city argued that, since the terms of a new contract were open, it was unnecessary to meet and confer over laws that affected the expired MOA.

The court, however, sided with the union because the parties to a labor contract are required to continue the status quo under the terms and conditions of an expired agreement while they are negotiating a new one. Therefore, the question whether FBOR imposed additional obligations on the city remained, and the dispute concerning whether the city was obligated to negotiate regarding the FBOR was not moot.

FBOR Prevails

The home rule doctrine emanates from the California Constitution, which empowers charter cities to make and enforce rules regarding municipal affairs, subject to the constraints of their charters. The court emphasized, however, that an exception to the doctrine exists for general laws that address a statewide concern.

The city explained that the FBOR would force it to change its disciplinary appeals process and to participate in evidentiary hearings before ALJs for all levels of discipline, including informal reprimands, even when such burdensome procedures are not required by due process. Under the city's process, an appeal of a written reprimand ended with review by the city manager. The city contended that being required to rewrite its rules would usurp its authority to control its disciplinary procedures.

The union countered that the city would not lose its power over firefighter discipline by changing the disciplinary appeals process. It pointed to court decisions holding that laws affecting procedures do not impinge on city authority and do not implicate the home rule doctrine.

The city disagreed that the FBOR provisions were merely procedural requirements. It contended that ALJ decisions would become final without city ratification, impinging on the city's power over firefighter discipline. Even the 2010 amendment to the FBOR that allows the parties to agree to submit disciplinary appeals to arbitrators does not make the provision constitutional as applied to charter cities because it still usurps local authority, the city argued.

The court found the disciplinary procedures provisions of the FBOR applied to the city, relying on *Baggett v. Gates* (1982) 32 Cal.3d 128, 1982 Cal. LEXIS 215, 55 CPER 23, and *County of Riverside v. Superior Court* (2003) 30 Cal. 4th 278, 2003 Cal. LEXIS 2426, 160 CPER 19.

In *Baggett*, the Supreme Court held that a provision of the Public Safety Officers Procedural Bill of Rights Act requiring an administrative appeal process for employees who are reassigned for disciplinary reasons was applicable to the City of Los Angeles even though it was a charter city. It found that the matters addressed in the PSOPBORA were matters of statewide concern. The court stated, "General laws seeking to assure fair labor practices may be applied to police departments,...even though they impinge upon local control to a limited extent."

In *County of Riverside*, the Supreme Court ruled unconstitutional a statute imposing interest arbitration on local agencies when they reached impasse in bargaining with public safety employees. Because the law would allow an arbitrator, rather than the county, to set compensation, it violated the home rule doctrine and improperly delegated power to a private body. The court distinguished *Baggett* because the PSOPBORA affected procedures only, not the substance of a labor decision.

The *IAFF* court had no trouble finding that laws affecting labor relations with firefighters are a matter of statewide concern, but that did not end its analysis. It examined the challenged provision of the FBOR to ascertain whether it was a procedural regulation or a substantive one.

The statute uses the term "rules and procedures," as did the legislative analyses at the time of enactment. When the provision was amended in 2010 to allow the parties to agree to arbitration of disciplinary challenges as an alternative to ALJ hearings, the legislature referred to the law as one governing procedures for appeals and described its purpose as protecting firefighters' due process rights. In light of this language and the absence of any standards for discipline in the law, the court concluded that the legislature intended to impose only procedural requirements on the disciplinary appeals.

The court rejected the city's contention that the statute impinges on local control. It declared, "[T]he statute does not control the standards, terms, or conditions for firefighter discipline and therefore does not violate the home rule provisions of the California Constitution." The court also dismissed the argument that the FBOR is not narrowly tailored to minimize impingement on municipal interests because it accords more rights to firefighters than the PSOPBORA grants to police officers. It bolstered its decision by relying on the Supreme Court's instruction in *Baggett* that doubts about whether legislation on matters of statewide concern intrude too much into municipal affairs "must be resolved in favor of the legislative authority of the state."

PERB Has Jurisdiction

The union contended that the court had jurisdiction to compel arbitration because Labor Code Sec. 1126 makes a collective bargaining agreement enforceable in the courts. It asserted the dispute concerned a question regarding the interpretation of the MOA that it described as "whether under...Article 44 of the MOA the parties must bargain over the implementation of the FBOR." It contended that this question should be decided in arbitration under Sec. 1111 of the city charter. Alternatively, it asserted that the courts and PERB had concurrent jurisdiction over the dispute with the city.

The court noted that Government Code Sec. 3509 gives PERB exclusive jurisdiction over the “initial determination” of unfair labor practices under the Meyers-Milias-Brown Act. The court looked at the underlying conduct that the union was challenging. It concluded that the root conduct was the city’s refusal to meet and confer, which arguably constituted an unfair labor practice under the MMBA. Therefore, PERB had exclusive initial jurisdiction over the dispute, and the motion to compel arbitration was properly denied.

The court also rejected the union’s contention that the courts had concurrent jurisdiction with PERB. It reviewed the analysis of the court in *Fresno Unified School Dist. v. National Education Assn.* (1981) 125 Cal.App.3d 259, 1981 Cal.App. LEXIS 2316, 52 CPER 39, where a school district had sued the teachers union after a work stoppage in violation of a no-strike provision in the collective bargaining agreement. The district alleged a breach of contract enforceable under Labor Code Sec. 1126. The appellate court found the Labor Code and the Educational Employment Relations Act conflicted, and chose to accommodate both statutes by staying the contract claim in the trial court while PERB exercised its jurisdiction over the unfair practice charge. The *IAFF* court rejected the union’s complaint that the *Fresno* decision was at odds with federal labor law, since the MMBA is not similar to federal labor laws on the issue of jurisdiction.

Even assuming that it had concurrent jurisdiction over the dispute, the court found other reasons not to exercise its jurisdiction. The *IAFF* had failed to exhaust its administrative remedies by going to PERB.

The union attempted to excuse this failure by asserting PERB had no power to order an interest arbitration. But the court found that the dispute did not involve interest arbitration. Rather than a dispute over what the terms of a new agreement should be, the question was whether the city’s refusal to meet and confer was a violation of the existing agreement. It found that arbitration under Sec. 1111 had not been properly invoked, since impasse had not been declared.

Finally, the court explained that concurrent jurisdiction was not justified in this case because PERB’s decision on the city’s obligation to meet and confer would probably leave no issues for a court to decide. If PERB decides the city had a duty to meet and confer, the parties would begin bargaining. If the board decides that the city was not required to bargain, the city could not be compelled to arbitrate whether it violated the contract by not negotiating.

The court upheld the trial court’s order denying the petition to compel. It also upheld the order awarding attorney’s fees to the city. (*International Association of Firefighters Local Union 230 v. City of San Jose* [2011] 195 Cal.App.4th 1179, 2011 Cal.App. LEXIS 635.)

CPER Journal Online

Around the State: A Strike, an Injunction, and Dueling Pension Measures

Workers Strike City of Lincoln Over Health Benefits

Garbage workers, mechanics, and maintenance workers represented by International Union of Operating Engineers Local 39 went on strike on September 14 after the Lincoln City Council voted to implement the city's last, best, and final offer. Bargaining began in April. In late June, after 10 negotiation sessions, the parties reached a tentative agreement making 54 changes to the contract. However, Local 39 members voted it down.

On August 1, IUOE presented its proposal to the city, which accepted it. But the membership voted 27 to 3 not to ratify the second tentative agreement. The city declared impasse and made its last, best, and final offer on August 10. On September 13, the council voted to implement the offer, and the union gave notice that it was going on strike the next morning.

The major compensation changes involve a 10 percent employee contribution to healthcare benefits. The city previously paid the full premium for Kaiser coverage. Employees hired after October 2, 2011, will be eligible for a 2 percent benefit formula at age 60 and pay 7 percent of salary toward their pensions. Current employees enjoy a 2.7 percent at 55 formula and contribute 8 percent of their pay toward retirement. Under the LBFO, the city may also freeze merit increases and eliminate vacation leave cash-outs except for those leaving city employment or who have reached the maximum leave balance. The city also strengthened the management rights clause.

Once the strike began, the city was forced to hire contract workers to collect garbage. The city's spokesperson admitted to the *Sacramento Bee* that it was paying them \$48 an hour, which is about 25 percent higher than a maintenance worker makes after five years of city employment, even with benefits included.

City of Costa Mesa Enjoined From Contracting Out Half Its Positions

The Costa Mesa City Council set off a nasty battle last March by sending notices to over 200 of its 472 employees that they would be laid off effective September 17. The council decided it could save money on its pensions by contracting out services. The city's \$15 million payment to the California Public Employees Retirement System is expected to grow to \$25 million within five years.

Costa Mesa employees represented by the Orange County Employees Association responded first by offering to reopen the contract to deal with fiscal conditions — as soon as the city rescinded the layoffs. The city has not taken up the invitation.

In May, OCEA filed a request for injunctive relief against the city. It argued that Government Code Secs. 37103 and 53060 prevent general-law cities from contracting out to private entities any services that are not special services. "Special services" include financial, accounting, engineering, legal, and administrative services that require special training and experience. Contracting of payroll services is also permitted.

In July, the court issued a preliminary injunction that barred the city from contracting out to any entity other than a local government agency "services currently performed by City of Costa Mesa employees represented by the Plaintiff Association," and from laying off employees as the result of improper contracting.

Despite the court order, the city began to explore outsourcing 18 services, not including contracting with the Orange County Fire Authority for fire protection, which is allowed by California law. But requests for bids for animal services, video production services, and building inspection services had to be withdrawn when the union pointed out the city was not following its own contracting-out policy. That policy was written in 1999, for the purpose of evaluating each operation to develop "the most cost effective and

efficient method of providing City services.” It requires contracting committees to evaluate whether contracting out a service should be recommended. It specifically provides for an employee association member to sit on the committee.

In early September, the city appealed the injunction order. It now anticipates implementing the layoffs on November 19.

San Franciscans to Choose Between Two Pension Amendments

Unlike in the City of Costa Mesa, leaders in San Francisco sat down with the unions when the stock market crash caused the San Francisco Employee Retirement System to become partially funded and the poor economy led to reduced city revenues. For several years, the city paid nothing into its pension plan since it was fully funded. But, in 2011-12, the city will pay 18 percent of payroll costs into the fund while employees contribute 7.5 to 9 percent of wages depending on classification. The city’s contribution is expected to rise to 26 percent of payroll by 2014-15. In addition, the city’s retirement health costs are projected to rise from 6 percent to 13 percent of payroll by 2020-21.

After months of negotiating with the unions, the mayor agreed to place a measure on the November ballot to amend the pension provisions of the city’s charter. Measure C will require more cost-sharing, with the employees’ pension contribution rate varying based on the employee’s salary and the level of the city’s costs. Those non-safety employees earning \$50,000 or less annually will never contribute more than 7.5 percent of their salary. Non-safety employees earning between \$50,000 and \$100,000 would pay up to 4 percent more of their salary when the city’s contribution rate exceeds 12 percent of payroll, and would contribute less than 7.5 percent when the city’s rate falls below 11 percent. Those earning more than \$100,000 would pay in up to 5 percent more as the city’s contribution rate rises above 12 percent, and up to 5 percent less as the city’s rate falls below 11 percent. Safety employees’ rates would vary by 6 percent in either direction from their base contribution rate. All employees would also begin contributing to the Retiree Health Care Trust Fund in 2016. Cost-sharing provisions would apply to elected officials as well.

New employees would earn pensions with lower benefit formulas. While current miscellaneous employees can retire at age 50 with a 1 percent factor applied to final compensation, employees hired beginning January 1, 2012, would be unable to retire until 53, but the benefit still would be based on a 1 percent factor. They will have to work to age 65 to earn a benefit at the maximum 2.3 percent formula. Safety employees’ minimum pension formula will change from 2.4 percent at age 50 to 2.2 percent at age 50, and the maximum 3 percent formula will not be available until age 58, rather than 55. Final compensation would be calculated from the three highest years of salary, rather than the single highest year.

Not content with the budget savings of the mayor’s proposal, Public Defender Jeff Adachi has placed Measure D on the ballot. Adachi’s measure also uses a floating pension contribution structure, but would require current police and fire employees to pay at least 10 percent of their pay toward their pensions. The base contribution rate for new employees would be 6 percent, or 8 percent for safety members, but they would not be eligible for a pension without more years of service, and the rate would never fluctuate downward. A miscellaneous employee could not retire at 55 unless the employee worked for 20 years, and would earn only a 1.3 percent factor at that age. Safety members would have to have 10 years of service to retire at age 50, and would be entitled to a 2 percent factor. The maximum earnable benefit would be 2.7 percent at 55, but could not exceed 75 percent of final compensation. Final compensation would be based on the highest five years of salary. Opponents assert that the Adachi proposal impairs vested rights because the contribution amount would be increased for current employees, without any new benefit, unlike the downward contribution fluctuation feature of the mayor’s measure.

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Due Process Requires Post-Suspension Hearings for Officers Even if They Retire

Even if a civil service commission has no jurisdiction to hear a challenge to a disciplinary suspension after an officer retires, due process requires that the public employer provide a post-suspension hearing to an officer who did not receive a pre-disciplinary hearing, the Ninth Circuit Court of Appeals held in *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles*. The court left open the question whether a hearing that merely confirms that an officer has been charged with a felony, rather than looking at whether there is evidence of actual illegal conduct, fails to satisfy an employer's due process obligations.

No Felonies Proven

Darrin Wilkinson, David Sherr, Lisa Brown Debs, and Sean O'Donoghue were Los Angeles County deputy sheriffs who were charged with felonies. All four were served with notices of intent to suspend them. Although they denied the charges, all were suspended without pay. They filed requests for post-suspension hearings before the Los Angeles County Civil Service Commission.

The challenges were held in abeyance during the criminal proceedings and the sheriff's department's disciplinary investigations. Sherr and O'Donoghue were acquitted after trial, and the charges against Wilkinson and Debs were dropped. All four were allowed to return to work before their hearings occurred. Months later, however, each was fired based in part on allegations relating to the felony charges. Their requests for post-discharge hearings were consolidated with their suspension cases.

Before their hearings were held, Wilkinson and Sherr were granted disability retirements effective the day after their discharges. The civil service commission never held hearings on their suspensions, as it asserted it no longer had jurisdiction over their cases.

Debs received a hearing. The hearing officer found her suspension and discharge were improper because the allegations underlying the felony charge were not true. He recommended back pay for the period of suspension and reinstatement as a deputy sheriff. The commission agreed to reinstate Debs, but denied her back pay during the three weeks she was suspended. It reasoned that the suspension was justified at the time because a felony charge was pending.

O'Donoghue also prevailed at his hearing. The hearing officer recommended reinstatement and back pay and benefits for the nine months he was suspended. The commission directed the department to reinstate him, and to reconsider its decision to suspend him. Because the department refused to reconsider the suspension, O'Donoghue never received the pay and benefits he lost due to the suspension.

The officers and their union, the Association for Los Angeles Deputy Sheriffs, filed civil rights lawsuits under 42 USC Sec. 1983 for violation of their due process rights in federal court. The trial court granted the county's motion to dismiss for failure to allege any actions by the defendants that would violate due process rights. It also ruled that the individual civil service commissioners, county supervisors, and the sheriff were entitled to qualified immunity because the law governing due process was not clear at the time of their actions. The officers and ALADS appealed.

Post-Suspension Hearings Required

The parties did not dispute that the officers had a constitutionally protected property interest in continued employment. The court reiterated the legal principles set out in *Gilbert v. Homar* (1997) 520 U.S. 924, 1997 U.S. LEXIS 3546, 125 CPER 19, that allows temporary suspension of police officers without pre-disciplinary due process if felony charges are filed against them. "However, the constitutionality of a suspension without any *pre*-suspension procedural due process depends on the availability of a *post*-suspension hearing," the court emphasized.

The court found that the holdings of *Gilbert* applied even though the officers in this case had been given written notice of the intent to suspend and the opportunity to submit a written response. The officers

contended that when their employer had received their responses, it had considered only the fact that felony charges were pending, not whether there was any truth to the charges. The court found that, if proven, this level of due process was no different than a summary suspension based on the mere filing of felony charges.

Under Sec. 1983, a local government cannot be liable for a deprivation of civil rights unless the violation was caused by the entity's custom or policy. The officers alleged that two policies denied them the post-suspension hearings required by due process.

Wilkinson and Sherr contended that the policy to deny a post-suspension hearing once an officer has retired caused the violation of their rights. The county asserted that the commission had no jurisdiction over the challenges to the suspensions once the officers retired, citing *Zuniga v. Los Angeles County Civil Service Com.* (2006) 137 Cal.App.4th 1255, 2006 Cal.App. LEXIS 410. The appellate court rejected this excuse. "[T]he fact that the Commission is precluded from hearing Wilkinson's and Sherr's appeals does not remove the County's constitutional obligation to provide some form of post-suspension hearings," the court instructed. Therefore, Wilkinson and Sherr stated valid claims against the county.

Although Debs and O'Donoghue did receive post-suspension hearings, they contended the hearings were meaningless because of the county's policy of upholding suspensions as long as there was a pending felony charge, regardless of whether the charges were true. As a result, they argued, the outcomes were predetermined in the same way as the results of the pre-suspension review of their responses to the notices of intent. The trial court had rejected this contention because the hearing officers in their cases had recommended back pay for the suspensions. The appellate court found this reasoning erroneous since the hearing officers could only make recommendations, which the commission and sheriff did not follow.

The question remained whether a policy of automatically upholding a suspension during the pendency of a felony charge could constitute a violation of due process. As the case had been dismissed before any evidence was placed in the record, the court could not rule that Debs and O'Donoghue had proven a constitutional violation. It assumed that they could prove facts that might demonstrate a denial of due process under *Mathews v. Eldridge* (1976) 424 U.S. 319, 1976 U.S. LEXIS 141, such as showing that the risk of an erroneous suspension outweighed the county's interest in performing such a limited review of the basis for the suspension. Based on that assumption, the court held that Debs and O'Donoghue had stated a valid claim against the county. It cautioned, however, it was not deciding that a post-hearing suspension which examines only whether a felony charge is pending would always violate due process. This court advised that the trial court would need to determine whether there was a constitutional violation in this case based on the *Mathews* factors.

The dissenting justice argued that Debs' and O'Donoghue's contention was a challenge to the substantive standard that the county used, and not a valid argument that their post-suspension hearings violated due process. She pointed to legal precedent establishing that the law governing a public worker's employment defines the scope of the employee's property interest, and argued that the law can limit that property interest by determining the causes for termination. Citing several passages in *Gilbert*, she found the county's policy constitutional because a felony charge "unquestionably" affects a deputy sheriff's suitability for employment as a law enforcement officer.

The majority of the court, however, reasoned that the policy rendered a hearing meaningless. "A meaningless hearing is no hearing at all, and does not satisfy the requirements of procedural due process," it declared. The court also disagreed that *Gilbert* settled the question of whether the county's policy of upholding suspensions solely on the basis of pending charges was constitutional. "*Gilbert* does not hold that felony charges alone can justify the suspension of a law enforcement officer. *Gilbert* merely holds that felony charges can justify suspension *without pre-suspension due process*," the court explained.

The Supreme Court obviously believed an officer with pending felony charges had a protected property interest, or it would not have examined what kind of due process was constitutionally required in that case, the majority pointed out. And it disagreed that the rule under which the county suspended the officers, allowing discipline for a "condition which impairs an employee's qualifications for his or her position," necessarily included felony charges.

Qualified Immunity

The court found that the individual civil service commissioners were not liable for failing to hear Wilkinson's and Sherr's challenges to their suspensions, since the commission had no jurisdiction over their cases. It held, though, that the county supervisors and sheriff should have known the officers were entitled to a post-suspension hearing and therefore did not have immunity from liability from the claims. Because the legal rights of Debs and O'Donoghue were much murkier, however, a reasonable official would not necessarily have understood that limiting a hearing to determining whether felony charges have been filed is unconstitutional. Therefore, the court found all the individual defendants were immune from liability on Debs' and O'Donoghue's claims.

The court reversed the dismissal of the claims, except where it had found qualified immunity, and remanded the case to the trial court. (*Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* [9th Cir. 8-12-11] 08-56283, ___ F.3d ___, 2011 U.S.App. LEXIS 16801.

CPER Journal Online

Two More Courts Hold County Pension Systems Must Disclose Benefits of Named Retirees

A newspaper and a pension watchdog organization have won rights to disclosure of retirees' pensions in two more courts in different parts of the state. Both the First District and the Fourth District Courts of Appeal reached similar results for many of the same reasons as the Third District Court of Appeal did last May in *Sacramento County Employees Retirement System v. Superior Court of Sacramento County* (2011) 195 Cal.App.4th 440, 2011 Cal.App. LEXIS 569, 202 CPER <http://cper.berkeley.edu/journal/online/?p=159>. In *San Diego County Employees Retirement Assn. v. Superior Court*, the court required the disclosure of the names of retirees who received more than \$8,333 in monthly benefits, the amount received, and how the amount was calculated. In *Sonoma County Employees' Retirement Assn. v. Superior Court*, the court upheld an order compelling the association to provide the *Press Democrat* with the names and retirement dates of individuals receiving an annual pension of at least \$100,000. It overturned the portion of the trial court's order that would have forced disclosure of retirees' ages at retirement.

San Diego County

The California Foundation for Fiscal Responsibility and its president, Marcia Fritz, asked SDCRA to disclose the names, gross monthly benefit, last employing agency, and worksheet used to calculate the benefit of each county retiree who received more than \$8,333 in any month in 2010. The retirement association refused, based on Sec. 6254(k) of the California Public Records Act, which exempts from disclosure public records that are protected by state or federal law. CFFR asked the trial court to order SDCRA to disclose the records. SDCRA argued that the information was confidential under the County Employees Retirement Law of 1937, specifically Government Code Sec. 31532. 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...." Alternatively, it contended that the records were protected under Sec. 6255(a) of the Public Records Act, because retiree privacy interests outweigh the public interest in disclosure.

The trial court found that retirees from public employment have a reduced expectation of privacy in their compensation. Although SDCRA was ordered to disclose the full names of the identified retirees, the judge prohibited CFFR and Fritz from publishing the surnames. The trial court also ordered SDCRA to provide CFFR with a calculation summary for each retiree, but with dates of birth, Social Security numbers, and names of financial institutions and medical programs redacted. SDCRA asked the appellate court to overturn the order.

Sonoma County

In *Sonoma County*, the *Press Democrat* requested the names of individuals receiving at least \$100,000 annually in retirement benefits, their dates of retirement, and age at the time of retirement. The newspaper later expanded the request to encompass all pensioners. When the retirement association refused to disclose the information, the newspaper obtained an order from the trial court requiring the disclosure of the names of all retirees, their gross pension amounts, and their age at retirement. SCERA asked the appellate court to overturn the order.

County Employees Retirement Law

The Public Records Act requires public entities to disclose records to a member of the press or public unless exempted. The *Sonoma County* court summarized the principle as it applies to public employees as follows: "[G]overnment payroll information — whether it be the salaries of active public employees or the gross pension amounts paid to retirees — is public information that cannot be kept confidential unless it is explicitly made so by statute," citing *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. The court noted that exemptions in the statute are construed narrowly to maintain openness in government affairs.

Like the *SCERS* court, both courts found Sec. 31532 ambiguous and looked to legislative history and several attorney general opinions to decide whether the legislature intended that county retirement systems be required to maintain the confidentiality of all retiree records. The courts relied heavily on a 1977 attorney general opinion that found retiree names and benefit amounts were not confidential under Sec. 31532, and on a 1955 A.G. opinion that concluded that a similar provision governing the state Public Employees Retirement System did not render names and benefit amounts confidential.

In the *San Diego* case, the SDCRA tried to distinguish the A.G. opinions on the ground that they addressed only whether a controller who receives retiree names and benefit amounts from a retirement system must maintain confidentiality of the information. But the court disagreed that the legal principle in the opinions did not extend to the retirement systems themselves. "Records are either exempt or nonexempt," it concluded.

The *Sonoma County* court construed Sec. 31532 to protect as confidential "all otherwise nonpublic information furnished to the board either *by* the member or by any third party *about* an individual member." Using this rubric, the court found such personal information as the members' birth dates and ages were protected, but not the department or agency from which they retired, their salary at retirement, their names and gross benefit amounts, and beneficiaries. The fact that the benefit calculations are based in part on confidential information does not render the benefit amounts themselves confidential, the court ruled, citing *International Federation*. In that case, the Supreme Court rejected the argument that peace officer salaries were exempt from disclosure since they did not reflect any personal information about the officers.

Balancing Interests

SCERA and SDCERA also argued that the records should be protected from disclosure under Sec. 6255(a), which 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." But neither court was persuaded that the privacy and safety interests of retirees were greater than the public interest in disclosure of pension amounts.

SCERA unsuccessfully attempted to minimize the public nature of retirement benefits, pointing out that only 20 percent of SCERA benefit payments comes directly from public employer contributions. The *Sonoma County* court, however, focused on the fact that most of the funds for benefit payments comes from investments on the public contributions. Only 10 percent comes from individual contributions. Moreover, the court emphasized, the defined benefit pensions must ultimately be funded by the public treasury if the retirement system lacks the money to pay benefits. This public liability and the nature of pensions as deferred public compensation led to the court's conclusion that the public interest in public pensions is just as great as it is in public employees' salaries that must be disclosed under *International Federation*.

In *San Diego County*, the retiree association tried to claim that the public did not need more information since its website listed pension amounts without linking them to names. The court rejected this contention, relying on the deposition testimony of Fritz, which it recited at length. Fritz asserted she needed a name to obtain enough information to assess the propriety of a retiree's final compensation factor. She used, as an example, adding car allowances into the final pay used to calculate pension benefits. She also pointed out that surnames were necessary to trace a retiree's employment history to determine whether the retirement benefit is "unfairly calculated."

SDCERA had no better success with the argument that investigation of pensions was futile since current retirees' benefits are vested and cannot be changed, and the controversial pension practices under attack are not illegal. Noting that CFFR's purpose is to educate decisionmakers about public pension issues, the court commented, "Even if CFFR's work cannot bring retrospective change, it may bring prospective change."

Both courts examined the possibility that releasing names with pension amounts could make retirees more vulnerable to financial crimes. The *Sonoma County* court noted that no contact information would be disclosed, which would minimize the potential for criminals to find addresses from other sources and prey on retirees. The court concluded that SCERA's claim that releasing information about pension benefits would expose its retirees to abuse was "too speculative" to outweigh the public's interest in information about how public funds are spent.

SDCERA attempted to illustrate the heightened risk of victimization of retirees whose pensions were disclosed by submitting declarations of law enforcement officers knowledgeable about financial crimes and elder abuse. Instead of combing through obituaries and conducting phony surveys, the officers warned, criminals will be able to easily identify lists of elderly people with substantial incomes if the retiree information is released. But the *San Diego County* court was not persuaded that the potential for such crimes outweighed the public interest in disclosure of retirees' names and pension benefits. It emphasized that it had no evidence of actual crimes perpetrated against retirees even though CalPERS has been releasing such information for years.

The *San Diego County* court upheld the trial court's order, including the portion prohibiting CFFR from publishing surnames since CFFR had not challenged it. (*San Diego County Employees Retirement Assn. v. Superior Court* [2011] 196 Cal.App.4th 1228, 2011 LEXIS 823.)

The *Sonoma County* court upheld the trial court's order with the exception of the requirement to release retirees' ages at retirement. (*Sonoma County Employees' Retirement Assn. v. Superior Court* [2011] 198 Cal.App.4th 986, 2011 Cal.App. LEXIS 1124.

CPER Journal Online

New Legislation Saves Teachers' Jobs — For Now

Legislation implemented very late in the budget process blocks K-12 teacher layoffs this fiscal year. Assembly Bill 114, a 100-page trailer to the main budget bill, Senate Bill 87, was introduced by the Assembly Committee on the Budget. It passed both houses without discussion on June 28, was published on June 29, and was signed into law by Governor Jerry Brown on June 30.

The bill requires districts to assume they will receive the same amount of state funding this fiscal year that they received in 2010-11 and to “maintain staffing and program levels commensurate with this funding level,” according to an Assembly analysis. It specifically prohibits districts from making additional layoffs in July and August this year. The California School Boards Association called on Brown to repeal those provisions, which he declined to do.

The legislation does acknowledge that mid-year budget cuts may be required if revenues are more than \$2 billion short. In that event, school bus programs will be cut by \$238 million and a district may implement a reduction of up to seven instructional days if the director of finance determines that the state revenue forecast does not meet a specified amount. For those districts, county offices of education, and charter schools subject to collective bargaining, the reduction in school days must be achieved through the bargaining process with the agreement completed and reductions implemented no later than June 30, 2012. Further, the legislation does not prohibit districts from making cuts in areas other than staffing and programs. Brown, in his signing statement, clarified this point. “In fashioning their local budgets, school boards may nevertheless need to make reductions due to cost increases, loss of federal funds, enrollment declines or other factors. AB 114 does not interfere with these local school board decisions. School boards should take all reasonable steps to balance their budgets and maintain positive cash balances,” he wrote.

Brown ended his signing statement by saying, “Let us not forget that schools would have enjoyed billions more in state funding if Republicans in the Legislature had allowed the people of California to vote on tax extensions.” He has pledged to go back to the voters in November, asking them to vote to restore funding to K-12 and community colleges. A.B. 114 provides that, if the measure is rejected, or never goes to the voters, the state will repay schools the \$2 billion that previously was taken away from Proposition 98 funds.

The bill has generated a lot of criticism. “The state should not be substituting its judgment for those who live in the communities affected, have fiduciary responsibility for the districts, and are held accountable for student outcomes,” wrote CSBA President Martha Fluor. Natomas Unified Interim Superintendent Walt Hanline was quoted in the *Sacramento Bee* as calling A.B. 114, “the most irresponsible piece of legislation I’ve seen in my 35 years in education.”

School districts also have expressed frustration with the bill. Based on the projection that they will be receiving the same amount of funds as last year, some have rehired teachers and other employees that they had just laid off, while other districts have not, out of fear of mid-year cuts. Immediately after the budget was signed, San Diego Unified took steps to refill 300 full-time teaching positions to restore smaller class sizes. Elk Grove Unified brought back 445 teachers. Santa Ana Unified, on the other hand, opted to save the \$17 million in unanticipated funds in case of mid-year cuts. The additional funds helped avoid bankruptcy in several districts, including Natomas Unified, Southern Kern Unified, and three in Sonoma County.

Other districts, such as Los Angeles Unified and Long Beach Unified, assumed they would be receiving the same amount of funds as last year but laid off employees anyway. LAUSD was able to rehire 4,170 teachers and other employees to whom it issued pink slips after United Teachers Los Angeles and other union members agreed to furlough days before the budget was finalized. It rehired 450 elementary school teachers in August, but said that these hirings were not related to new funding from the state. UTLA is taking the position that A.B. 114 mandates that the district rehire the remainder of the employees who were laid off, or about 1,400 teachers and health and human services professionals. The district claims those position were lost because of “the loss of federal stimulus funding, declining enrollment, and other factors” unrelated to state funding.

Those districts that have acted conservatively may be the ones who weather this fiscal year more soundly. In August, State Controller John Chiang reported that revenues were \$539 million below projections. If, by December, revised estimates fall more than \$4 billion below projections, school funding will be cut by \$1.5 billion.

CPER Journal Online

Teacher Entitled to Qualified Immunity for In-Class Statements Alleged to Violate Establishment Clause

In an interesting case challenging a teacher's in-class statements, the Ninth Circuit Court of Appeals has come down on the side of academic freedom, protecting "the robust exchange of ideas in the classroom." The court, in *Farnan v. Capistrano Unified School Dist.*, held that a high school history teacher had qualified immunity from a suit brought by one of his students alleging that the student's constitutional rights were violated when the teacher made comments hostile to religion.

Dr. James Corbett has taught Advanced Placement European History at Capistrano Valley High School for more than 16 years. Chad Farnan was a 15-year-old student in Dr. Corbett's class. Both Corbett and Farnan are Christians. Farnan was offended by certain of Corbett's comments, which he called "derogatory, disparaging, and belittling regarding religion and Christianity in particular." Farnan withdrew from the class before the end of the first semester and filed suit under 42 USC Secs. 1983 and 1988 alleging that both Corbett and the district violated his First Amendment rights under the Establishment Clause.

All of the comments Farnan found offensive can be found in the district court's opinion at *Farnan I* (C.D.Cal.2009) 615 F.Supp. 2d 1137, 2009 U.S. Dist. LEXIS 37752. The following is a summary of those discussed by the Ninth Circuit.

In one instance, Farnan objected to Corbett's assertions that the way to get peasants to oppose reforms that are in their best interest is to use something "irrational," i.e., religion. "When you put on your Jesus glasses, you can't see the truth," Corbett said.

Farnan also objected to Corbett's statements about religion and the scientific revolution, the essence of which was that religion is magical thinking. Corbett characterized as "faulty logic" the idea that there has to be a god because "if all this stuff that makes up the universe is here, something must have created it." Specifically regarding evolution, Corbett said when scientists do the research, "they're not looking to prove evolution. They're looking to disprove it. And the more you try and disprove it and the more you fail, the more you believe it." "Contrast that with creationists," he continued. "They never try to disprove creationism. They're all running around trying to prove it. That's deduction. It's not science. Scientifically, it's nonsense."

And, Farnan focused on comments Corbett made in response to a question from a student about a lawsuit filed against him by a fellow teacher, John Pelozo, approximately 20 years earlier. Pelozo had been ordered by the district not to teach creationism in his science class. Corbett related to the class how he had responded when his attorney told him not to make any more public comments regarding the case. "[Y]ou do not have to defend me but I will not leave [Pelozo] alone to propagandize kids with this religious, superstitious nonsense... ."

The district court originally granted Farnan's motion for summary judgment as to the Pelozo comment, but granted summary judgment to the defendants regarding the other comments, finding that they did not violate the Establishment Clause. It denied Farnan's request for injunctive and declaratory relief. The lower court subsequently granted Corbett's request to amend his answer to allege the defense of qualified immunity. It then ruled that, although the Pelozo comment did violate the Establishment Clause, because the law was not clearly established, Corbett was protected by qualified immunity. Both sides appealed.

Court of Appeals Decision

The appellate court first affirmed the ruling that Farnan was not entitled to declaratory relief because he had graduated from high school, rendering the issue moot. The court referred to Article III's requirement that there be a live case or controversy at the time a federal court decides a case. It rejected Farnan's argument that his case fell into the "capable of repetition, yet evading review" exception, again noting that, because Farnan had graduated, there was no reasonable probability that he would again be subjected to the same action.

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The court also rejected Farnan's claim that the district court erred by allowing Corbett to amend his answer to allege qualified immunity. The appellate court found that the district court had good cause to allow the amendment, and that not to do so would have resulted in substantial prejudice to Corbett.

Moving to the heart of the case, the court first noted that the Establishment Clause applies to both official endorsement of a particular religion or religious belief and to official disapproval or hostility to religion. "Even statements exhibiting some hostility to religion do not violate the Establishment Clause if the government conduct at issue has a secular purpose, does not have as its principal or primary effect inhibiting religion and does not foster excessive government entanglement with religion," it continued, citing *American Family Assn. v. City and County of San Francisco* (9th Cir. 2002) 277 F.3d 1114, 2002 U.S. App. LEXIS 672.

The court instructed that two questions must be asked when evaluating a grant of qualified immunity: whether the government official's conduct violated a constitutional right, and whether the right was clearly established at the time of the alleged misconduct. "If the answer to either question is 'no,' the official cannot be held liable for damages."

Addressing the second question first, the court determined that Corbett's conduct did not violate a clearly established statutory or constitutional right under the state of the law at the time of the alleged incident. The standard to be applied is whether existing precedent places the statutory or constitutional question "beyond debate," it said, citing the recent Supreme Court case *Ashcroft v. al-Kidd* (2011) ___ U.S. ___, 131 S.Ct. 2074, 2011 U.S. LEXIS 4021. "That standard is not met here — nothing put Corbett on notice that his statements might violate the Establishment Clause," it concluded.

The court was not persuaded by Farnan's assertion that case law has clearly established that the government must remain neutral and may not show its disapproval of religion. This highly general proposition was "just the sort of sweeping statement of the law that is inappropriate for assessing whether qualified immunity applies," said the court, citing *al-Kidd*. "Instead, the issues must be characterized with greater specificity."

The court could find no prior case holding that a teacher violated the Establishment Clause "by appearing critical of religion during class lectures, nor any case with sufficiently similar facts to give a teacher 'fair warning' that such conduct was unlawful." It found the cases cited by Farnan in support of his position were not on point and insufficient to clearly establish the law.

The court concluded its opinion with a forceful defense of academic freedom, quoting from a number of different decisions. "The Supreme Court has long recognized the importance of protecting the 'robust exchange of ideas' in education, 'which discovers truth out of a multitude of tongues,'" it said. "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding...." "Academic freedom is an essential for responsible teachers.... To prepare students for adult roles in a democratic society, teachers and the schools must try to maintain an atmosphere of free inquiry," it continued.

Recognizing that this academic freedom will sometimes lead to the examination of controversial issues, including religion, the court cautioned that "teachers must be sensitive to students' personal beliefs and take care not to abuse their positions of authority." However, "teachers must also be given leeway to challenge students to foster critical thinking skills and develop their analytical abilities." It noted balancing the two is difficult and courts "must be careful not to curb intellectual freedom by imposing dogmatic restrictions that chill teachers from adopting the pedagogical methods they believe are most effective."

The court recognized that at some point a teacher's remarks about religion might rise to the level of unconstitutional hostility, but without any cases for guidance, it could not conclude "that a reasonable teacher standing in Corbett's shoes would have been on notice that his actions might be unconstitutional." It therefore affirmed the district court's finding of qualified immunity. Having not reached the issue of the constitutionality of any of Corbett's statements, it vacated the district court's judgment on that issue. (*Farnan v. Capistrano Unified School Dist.* [9th Cir. 8-19-11] No. 09-56689, ___ F.3d ___, 2011 U.S.App. LEXIS 17207.)

CPER Journal Online

PERB Applies *Peralta* Presumption to Charter School Teachers

In a potentially game-changing development, California's Public Employee Relations Board has ruled, for the first time, that certificated employees and teachers at a charter school may be included in an existing bargaining unit of other district teachers. In *Orcutt Union School Dist. v. Orcutt Education Assn.*, the board determined that, because the charter school teachers shared a community of interest with other district teachers, a single bargaining unit of certificated employees was appropriate.

Case Summary

The association filed a unit modification petition seeking to add 15 certificated employees and teachers at the Orcutt Academy Charter School to the certificated bargaining unit comprised of 185 teachers at the Orcutt Union School District. The district argued that, given the unique structure of charter schools, a separate unit of charter school teachers was appropriate. Relying on the Charter School Act of 1992, amendments to the act, and the legislative history, the district asserted that charter school teachers possess the right to determine their own bargaining units and that charter school employees must support the formation of a unit.

The board agent rejected the district's contentions and found nothing in the act or its legislative history precludes the board from conducting its normal unit modification analysis. Employees' preferences cannot usurp the board's authority to make unit determinations in disputed cases.

In *Peralta Community College Dist.* (1978) PERB Dec. No. 77, 17 CPER 60, the board established a presumption that all classroom teachers employed by a public school employer are to be placed in a single unit, except where the factors listed in Educational Employment Relations Act Sec. 3545(a) are not met. In addition to considering the *Peralta* presumption, the board agent also considered the effect the unit configuration would have on the charter school's ability to carry out its educational model and the goals of the CSA.

Applying the unit determination analysis set out in Sec. 3545(a), the board agent found that personnel at the academy share a community of interest with the teachers in the certificated bargaining unit. Both sets of teachers have the same basic goals and use the same teaching materials and textbooks to achieve those goals. While charter school employees use different techniques, the academy's educational model does not demonstrate a community of interest distinct from the district's other teachers. In addition, the board agent found that the academy teachers are paid on the same pay scale and receive the same benefits. Academy and other district teachers do not interact on a daily basis, but this is true of all district teachers who work at separate school sites.

After noting the numerous similarities between academy and other district teachers' working conditions, the board agent found that any differences did not rebut the presumption in favor of a single teachers' unit.

The board agent rejected the district's argument that operational efficiency would be impaired by granting the unit modification petition. Nothing requires the parties to apply existing terms and conditions of employment to academy teachers; those would be subject to negotiations. The district presented no evidence that bargaining with the unit would adversely affect the academy's ability to achieve its goals under the charter. Indeed, the board agent noted, many aspects of the academy's operations may be outside the scope of representation and not subject to change. The union is seeking representation of the academy teachers and the district has historically treated academy and district teachers similarly. An historically distinct treatment of the two groups of teachers is not evident.

On appeal, the board adopted the board agent's proposed decision. It further instructed that it is authorized by its own regulations to add unrepresented classifications to an existing bargaining unit and that proof of support within the proposed additional classifications is required only if the proposed addition would increase the size of the unit by 10 percent. Therefore, under PERB precedent, unrepresented employees may be added to an existing unit where the increase would amount to less than 10 percent.

In addition, the CSA provides for collective bargaining rights of charter school employees, and nothing in that act addresses the bargaining unit placement of charter school employees.

Consistent with the board agent's conclusions, the board found nothing in the legislative history to support the district's assertion that amendments to the act had the intent or the effect of abrogating PERB's normal unit modification rules. And, it agreed that the legislative history does not support the district's position that charter school employees cannot be included in a unit of non-charter school employees.

The board concluded that its unit modification regulations apply to charter schools, subject to the requirement of Education Code Sec. 47611.5(d) that it take into account the CSA when deciding cases related to charter schools. And it concluded that charter school classroom teachers may be added to an existing unit of non-charter school teachers unless the factors set forth in EERA Sec. 3545(a) are not met.

The district failed to demonstrate that teachers in its charter school did not share a community of interest with the teachers in its other schools. Therefore, the association's unit modification petition was granted. (*Orcutt Union School Dist. v. Orcutt Education Assn.*, CTA/NEA, PERB Dec. No. 2183, 6-7-11, 8 pp. + 26 pp. B.A. dec. By Member Dowdin Calvillo, with Chair Martinez and Member Huguenin.)

Impact of the Decision

Shortly after PERB issued its decision in *Orcutt*, the school board decided that it would no longer challenge the association's petition.

More broadly, the board's holding in this case undeniably will make it easier for unions to organize charter school teachers. Even though both the California Teachers Association and the California Federation of Teachers have been actively organizing in charter schools for a number of years, the vast majority of charter school teachers remain unrepresented.

CPER Journal Online

Teacher Evaluations: Where Are We?

No Child Left Behind

With reauthorization of the No Child Left Behind Act already four years late, and most states clearly unable to meet the law's main requirement that all children be proficient in math and English language arts by 2014, the Obama administration has directed the Department of Education to offer the states waivers from compliance. However, it is widely expected that the waivers will be contingent on a number of conditions, including implementing teacher and administrator evaluations based in part on student test scores.

California State Superintendent of Public Instruction Tom Torlakson has said that, if relief from sanctions under NCLB is not provided, he would consider abandoning attempts to comply with the law. He wrote a letter to U.S. Secretary of Education Arne Duncan last month asking that he freeze the state's annual proficiency targets until reauthorization is completed. Torlakson made it clear that his letter was not an application for a waiver, preferring to wait and see what conditions would be attached.

School Improvement Grant Program

California's State Board of Education voted to accept the U.S. Department of Education's offer of a waiver from the requirement that School Improvement Grant transformation schools develop teacher and principal evaluations which include consideration of student test scores. SIG grants are available to the most persistently lowest-achieving schools, including those in the bottom 5 percent based on performance. In a letter directed to every state, the federal department of education recognized that many districts have no experience in creating these kinds of evaluations and may need more time than originally contemplated under the original SIG requirements. In a her response, Deputy Superintendent of the California Department of Education Deborah Sigman explained that fewer than one-half of the 56 California schools in the transformation model have met the timeline for establishing the required evaluation system.

The waiver gives the schools three years to phase in the evaluation system. This current school year is for development; next year is for conducting a pilot program, with full implementation to take place in 2013-14.

AB. 5

The problems California faces in developing a teacher evaluation system that meets federal requirements may be solved in the near future by legislation now pending in the state legislature. A.B. 5, sponsored by Assembly Member Felipe Fuentes (D-San Fernando), would change how teachers are evaluated throughout the state in an attempt to develop and adopt uniform objective evaluation and assessment guidelines. Fuentes agreed to delay a vote on the bill until next year in order to work on some of its provisions and to await the outcome of a legal dispute between the Los Angeles Unified School District and United Teachers Los Angeles. UTLA filed an unfair practice charge against the district with the Public Employment Relations Board in an effort to stop it from designing a new evaluation process. (See story at *CPER*, No. 202.)

The bill, as drafted, would require that all districts adopt "objective evaluation and assessment guidelines" for teacher evaluation, using best practices that would be assess a number of factors. These would include the teacher's ability to engage and support all students in learning, create an engaging learning environment, understand and organize subject matter for student learning, use differentiated instruction to reach students at various achievement levels, employ student assessment information to improve classroom learning, collaborate with other teachers, develop as a professional educator, and contribute to pupil academic growth. These factors would be measured in a number of ways, including evidence of teacher impact on student achievement and observation by trained evaluators. Which measures to use and how much weight should be given to each would be subject to negotiation between districts and unions. Probationary teachers would be evaluated annually, and tenured teachers biannually. Tenured teachers with 10 or more years experience would be assessed at least every five years.

There are miles to go before the issue of teacher evaluations can be put to sleep, however. Historically, teachers unions have been opposed to systems that incorporate student test results. Advocates of strong evaluations have criticized the bill as written. They point out it would be a state mandate, potentially costing millions of dollars. They do not favor local discretion over implementation, and they are dismayed that it is silent on how long a district must wait before dismissing a teacher with unsatisfactory reviews.

CPER Journal Online

Coach Deemed Temporary Employee; Coaching Time Doesn't Count

A basketball coach's time spent coaching outside of the classroom does not count towards the 60 percent of full-time assignment required to be considered a contract employee under the Education Code, concluded the Second District Court of Appeal in *Theiler v. Ventura County Community College Dist.* The appellate court overruled the lower court's grant of summary judgment and held that the coach was a temporary employee not entitled to due process.

Factual Background

Jeff Theiler was terminated from his position as basketball coach without due process. Each semester that Theiler worked for the district, he signed a written "Offer of Temporary Non-Contract Academic Employment." The offers specified that he was to teach a class for two hours each day Monday through Friday, although the actual class time was one hour and 50 minutes. It also specified the percentage of hours that was equivalent to a full-time teaching assignment. None of the offers provided for more than 60 percent of full-time equivalent, or FTE.

Theiler was a member of the Ventura County Federation of Teachers. The union and the district had a collective bargaining agreement that recognized a basketball coach has ancillary duties outside of the class hours specified in the contract. The agreement provided coaches were to be paid for their performance of these duties with a flat stipend that did not depend on the amount of hours worked.

Theiler petitioned for a writ of mandate to compel the district to reclassify him as a contract employee, rescind his termination, and grant him due process. He argued he was a contract employee pursuant to Ed. Code Sec. 87482.5(a) because he taught classes for more than 60 percent of the hours a week considered a full-time assignment and, therefore, was entitled to due process. Theiler claimed that, during the season, he continued his basketball practice class beyond the one hour and 50 minutes to two to three hours a day. In addition, he held one extra practice a week for two to three hours. He was also required to supervise students in weight training and other exercise, and spent at least 1.63 hours a week coaching basketball games. He concluded that he taught athletes a minimum of 17.63 hours a week. Along with teaching, he was required to attend staff meetings, plan practices, review films, raise funds for the program, and perform a number of other duties.

The district contended that it had properly classified Theiler as a temporary employee. It argued that only the 10 hours specified in the offer of employment should be considered in calculating the FTE. A full-time faculty member spends 15 hours a week teaching class. However, physical education is considered a laboratory teaching assignment and, under the collective bargaining agreement, laboratory teaching assignments are given two-thirds the value of a lecture teaching assignment. The time Theiler spent in addition to scheduled class hours was on ancillary duties covered by the stipend.

The trial court granted Theiler's motion for summary judgment, reasoning that coaching is more akin to "teaching" than to "ancillary activities." It added the 1.63 hours coaching basketball games to Theiler's assigned class hours and concluded that Theiler spent more than the nine hours a week teaching necessary to reach 60 percent of FTE. Therefore, Theiler was a contract employee entitled to due process.

Court of Appeal Decision

Section 87482.5 states, "Notwithstanding any other provision of law, any person who is employed to teach adult or community college classes for not more than 60 percent of the hours per week considered a full-time assignment for regular employees having comparable duties shall be classified as a temporary employee, and shall not become a contract employee under Section 87604."

The appellate court relied on *McGuire v. Governing Board* (1984) 161 Cal.App.3d 871, 1984 Cal.App. LEXIS 2717, 64 CPER 38, in holding that only the 10 hours a week that Theiler spent teaching as specified in the offer of temporary employment could be considered duties comparable to those of full-

time faculty members. In *McGuire*, a community college instructor was hired to teach classes nine hours a week. He also was hired to tutor students under separate contract. He argued that his tutoring duties were comparable to his instructor duties and that the hours he spent tutoring should count towards the 60 percent in determining the FTE. The court rejected his argument, finding that “the proper measure in determining whether the 60 percent limit is exceeded is the number of hours the person seeking tenure spends teaching classes compared to the number of hours per week a regular fully assigned employee spends on comparable duties. The statutory language emphasizes the teaching of classes.”

The *Theiler* court agreed that “the ‘number of hours the person...spends teaching classes’ is the focus of section 87482.5.” While some of the duties of a basketball coach involve a type of teaching, they are not comparable to that of a typical classroom instructor, said the court. “Here, Theiler’s employment contemplated only two types of duties: teaching the class specified in the offer of temporary employment and ancillary duties,” it said. Any duties in addition to the 10 hours specified in the offer of employment are ancillary, and “cannot be used in calculating the FTE,” said the court.

Further, while 60 percent of the 15 hours that full-time faculty are expected to teach totals only nine hours, the collective bargaining agreement specifies that physical education classes are to be treated as laboratory teaching assignments and count as only two-thirds of a regular lecture hour, noted the court. Even using the three-quarters of an hour calculation for lecture-laboratory classes, the 10 hours of class assigned to Theiler totaled only 7.5 hours, far short of the 60 percent required. The court reversed the lower court’s judgment and sent the case back for further proceedings. (*Theiler v. Ventura County Community College Dist.* [2011] 198 Cal.App.4th 852, 2011 Cal.App. LEXIS 1108.

CPER Journal Online

LAUSD Changes Policy: Teachers and Administrators Given First Chance to Take Over New Schools

Two years after the Los Angeles Unified School District instituted its controversial Public School Choice plan allowing charter schools, nonprofit groups, and internal teams of educators to compete to take over 250 schools, the school board has voted unanimously to modify the plan to consider teachers' bids for new schools first. (See story describing the plan at *CPER* No. 198, pp. 20-21.) Of the 37 schools included in the plan's upcoming third round, 15 are new. The bidding process for existing low-performing schools will remain the same.

The revised rules will allow the internal teams to be the first to submit their proposals to run the new schools. If those proposals are found unacceptable, then charter operators and others may apply. However, the new rules will go into effect only if the teachers' and administrators' unions agree to certain contract changes for the new schools by November 1. If the district and the unions cannot come to agreement by the deadline, the change to the plan will be nullified leaving all groups again on equal footing.

The contract changes include performance-based evaluations, more flexibility for administrators to hire and fire staff, and more freedom to set hours and rules for teachers and principals. These items are also listed in a *Los Angeles Times* op-ed piece (July 31, 2011) written by LAUSD Superintendent John Deasy with regard to what components he would like included in all contracts that cover district teachers and administrators.

Union leaders have taken the position that the district cannot force them to accept the conditions. "It's all bargainable," United Teachers of Los Angeles President Warren Fletcher said, according to the *Los Angeles Times*. He called the district's request that the union negotiate these items "promising."

In the time that the School Choice plan has been in effect, charter schools have won bids to run 11 new schools and one existing campus. Inside district groups are now operating 40 schools. In the first two rounds, only four charter school operators bid for the right to take over existing campuses, whereas 39 submitted proposals to run new schools. However, charter schools did submit initial applications for 12 existing schools in the third round.

When the plan was first implemented, the teacher and administrator unions strongly opposed it, seeing it as a threat to organized labor because most charter schools are non-union. UTLA even filed a lawsuit to try to stop the plan, but was unsuccessful. Now, it is charter school operators who are unhappy. They claim that the changes will discourage the participation of charters in the district's school reform plan. In a press release issued in response to the board's action, Jed Wallace, president and CEO of the California Charter Schools Association, said, "We continue to support the Board in its efforts to move forward with district reform, however, there can be no doubt that the changes approved today impede high-performing charter schools from applying for new schools and create roadblocks to in-district and charter school collaboration."

CPER Journal Online

Furloughs Upheld for Constitutional Agency, Most Special Fund Employees

Courts continue to work through the multitude of state furlough cases, sorting the meritorious from those weakened by the Supreme Court's pronouncements in *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989, 2010 Cal. LEXIS 9757, 201 CPER 47. Two recent cases illustrate the difficulty of challenging the furloughs since the Supreme Court found the legislature ratified the furlough order. In *Brown v. Chiang*, employees of constitutional officers could not avoid the conclusion of the court that they were included within the legislature's endorsement of the furlough program. Employees in special fund agencies lost once the appellate court further parsed the legislative wording and focused on each "item of appropriation" in *Service Employees International Union, Loc. 1000 v. Brown*.

Furlough Order Ratified

In November 2008, the state Department of Finance predicted a general fund 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 decided to decree 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 per 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.

In February 2009, the legislature passed a law that modified the 2008-09 budget. It 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 the total amounts of \$385 [million] from General Fund items

Unions representing state employees filed multiple lawsuits, some of which were consolidated. The Supreme Court in *Professional Engineers* found that, although the governor did not have authority to impose furloughs on represented employees unilaterally, the legislature had ratified the order. The 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."

The Supreme Court did not address the validity of a third day of furlough that the governor ordered in July 2009. It also did not decide whether the furloughs could be properly applied to the employees of constitutional officers or to employees paid with special funds. The two most recent cases address these issues.

Legislative Authority Over Officers' Employees

After former Governor Schwarzenegger issued the furlough order in December 2008, Julie Chapman, chief deputy director of the Department of Personnel Administration, had a conference call with representatives of Controller John Chiang and other constitutional officers, such as the Treasurer. One participant raised the question whether the order applied to constitutional offices. In evidence filed with the trial court, the controller's representative asserted that Chapman acknowledged that the order did not apply to the officers' employees, but asked for their voluntary compliance. Chapman, however, claimed that she told the participants that her office would research whether the governor had authority to furlough

employees of constitutional offices, and that the issue remained unresolved at the end of the call. C.B.F. Journal No. 203

The governor subsequently insisted that the constitutional officers furlough their employees, and the officers, except for Insurance Commissioner Steve Poizner, went to court. After they lost in the trial court, they appealed.

The appellate court rejected the officers' contention that the wording of the furlough order did not apply to them. Although the order did not specifically mention the constitutional officers' employees, it did call for a furlough "of represented state employees and supervisors" and of "all state managers, including exempt employees, regardless of funding source." The court pointed out that the constitutional officers are "civil executive officers" under Government Code Sec. 1001, whose employees generally are included in the civil service system with respect to the merit aspects of their employment. In addition, it was undisputed that more than 11,000 of the 15,000 constitutional office were represented by unions. The court concluded that they were subject to the furlough order, despite their employment in a constitutional office.

The court rejected the contention that constitutional officers were encompassed in the portion of the order that merely requested "other entities of the State government not under [the governor's] direct authority," including the legislature, courts, and universities, to implement similar measures. The appellate court ruled the plain and unambiguous meaning of the phrase "represented state employees" prevailed. The officers employed represented employees, and the furlough order applied to them.

The court also found that the legislature intended to include the employees of constitutional officers when it passed its budget language. Evidence from the department of finance proved that the compensation cost savings from the constitutional offices were assumed in the budget reductions that the legislature enacted. Since the legislature ratified the furlough order, including the savings from the constitutional offices, the court held the controller had a ministerial duty to implement the furlough by reducing employees' paychecks.

The controller urged the court to hold that the furlough order could not constitutionally be applied to the officers because they are independent of the governor and have statutory authority to control the staffing and management of their offices. The court agreed that the California Constitution sets out a structure of divided executive power, but it pointed out that the Constitution gives the legislature "plenary legislative authority" and leaves it to the legislature to define the duties and functions of the constitutional offices.

The controller relied on language from an early California case that stated the controller is entirely independent of the governor. That case was decided before the legislature enacted statutes that empower the governor to oversee that the duties of the various offices are performed, the court found. It continued:

[W]e need not resolve further the abstract question of the degree of independence each officer possesses with respect to the Governor....This is because the Legislature has endorsed the Governor's furlough plan.

The legislature has the ultimate authority over the terms and conditions of state employment, the court reminded the parties, and the controller acknowledged that the legislature's authority in that area extended to employees of the officers. The controller's argument concerning control over staffing met with the same response: "[T]he Legislature has also endorsed whatever impact the Governor's order might have on the functioning of the officers' respective offices."

The controller asserted, however, that the governor's subsequent action made the furlough order moot. The governor made line-item vetoes in the constitutional officers' budgets equivalent to the compensation savings from the two-day furlough, and stated that the veto "reflects the state employee compensation reductions for furloughs, overtime reform, and the elimination of two state holidays." The court was not persuaded that this language proved the cuts substituted for the furloughs. It found that the veto reductions were in addition to the compensation savings enacted by the legislature.

The court also turned aside the constitutional officers' assertion that the governor's office should be estopped from enforcing the furlough order because DPA induced the constitutional officers to rely on its initial position that their employees would not be furloughed. The appellate court agreed with the trial court's ruling that the state's financial condition was so precarious — and worsening by the day — that the constitutional officers could not reasonably have assumed that they would be spared from further cuts, including furloughs. (*Brown v. Chiang* [2011] 198 Cal.App.4th 1203, 2011 Cal.App. LEXIS 1141.)

The legislature's budget language also featured heavily in the court's decision in the *SEIU* case. This case is one of three union challenges to the application of the furlough order to employees paid with special funds or federal funds. (See story on *UAPD v. Brown* [2011] 195 Cal.App.4th 691, 2011 Cal.App. LEXIS 587, in 202 CPER <http://cper.berkeley.edu/journal/online/?p=209>).

The union argued to the trial court that the governor justified the furloughs by citing a general fund deficit, low cash reserves in the state treasury, and the failure of the legislature to pass a balanced budget. Furloughing employees to save money in special funds, they contended, had no rational basis. The governor pointed out that furloughing special fund employees freed up money so that it could be borrowed for general fund expenses. The union countered that borrowing money interfered with the purposes for which the special funds were created by impeding their operations, and that borrowing from some special funds is prohibited. The trial court found in the union's favor prior to the issuance of *Professional Engineers*, and the governor appealed.

In the appellate court, the governor's fortunes changed with the decision in *Professional Engineers*. The governor asserted to the appellate court that under *Professional Engineers*, the phrase "existing administration authority" validated the entire furlough order, including the extension to all employees "regardless of funding source." The court found this contention too simplistic. But, neither did it accept the SEIU argument.

The court focused on the language that stated, "[E]ach item of appropriation in this act ... shall be reduced...to reflect a reduction in employee compensation." An item of appropriation must first exist before it can be reduced through furloughs, reasoned the court.

Once the court set out this criterion, it was simple to decide whether the specially funded or federally funded employees were properly furloughed. Those employed in agencies that received an item of appropriation could be furloughed. Only 5 of the 63 specially funded agencies received no appropriations from the general fund. Therefore, the court found, the employees of 58 agencies were properly furloughed.

The court rejected the union's assertion that a special funds agency's employees could be validly included in the furlough program only if the special fund money was borrowable. There was evidence that the legislature had a longstanding practice of borrowing from special funds for the general fund. A line of cases holds that all the monies allocated to fund operations of an agency are a single item of appropriation. Whether borrowed from a special fund or not, the existence of an item of appropriation governed the validity of the furlough, said the court. Despite the fact that the question had not been presented to the Supreme Court in *Professional Engineers*, the court supported its holding by saying that the Supreme Court did not mention that borrowability could affect the propriety of furloughs in special fund agencies. The court also noted that SEIU had not been able to identify a non-borrowable fund from which the legislature transferred money to balance the budget.

The union also contended a third day of furlough added in July 2009 was illegal. As did the court in *UAPD v. Brown*, the *SEIU* court found that *Professional Engineers* was dispositive. The same language used in the February budget legislation was used in July 2009 when the legislature approved a budget for 2009-10, approving of further compensation reductions. The court concluded that the legislature ratified the third furlough day.

While the court found that there was no evidence that five special fund agencies received items of appropriation, it did not rule that the employees of the five agencies were improperly furloughed. The court believed it possible that agencies for which there was a continuing appropriation might be validly included in the furlough program and invited the parties to examine that issue before the trial court.

The court explained at length that it was not considering arguments about the monetary benefits or nonsensical nature of furloughing employees of special fund agencies. It deemed these issues to be in the realm of public policy best left to the political branches of government. It chastised the trial court for condemning the special fund furloughs as "arbitrary, capricious, and unlawful. (*Service Employees International Union, Loc. 1000 v. Brown* [2011] 197 Cal.App.4th 252, 2011 Cal.App. LEXIS 885.)

CPER Journal Online

Legislation on Governor's Desk to Improve Enforcement of Limits on Service Contracts

UPDATE 10-13-11.

To minimize corruption and preserve the civil service, the California Constitution and the Government Code place limits on contracting with private entities for services normally performed by state government workers. The State Personnel Board has the responsibility to review personal services contracts to ensure that they meet exceptions to the law prohibiting the state from contracting out civil service work. While the state agency must notify the SPB when it enters into a contract justified under a cost savings rationale, there is no reporting requirement for contracts based on other exceptions. When an agency believes it must obtain services that are needed temporarily or urgently, or for highly specialized tasks not available in the civil service workforce, it may enter into contracts without notifying anyone other than the Department of General Services. That makes them hard to discover.

In 2009, the Bureau of State Audits reported that most of the contracts the SPB invalidated were either expired by the time of the SPB's decision or were not terminated after the SPB ruling. (See story in *CPER* No. 197, pp. 48- 51.) The BSA found that the SPB does not always order disapproved contracts terminated even though state law provides that a contract which violates the restrictions on contracting out is void. In addition, agencies sometimes entered new agreements for the very same services that already were the subject of a disapproved contract.

AB. 740

A.B. 740 (Blumenfeld, D-San Fernando Valley) aims to correct this lack of oversight. If signed, it would require an agency to immediately discontinue a contract disapproved by the SPB unless ordered otherwise by the board. The agency would be required to serve a notice of discontinuation on the vendor and the SPB within 15 days of the board's final action. The bill also prohibits the agency from entering into another contract for the same or similar services. **UPDATE: This bill was signed October 9, 2011.**

AB. 172

Another bill awaiting the governor's action would require most state entities to post on the Reporting Transparency in Government Internet website information about any contract for \$5,000 or more. Under A.B. 172 (Eng, D-Monterey Park), contracts signed before February 15, 2012, would need to be posted by that date. Agencies would be required to post contracts awarded after January 1, 2012, within 15 days of the date they are signed by all parties. There are exceptions for undisclosed expert witnesses and security-sensitive contracts.

According to Assembly Member Eng, 36 states post information that allows the public to track state expenditures. The United States Public Interest Research Group has given California a D grade for transparency, below the level of 28 other states. While staffing levels and expenditures associated with civil service employees are disclosed to the public through the budgeting process, expenses of personal services and consulting contracts are not. Eng asserts that the bill will help California find ways to save funds and avoid raising taxes.

UPDATE: Governor Brown vetoed this bill on October 9, 2011, stating that another law was not necessary since the Department of General Services already provides contracting information on its website. Instead, he issued an executive order requiring agencies under his authority to provide "as much information as possible" on their contracts through the DGS website.

CPER Journal Online

Raises at the Top at CSU

Unions representing employees at the California State University are stirred up over hefty increases to college presidents' salaries at a time the university is proposing to trim the money in their members' pockets. CSU says it needs to attract excellent leaders and has to compensate them well for the top jobs at its 23 campuses, but Governor Jerry Brown has asked the university to reevaluate its presidential compensation policies.

\$50,000 More

Like existing employees, incumbent presidents have not had a raise since 2007. In September of that year, the CSU board of trustees decided to increase salaries of campus presidents and systemwide executives an average of 11.8 percent. Unlike for other employees, however, the presidents' salary hikes were not contingent on funding from the state. While the university trumpeted a 2007-10 agreement with the California Faculty Association that would raise faculty salaries more than 20 percent over four years, most of those raises have yet to occur, since they were contingent on state funding increases beginning in 2008-09 that never materialized.

What especially irks CSU employees is the tremendous leap in salary when new presidents are hired, as well as the sudden increase in the presidential salary schedule approved last January. (See story on salary schedule in 202 CPER <http://cper.berkeley.edu/journal/online/?p=202..>

CPER No. 202.) The most recent recipient of ballooning pay is Elliot Hirshman, the new San Diego State University president, who came to California from a \$267,000 provost job at the University of Maryland. In July, the trustees approved a salary of \$350,000 from university funds, \$50,000 more than his predecessor. With an annual supplement of \$50,000 from the San Diego State Foundation, his \$400,000 salary tops the previous highest salary of Jeffrey Armstrong, who was hired last January as the president of Cal Poly at a salary of \$350,000, augmented by \$30,000 from the Cal Poly Foundation. Both also enjoy presidential car allowances of \$12,000 a year and free housing.

Tuition Up, Not Union Wages

At the same meeting where Hirshman's salary was approved, the trustees hiked student tuition by another 12 percent. This was on top of an increase of 10 percent last November. Students will be paying more even though there are 500 fewer tenure-track or tenured faculty than last year, and 800 fewer than in 2008. Since 2008, the university has reduced its workforce by 4,125 employees. Its state funding has dropped to the same level as it was in 1998-99, even though the university now serves 72,000 more students.

Raising tuition and cutting employees by 8.8 percent have not been enough to hold down costs for the system. In response to plunging state revenue, the university has not given raises to union-represented employees since 2008. Now CSU is asking for concessions, the unions complain. The university is demanding raises in parking fees from the clerical, laborer, and technical employees represented by the California State University Employees Union, even though there have not been any wage boosts. In the past, parking rate increases have been restricted by wage increases. CFA was willing to extend the faculty contract so it could spend time fighting for state funding, but the university refused. It is proposing cuts to faculty pay for summer classes and wants language allowing college presidents to deny sabbatical leaves for budget reasons. CFA is outraged and has posted graphs showing that the average salary of CSU presidents has risen from \$250,000 to \$300,000 since 2005. The average salary of full professors has risen only from \$86,000 to \$96,000 in the same period.

Politicians Weigh In

The sharp disparity between the largess to new executives and the treatment of students and employees drew the attention of the governor. He wrote the chair of the board of trustees before the July meeting to express his concern "about the ever-escalating pay packages awarded to your top administrators. I fear your approach to compensation is setting a pattern for public service that we cannot afford." He challenged the assumption that CSU would not be able to find a qualified candidate "unless paid twice that

of the Chief Justice of the United States.” Brown suggested the board reconsider how it sets administrator salaries.

While the board approved Hirshman’s salary anyway, it did assign a committee to review presidential selection and compensation policies. The committee recommended changes to selection practices at the meeting this month, but will not finish reviewing potential compensation policies until October.

Meanwhile three legislators tried to exert more control over CSU executive compensation. Senator Elaine Alquist (D-Santa Clara) introduced S.B. X1-25, which would have prohibited the university from raising incumbent or new administrator salaries more than 10 percent in the same year as it increases student fees. Senator Ted Lieu (D-Torrance) offered S.B. X1-26, which would have prevented paying a CSU president more than 150 percent higher than the chief justice of the California Supreme Court. And S.B. X1-27 by Senator Leland Yee (D-San Francisco) would have barred compensation increases for executive officers in any year when CSU state funding does not increase. None was passed.

CPER Journal Online

U.C. Provides Pool for Merit Raises to Non-Represented Employees

In mid-August, University of California President Mark Yudof announced that a pool of money would be provided to campus chancellors to distribute as merit raises. In a year when the university has hiked tuition a total of 18 percent, students and politicians cried foul. But Yudof justified the merit increases as a demonstration to staff that the university understands how hard they have worked, despite not having seen a cost-of-living increase since October 2007, suffering furloughs of 4 to 10 percent in 2009-10, and absorbing work previously done by laid-off employees. He also pointed out that the university has increased health benefit contributions which cut into take-home pay, and that it restarted employee pension contributions on July 1.

The president limited the potential recipients to non-represented employees earning less than \$200,000, since many union-represented employees have received salary range increases over the last three years under contracts negotiated in 2007 or 2008. Academic employees continued to have the opportunity to gain merit raises once every three years, but like other non-represented staff, have not had a general salary increase since 2007. Senior management and staff earning over \$200,000 are compensated below market levels, Yudof acknowledged, but expressed confidence they would understand the choice he made.

The president is using funding that the regents approved last November in their budget for 2011-12. The university requested \$87 million for compensation increases in addition to \$27.7 million in academic merit raises. The *2011-2012 Expenditure Plan for Current Operations* explained that the gap between faculty pay and the salaries of faculty at comparable institutions was 11.2 percent in 2009-10. Staff have received no raises in 4 out of the last 13 years even though the market has risen about 4 percent a year over that period. A report on 2010 employee pay issued in August 2011 states that the faculty pay gap has widened to 12.4 percent, and the cash compensation for staff, both union-represented and non-union-represented, is 13 to 19 percent under market levels. Faculty in particular are being lured away by the higher salaries paid at Harvard, Yale and other top universities.

The compensation pool was announced days after the regents approved a 9.6 percent fee increase for students. The university asserted the tuition hike was necessary in the face of a \$650,000 cut to its state funding for 2011-12. Students were upset that U.C. found the money to raise salaries but not to avoid a fee increase. In fact, however, student fees and state general funds account for less than 30 percent of the funds used for wages. The rest of the \$10 billion payroll is paid from grants, federal funds, gifts, and contracts. In a presentation to the regents this month, U.C.'s Office of the President reported that state support is just \$240 million above the amount the university received in 1990-91, while enrollment has increased 51 percent.

The University Professional and Technical Employees, CWA, is hoping that the merit increase pool does not distract from its campaign to organize administrative professionals who stand to benefit from merit raises. The union pointed out that the potential 3 percent raise is much smaller than the yearly raises enjoyed over the last three years by the employees it represents.

CPER Journal Online

No Same-Sex Harassment Where No Sexual Desire or Intent; Employer May be Liable for Co-workers' Retaliatory Conduct

The First District Court of Appeal, in *Kelley v. The Conco Companies*, upheld the dismissal of allegations of sex discrimination and sexual harassment in violation of the Fair Employment and Housing Act, finding that the alleged offensive comments did not express actual sexual desire or intent. In doing so, it explicitly rejected the Second District's holding in *Singleton v. United States Gypsum Co.* that a plaintiff alleging same-sex harassment need not prove the harassment was motivated by sexual desire in order to prevail. The court did, however, reverse the lower court's dismissal of allegations of retaliation, where evidence showed that the employer knew or should have known of retaliatory conduct by co-workers and failed to take steps to stop it.

Sex-Laden Language

On or about July 30, 2006, while Patrick Kelley was working as an apprentice ironworker at Conco Companies, his supervisor, David Seaman, yelled at him while he was sorting rebar. Seaman told Kelley to "fucking quit using [your] godamn fucking foot; bend the fuck over and pick that shit up. Pick that shit up, bitch." While Kelley was bent over, Seaman came up behind him and called him a "bitch" and a "fucking punk." He said Kelly had a "nice ass" and that he wanted to "fuck [Kelley] in the ass." He said Kelley's pants "made [his] ass look good," that he would "look good in little girl's clothes," he would "fuck the shit out of [Kelley's] ass," he would "fuck [Kelley] better than [Kelley's] old lady," he would make Kelley 'his bitch," he would "cum all over [Kelley's] ass" and he would "turn [Kelley] out." When Kelley got down on his knees to complete a task, Seaman said, "That's where you belong, on your knees." A co-worker told Kelley he was going to make him "suck [Seaman's] dick" while he watched. Seaman said he thought the comment was a funny joke.

Kelley related these events to Conco Field Safety Manager Joseph Anthony Gallegos. After Gallegos talked to Seaman, he told Kelley, "Sorry, dude, there's nothing I can do. Stay on the job. If you leave you'll get fired."

Later that afternoon two coworkers called Kelley a "bitch" and "talked shit" to him.

Kelley told the Conco dispatcher, Scott Nava, what had happened and asked to be assigned to a different job site. He was reassigned, but coworkers at the new site called him a "bitch," "faggot," "narc," and "snitch," for complaining about Seaman. He was told he would be lucky if he didn't get his "ass" beat after work. When he told Nava about the incidents, Nava said, "Well, that's the way the trade is, man. That's just the way these guys operate."

In subsequent months, Kelley worked on several other Conco job sites. He had no problems at some but at others comments were made about the incident with Seaman: he was called "punk bitch," "snitch," or "fag" and was threatened with being jumped after work. He complained to Nava about this conduct two to three times a week and asked to be removed from those jobs. Nava regularly moved him.

In October 2006, Kelley was suspended from the union for six months for failing to attend a class. Kelley claimed that he had given a letter to Dana Fairchild, a union representative, asking for a day off to attend his brother's wedding. Fairchild said he had never received such a letter. Conco was notified that Kelley had been suspended and was not authorized to work.

After the expiration of his suspension, Kelley was told by the union not to return to Conco as there was no work for him. He worked for other companies but was often released after one week. When he asked why, Fairchild yelled at him about the incident with Seaman and told him that was why he could not get work. While working at one of the other companies, coworkers called him a "bitch," a "narc," and a "punk."

More than a year after the incident with Seaman, Kelley was suffering a deep depression. He asked the union for a six-month leave of absence "due to the unlawful discrimination and harassment" he endured while employed by Conco. The union granted his request. Kelley resigned from the union before the expiration of his leave.

Kelley filed suit against Conco and Seaman, alleging sex discrimination, sexual harassment, and retaliation in violation of the FEHA. The trial court dismissed the complaint and Kelley appealed.

Sexual Harassment

The appellate court, citing the Supreme Court's decision in *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, 1998 U.S. LEXIS 1599, 129 CPER 11, had no problem concluding that same-sex sexual harassment violates both Title VII and the FEHA where the plaintiff can establish "that the harassment amounted to discrimination *because of sex*." The problem, said the court is determining when the harassment is "because of sex." It noted that in *Oncale*, the high court specified that not all verbal or physical harassment in the workplace is prohibited by Title VII, but only that which constitutes *discrimination* because of sex. "Similarly," said the appellate court, "the California Supreme Court has held that it 'is the disparate treatment of an employee on the basis of sex — not the mere discussion of sex or use of vulgar language — that is the essence of a sexual harassment claim,'" quoting from *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 2006 Cal. LEXIS 4719, 178 CPER 56. "Both courts have cautioned that title VII and FEHA should not be transformed into 'a general civility code for the American workplace,'" it continued.

Here, while the court recognized that Seaman's comments were offensive and demeaning, it found "no evidence...from which a reasonable trier of fact could conclude that they were an expression of actual sexual desire or intent by Seaman, or that they resulted from Kelley's actual or perceived sexual orientation." "[W]hile the use of vulgar or sexually disparaging language may be relevant to show discrimination, it is not necessarily sufficient, by itself, to establish actionable conduct," it said, again quoting *Lyle*.

The court cited a number of Title VII cases in support of its conclusion that "[c]ourts have routinely insisted on evidence that an alleged harasser was acting from genuine sexual interest before holding that the fact of a sexual proposition supported an inference of discrimination because of sex." Those included *Davis v. Coastal Intern. Sec., Inc.* (D.C.Cir. 2002) 275 F.3d 1119, 2002 U.S.App. LEXIS 4117, where the harassers grabbed plaintiff's crotch, made kissing gestures, and described oral sex. but the court found no reasonable jury could believe that the actions were motivated by sexual desire, and *McCown v. St. John's Health System* (8th Cir. 2003) 349 F.3d 540, 2003 U.S.App. LEXIS 23079. In *McCown*, the harasser grabbed plaintiff's genitalia and simulated anal intercourse with him, but the court found insufficient evidence of sexual harassment because there was "no evidence that the harasser was homosexual or motivated by sexual desire."

Kelley pointed to *Singleton v. United States Gypsum Co.* (2006) 140 Cal.App.4th 1547, 2006 Cal.App. LEXIS 1023, in support of his contention that evidence of sexual intent or motivation is not required under the FEHA to establish same-sex sexual harassment. In that case, the Second District held that very similar conduct to that suffered by Kelley violated the FEHA because the harassers treated Singleton differently than they would have treated a woman. "It follows that the harassment was 'because of sex,' i.e., it employed attacks on Singleton's identity as a heterosexual male as a tool of harassment," explained the court.

The *Kelley* court was not persuaded. "*Singleton's* reasoning inevitably leads to the conclusion that any hostile, offensive and harassing comment or conduct, with or without sexual content or innuendo, made to one gender and which would not be made to the other, would constitute discrimination within the scope of the FEHA. What matters, however, is not whether the two sexes are treated *differently* in the workplace, but whether one of the sex [sic] is treated *adversely* to the other sex in the workplace because of their sex."

Retaliation

The court concluded that Kelley failed to produce evidence to support an inference that Conco caused the union to suspend him. Kelley also had not shown Conco failed to rehire him in retaliation for his complaints about Seaman since he had never again applied to Conco for work. However, it found that Kelley *had* produced evidence establishing a clear inference that he was subjected to retaliation by co-workers as a result of his complaints.

Noting that Sec. 12940(h) of the FEHA does not specifically address whether an employer can be held liable for the retaliatory actions of non-management employees and the paucity of California court

decisions addressing the issue, the court again turned to Title VII case law for guidance. It found that in *Gunnell v. Utah Valley State College* (10th Cir. 1998) 152 F.3d 1253, 1998 U.S.App. LEXIS 20205, cited with approval by the Supreme Court in *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 2005 Cal. LEXIS 8594, 174 CPER 23, the court held that an employer may be found liable for a co-worker's retaliatory harassment where management personnel either orchestrated the harassment or knew about it and acquiesced in such a manner as to condone it.

The court, agreeing with the rationale of the federal courts, ruled that "an employer may be held liable for co-worker retaliatory conduct if the employer knew or should have known of [the conduct] and either participated or encouraged the conduct, or failed to take reasonable actions to end the retaliatory conduct."

Finding that Kelley had raised triable issues as to whether co-workers engaged in retaliatory harassment sufficiently severe so as to constitute adverse employment action, whether Conco had knowledge of the conduct, and whether it took appropriate action in response. It therefore reversed the lower court's grant of summary judgment on the retaliation cause of action. (*Kelley v. The Conco Companies* [2011] 196 Cal.App.4th 191, 2011 Cal.App. LEXIS 690.)

CPER Journal Online

Employee Not Entitled to Reinstatement Where CFRA Protected Leave Time Exceeded

The California Family Rights Act entitles an eligible employee to 12 weeks of unpaid leave during any 12-month period to care for her children, parents, or spouses, or to recover from a serious health condition. The employee is guaranteed that taking CFRA leave will not result in a loss of job security or other adverse employment action. Upon return from leave, the employer is required to reinstate the employee to the same or a comparable position. However, these protections do not apply where the employee's leave exceeds 12 weeks, according to the Second District Court of Appeal in *Rogers v. County of Los Angeles*.

In that case, Katarina Rogers took CFRA leave due to work-related stress. Her treating physician did not release her to return to work for a period of 19 weeks. Upon her return, she was told that she was being transferred to a job that was not comparable to her prior position of personnel officer. The decision had been made by a new executive officer, Sachi Hamai, who was charged with streamlining the organizational structure.

Upon being informed of the transfer, Rogers left the office and ultimately retired without ever taking the position. She filed suit and was awarded \$365,000 in damages at trial. The county appealed.

Interference Claim

Rogers alleged that the county interfered with her CFRA rights by transferring her to a non-comparable position. The county claimed that, as a matter of law, Rogers was not entitled to reinstatement because she failed to return to work at the end of her 12-week protected CFRA leave.

The appellate court agreed with the county, explaining that “the CFRA’s statutory language expressly allows an employee ‘to take up to a *total of 12 workweeks* in any 12-month period.’” It noted that, according to the statute, the employer is required to provide “a guarantee of employment in the same or a comparable position *upon the termination of the leave*.” The statute also provides that the 12-month period during which the 12 workweeks are taken shall run concurrently with the 12-month period provided under the federal Family and Medical Leave Act and that “the aggregate amount of leave taken under this section or the FMLA, or both....*shall not exceed 12 workweeks* in a 12-month period.”

The court was also persuaded by the fact that the other obligations under the act are tied expressly to the 12-week protected period. Examples include provisions allowing the employer to require the employee to use accrued sick leave during that period and requiring the employer to maintain and pay for health insurance for up to 12 weeks in a 12-month period. Further, the employee’s right to seniority is only protected until her return from leave.

In support of its holding, the Second Circuit noted that “other courts interpreting the CFRA and the FMLA have concluded that the statutes only ensure protected leave for a 12-week period.” In *Neisendorf v. Levi Strauss & Co.* (2006) 143 Cal.App.4th 509, 2006 Cal.App. LEXIS1520, 181 CPER 60, the First District Court of Appeal determined that the employee’s right to reinstatement under the CFRA ended at the expiration of 12 weeks of leave. In so finding, the *Neisendorf* court cited federal cases holding that the FMLA is not violated when an employer fires an employee who is unable to return to work at the expiration of the 12-week protected period, including *Cehrs v. Northeast Ohio Alzheimer’s Research Center* (6th Cir. 1998) 155 F.3d 775, 1998 U.S.App. LEXIS 21260, and *Nunes v. Wal-Mart Stores, Inc.* (N.D.Cal. 1997) 980 F. Supp. 1336, 1997 U.S.Dist. 15898, revd. on other grounds, (9th Cir. 1999) 164 F.3d 1243, 1999 U.S.App. LEXIS 1048, 135 CPER 61.

The court also reasoned that “policy considerations underlying the FMLA, which closely parallels our CFRA, support our conclusion.” Congress, in enacting the FMLA, intended to strike a balance between the needs of employees with serious health conditions and the legitimate interests of their employers, instructed the court, citing the statutory language to that effect at 29 USC Sec. 201(b).

Rogers’ argument that the county interfered with her CFRA rights because the transfer decision was made during her protected leave was flatly rejected. “[S]he cites no authority to support her position, which

Retaliation Claim

Rogers maintained that the transfer was in retaliation for exercising her right to take CFRA leave. The county contended there was insufficient evidence that she suffered an adverse employment action as a result of taking leave.

The court again agreed with the county. Even assuming that the transfer constituted an adverse employment action, Rogers “failed to establish the requisite causal connection between her protected actions in taking a CFRA medical leave and the decision to transfer her to another position,” said the court. It pointed out that Hamai testified Rogers’ transfer was a “business decision” that had nothing to do with Rogers personally or with her performance. She also testified that Rogers’ leave had “absolutely” nothing to do with her decision. And, noted the court, “Rogers put forth no evidence in response to the County’s legitimate, nondiscriminatory reason for the decision to transfer her to another position.”

The court reversed the jury’s verdict and award of damages and the award of costs and fees to Rogers and ordered the trial court to enter judgment in favor of the county. (*Rogers v. County of Los Angeles* [2011] 198 Cal.App.4th 480, 2011 Cal.App. LEXIS 1075.)

CPER Journal Online

Government Employer Retaliation Does Not Violate Petition Clause Where Petition Relates to Matter of Private Concern

In *Borough of Duryea v. Guarnieri*, where an employee claimed that his grievance and lawsuit were protected by the First Amendment's Petition Clause, the United States Supreme Court held that a government employer's allegedly retaliatory actions against an employee do not give rise to liability under that clause unless the employee's petition relates to a matter of public concern. In an opinion authored by Justice Anthony Kennedy, the court applied to the Petition Clause the tests that it developed in the cases of *Connick v. Meyers* (1983) 461 U.S. 138, 1983 U.S. LEXIS 153, CPER SRS No. 22, and *Pickering v. Board of Education* (1968) 391 U.S. 563, 1968 U.S. LEXIS 1471. These tests were originally formulated to determine whether a government employer violated a public employee's rights under the First Amendment's Speech Clause.

Private Concerns

After Charles Guarnieri was fired as police chief, he filed a union grievance challenging his termination. The grievance proceeded to arbitration. The arbitrator found that the borough council had committed procedural errors regarding the termination, but also that Guarnieri had engaged in misconduct. The arbitrator ordered Guarnieri reinstated after a disciplinary suspension.

When Guarnieri returned to the job, the council presented him with 11 directives, including prohibiting him from working overtime without the council's express permission. Guarnieri filed a second grievance challenging the directives, and the arbitrator instructed the council to modify or withdraw some of them.

Guarnieri filed a lawsuit under 42 USC Sec. 1983, in which he claimed that his first grievance was a petition protected by the Petition Clause and that the directives issued upon his reinstatement were in retaliation for having filed it. Subsequently, the council denied a request by Guarnieri for \$338 in overtime pay. Guarnieri amended his complaint, alleging that the filing of the lawsuit was a protected petition and that the denial of overtime pay was in retaliation for having filed suit.

The jury found in favor of Guarnieri at trial. The defendants appealed on the ground the Petition Clause only protects petitions involving matters of public concern; because Guarnieri's grievance and suit did not address matters of public concern they could not be held liable for any retaliatory action. The Third Circuit Court of Appeals affirmed the jury's award of compensatory damages, concluding that a public employee who has filed a lawsuit or grievance is protected under the Petition Clause, even if his complaint concerns matters of private concern. This holding put the Third Circuit in direct conflict with those of all other circuits to have considered the issue. See, for example, the Fourth Circuit's decision in *Kirby v. Elizabeth City* (2004) 388 F.3d 440, 2004 U.S. App. LEXIS 22962, and the First Circuit's decision in *Tang v. Rhode Island, Dept. of Elderly Affairs* (1998) 163 F.3d 7, 1998 U.S.App. LEXIS 31184.

The Supreme Court granted the defendants' petition for certiorari to resolve the conflict in the Courts of Appeals.

Supreme Court Opinion

The high court first noted that when a public employee sues a government employer under the First Amendment's Speech Clause, it is well settled that, in order to proceed, the employee must show that he or she spoke as a citizen on a matter of public concern. Otherwise, "a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior," it said, quoting from *Connick*. And, even if the employee did speak as a citizen on a matter of public concern, courts will balance the First Amendment interest of the employee against the government's interest in promoting the efficiency of the public services it performs, it explained, citing *Pickering*.

While the court acknowledged that "there are some rights and freedoms so fundamental to liberty that they cannot be bargained away in a contract for public employment," someone who accepts public employment must also accept "certain limitations on his or her freedom."

Even though Guarneri brought his suit under the Petition Clause, he could just as easily have proceeded under the Speech Clause, alleging that his employer retaliated against him for the speech contained in the grievances and lawsuit, the court instructed. And, if he had chosen that path, he would have had to meet the public concern test. “The question presented by this case is whether the history and purpose of the Petition Clause justify the imposition of broader liability when an employee invokes its protection instead of the protection afforded by the Speech Clause.”

Although the two clauses share substantial ground, courts should not presume that they are equivalent or that Speech Clause precedents should always be relied on to resolve Petition Clause claims, said the high court. However, while there may be cases that would require separate analyses, that is not true for claims of retaliation by public employees.

The court explained that both petitions and speech can interfere with the efficient and effective operation of government. Both could negatively affect the employer’s mission and its employees’ professionalism. For example, a public employee might use the courts to pursue a personal vendetta or harass a member of the public. And, if directed at other public employees, either one could seriously impact morale.

Petitions that take the form of a lawsuit against a government employer may be especially disruptive, the court cautioned. Lawsuits, unlike other forms of speech, demand a response and can require the expenditure of time and resources of the government employer. Further, a broad application of the Petition Clause could result in invasive judicial scrutiny of a wide range of government operations. Determination of whether a government employer’s response to an employee grievance was retaliatory could mean that budget priorities, personnel decisions, and policies would all be subject to examination by a jury. “This would raise serious federalism and separation-of-powers concerns,” said the court. “It would also consume the time and attention of public officials, burden the exercise of legitimate authority, and blur the lines of accountability between officials and the public.”

The court reasoned that Petition Clause protection was not necessary for matters of private concern when the rights of public employees to file grievances and to litigate are already protected by statutes or regulations. “The Petition Clause is not an instrument for public employees to circumvent these legislative enactments when pursuing claims based on ordinary workplace grievances.”

The public concern test was developed to protect the government’s interest in managing its internal affairs, the court instructed. Applying a different standard for the Petition Clause would give public employees a way to get around the test’s protections.

A separate Petition Clause analysis would also increase the cost to government of constitutional compliance. Petitions would have to be separated from speech and, because petitions can take many forms, they can be difficult to identify.

Guarneri contended that it would be inappropriate to apply the public concern test to the Petition Clause given the private nature of many petitions for redress of grievances. The court agreed that there are many personal grievances made to government where the Petition Clause would be applicable. It remarked that at the time of the founding of the United States, many petitions to colonial legislatures addressed matters of both public and private concern. “Outside the public employment context, constitutional protection for petitions does not necessarily turn on whether those petitions relate to a matter of public concern,” wrote Justice Kennedy.

However, the argument that the public concern test should not apply because the majority of petitions to colonial legislatures involved matters of purely private concern is without merit, said the court. Rather, “some effort must be made to identify the historic and fundamental principles that led to the enumeration of the right to petition in the First Amendment, among other rights fundamental to liberty.” The court proceeded to examine the history of the right to petition, from the Magna Carta through the civil rights movement. It concluded that “petitions have provided a vital means for citizens to request recognition of new rights and to assert existing rights against the sovereign,” and “litigation on matters of public concern may facilitate the informed public participation that is a cornerstone of democratic society.”

The court acknowledged that the public can benefit from hearing the views of public employees who are the most likely group to have informed opinions about matters that relate to their employment. When a public employee seeks to participate as a citizen in the democratic process, whether through speech or petition, he must be treated as a member of the general public, cautioned the court.

In summary, the court stated:

The framework used to govern Speech Clause claims by public employees, when applied to the Petition Clause, will protect both the interests of the government and the First Amendment right. If a public employee petitions as an employee on a matter of purely private concern, the employee's First Amendment interest must give way, as it does in speech cases....When a public employee petitions as a citizen on a matter of public concern, the employee's First Amendment interest must be balanced against the countervailing interest of the government in the effective and efficient management of its internal affairs....If that balance favors the public employee, the employee's First Amendment claim will be sustained. If the interference with the government's operations is such that the balance favors the employer, the employee's First Amendment claim will fail even though the petition is on a matter of public concern.

Whether an employee's petition relates to a matter of public concern will, as with the Speech Clause, depend on "the content, form, and context of the [petition], as revealed by the whole record," said the court, quoting from *Connick*. The forum where the petition is filed is also relevant to the determination, it added, indicating that an internal grievance will rarely meet the public concern test.

A public employee's right under the Petition Clause "is not a right to transform everyday employment disputes into matters for constitutional litigation in the federal courts."

Because the Third Circuit had not applied the *Connick/Pickering* framework, the Supreme Court vacated the Court of Appeal's decision and remanded the case for further proceedings consistent with its opinion.

Scalia's Dissent

Justice Anthony Scalia dissented in part from the majority's opinion on two grounds. First, he found "the proposition that a lawsuit is a constitutionally protected 'Petition' quite doubtful," but agreed with the court that, as the parties did not litigate the issue, it should be left for another day.

More importantly, Scalia disagreed that the *Connick* public concern test should apply to retaliation claims brought under the Petition Clause. In his view, the principal purpose of the Petition Clause is to protect both personal and public grievances addressed to the government, noting that the overwhelming majority of petitions to colonial assemblies and the First Congress addressed private claims. He argued that because neither the history nor the text of the Petition Clause distinguishes between public and private concerns, there should be no doctrinal distinction between them.

In place of the public concern doctrine, Scalia would hold that "the Petition Clause protects public employees against retaliation for filing petitions unless those petitions are addressed to the government in its capacity as the petitioners' employer, rather than its capacity as their sovereign." "When an employee files a petition with the government in its capacity as his employer, he is not acting 'as [a] citizen for First Amendment purposes,' because 'there is no relevant analogue to [petitions] by citizens who are not government employees,'" he explained, quoting language from *Garcetti v. Ceballos* (2006) 547 U.S. 410, 2006 U.S. LEXIS, 180 CPER 13, regarding the Speech Clause. Using this test, "a union grievance is the epitome of a petition addressed to the government in its capacity as the petitioner's employer." However, given that Guarnieri was not a federal employee, it would be impossible to say that his Sec. 1983 claim was addressed to government in its capacity as his employer, Scalia reasoned. (*Borough of Duryea v. Guarnieri* [6-20-11] No. 09-1476, ____ U.S. ____, 131 S.Ct. 2488, 2011 U.S. LEXIS 4564.)

CPER Journal Online

Last Chance Agreement Did Not Waive Pre-Termination Due Process Hearing

An employee terminated for violating a last chance agreement was entitled to a pre-termination due process hearing, even though he agreed that non-compliance with the agreement would result in his “immediate and final termination,” the Ninth Circuit Court of Appeals ruled in *Walls v. Central Contra Costa Transit Authority*. In another section of the opinion, the court found he was not an employee on the day he made a request for leave under the Family and Medical Leave Act, and therefore was not entitled to the protection of the act when he requested the time off that led to his second termination.

Termination Grieved

Kerry Walls was a bus driver who was terminated from CCCTA on January 27, 2006. During the grievance process, he entered into a last chance agreement with the employer that would allow him to return to work on March 2, and set conditions for his continued employment. The agreement provided that a week in January would be treated as a suspension and that he would be reinstated March 2 with full seniority. However, it did not stipulate that the January 27 termination was rescinded.

During a meeting on March 1 that led to the agreement, Walls requested FMLA leave from March 3 through April 10. When he missed work on March 3, he was charged with an unexcused absence, which violated the attendance requirement of the last chance agreement. CCCTA fired him on March 6 without granting him a pre-disciplinary hearing.

Walls sued the transit authority for violation of the FMLA and deprivation of due process. The district court granted summary judgment to CCCTA, and Walls appealed.

Not an At-Will Employee

Walls argued that he was entitled under the state and federal constitutional due process clauses to a pre-disciplinary hearing before he was fired on March 6. The court held that the transit authority was required to give him due process.

When a public employee may be discharged only for cause, he has a property interest in public employment and is entitled to due process before being fired, the court noted. It rejected CCCTA's argument that the last chance agreement made Walls an at-will employee who was not entitled to due process. At-will employees can be fired without cause, the court agreed, but the agreement did not express that Walls was at-will or subject to discharge without cause. It only modified what would constitute just cause under the collective bargaining agreement between CCCTA and Walls' union, and specified certain occurrences that would lead to termination. Therefore, the court found Walls had a protected property interest in his employment.

Since he had a property interest in continued employment, Walls was entitled to notice of the charges against him, an explanation of the employer's evidence, and an opportunity to tell his side of the story before being fired, the court explained, citing *Cleveland Bd. of Educ. v. Loudermill* (1985) 470 U.S. 532, 1985 U.S. LEXIS 68, 61X CPER 10. The California Constitution requires similar pre-removal safeguards held the California Supreme Court in *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 1975 Cal. LEXIS 226.

CCCTA had allowed a post-termination hearing, despite a term of the last chance agreement waiving Walls' grievance and arbitration rights. But, it had not given Walls an opportunity to respond to the attendance charge prior to his termination. The court held that the post-termination due process hearing was insufficient to comply with the transit authority's constitutional responsibilities.

CCCTA contended that Walls had waived his right to pre-termination due process when he signed the agreement. The court cautioned, “Such a waiver should not be implied and should not be lightly found.” There was no express waiver of a pre-termination hearing or of due process in the agreement. While Walls did waive grievance and arbitration rights, the court found this did not waive pre-disciplinary due

Nor did the court find a waiver in the language providing that non-compliance with the agreement “will result in your immediate and final termination.” The word “immediate” did not necessarily indicate that the termination would take effect without any process, the court explained, noting no judicial precedent on the issue. In addition, it was not clear to the court that Walls understood when he signed the agreement that he was waiving his pre-termination due process rights. Since the agreement required him to waive the *post*-termination grievance process, the court found it “logical for Walls to have assumed that, absent an analogous waiver, he would be afforded *pre*-termination safeguards.” The court concluded CCCTA violated Wall’s due process rights.

The court held that Walls was not an employee at the time he requested FMLA leave. Since protection under the FMLA requires an employment relationship, his claim that his second termination interfered with FMLA rights failed. The court rejected Walls’ argument that the last chance agreement retroactively changed his employment status. The court found the agreement did not change his status from non-employee to employee on March 1. The court also turned aside Walls’ contention that CCCTA had actual notice of his need for leave on March 2 and 3 after he had been reinstated. It found that his signature on the agreement retracted his leave request, and his attendance at a refresher training course on March 2 indicated he was able to return to work.

The court upheld the summary judgment on the FMLA claim but reversed summary judgment on Walls’ due process claims. It remanded the case to the district court to determine the remedy. (*Walls v. Central Contra Costa Transit Authority* [9th Cir. 8-3-11] 10-15967, ___ F.3d ___, 2011 U.S. App. LEXIS 15914, 2011 DJDAR 11681.)

CPER Journal Online

Interference with Public Employee's First Amendment Rights is Unconstitutional When Based on Mere Suspicion of Disloyalty

Sitting next to her supervisor at the school board meeting during which he was fired was not sufficient justification to reassign an administrative assistant, the Ninth Circuit Court of Appeals found in *Nichols v. Dancer*. A public employer needs more than mere speculation that an employee may be disloyal or disruptive in the workplace before it may interfere with her First Amendment right of association.

Attending a Board Meeting

Kathleen Nichols was an administrative assistant to the general counsel of the Washoe County School District, Jeffrey Blanck. Among her duties were to provide litigation support and manage case files. She and Blanck sometimes socialized outside the office.

In January, a dispute arose between Blanck and the school superintendent, and Blanck was suspended. The human resources director, Laura Dancer, told Nichols that she should no longer take direction from Blanck. Nichols was transferred temporarily to the human resources department.

Blanck's continued employment was scheduled to be considered at a school board meeting in March. Dancer told Nichols the day before the meeting that she would be transferred back to her original position whether or not Blanck was fired.

Nichols attended the meeting because a friend was receiving an award and also to find out whether Blanck would be fired. She sat next to Blanck, but did not speak to him. The board decided to dismiss him.

The next day, Dancer told Nichols that she could not return to the general counsel's office because she had attended the meeting and the district had questions about her loyalty. She was offered the option to remain in the human resources department, with her salary frozen, or take an early retirement. She retired.

Nichols filed a lawsuit under 42 USC Sec. 1983, claiming that the district and Dancer had violated her right to association by demoting her for attending a meeting and sitting next to her boss. The district successfully moved for a judgment before trial. The court held that the district's interests in workplace efficiency outweighed Nichols' interest in free association. Nichols appealed.

'Specter' of Disruption Insufficient

The Court of Appeals applied the balancing test set out in *Pickering v. Board of Education of Township High School Dist. 205* (1968) 391 U.S. 563, 88 S.Ct.1731, 1968 U.S. LEXIS 1471, to determine whether Nichols' conduct was protected by the First Amendment. In free speech cases, the test examines the interests of the employee "as a citizen, in commenting upon matters of public concern" and the interests of the employer "in promoting the efficiency of the public services it performs through its employees." The court explained that the employer's interests prevail if the employee's conduct impairs discipline or co-worker harmony, has a detrimental effect on relationships in which loyalty and confidence are necessary, or interferes with an employee's performance or the operation of the entity.

The court emphasized the holdings of prior cases that, while actual disruption of the workplace is not necessary before a public employer may step in, there must be a reasonable prediction of disruption. It commented that it could not abdicate its responsibility to weigh opposing interests "simply because an employer raises the specter of disruption."

The court found no evidence that Nichols' association with Blanck actually impaired the district's operations or interfered with Nichols' job performance. No evidence before the court contradicted Nichols' claims that she got along well with her co-workers in the human resources department and had no problems with Dancer.

The court noted that after Nichols sued, the district piled on other reasons for its decision, such as files

that were missing and a telephone call during which Nichols told Blanck that outside counsel was scheduled to come to the office. Neither reason was mentioned when she was reassigned. At this stage of the lawsuit, the court found that Nichols' allegations that she was reassigned because of her attendance and seat at the meeting, if proven, were sufficient to show a violation of her right to free association.

The court dismissed as "speculation" the district's assertion that Nichols would have had a conflict of interest if she had continued to work in the general counsel's office because Blanck filed suit against the district. There was no evidence of disloyalty or disruption, the court said, nor any indication that her contact with Blanck threatened to disrupt operations. It found the district did not provide enough evidence to establish without a trial that its interests outweighed Nichols' free association rights.

The court reversed the summary judgment and sent the case back to the trial court. (*Nichols v. Dancer* [9-15-11] 10-15359, ___ F.3d ___, 2011 LEXIS 19006, 2011 DJDAR 14081.)

CPER Journal Online

Employer May Reinstate Discharge After Employee Repudiates Settlement Agreement

Fearing a behind-the-scenes attempt to scuttle a settlement agreement rescinding his client's discharge, an employee's lawyer sent the employer a letter asserting the agreement was "null and void." The letter gave the city employer the right to discharge the employee, since it was no longer bound by the settlement agreement, the Court of Appeal ruled in *Ferguson v. City of Cathedral City*.

Criminal Charges Filed

Thomas Ferguson was a police officer employed by Cathedral City who was arrested for soliciting a prostitute. After his arrest, the city served him with a notice of intent to discharge him. At his Skelly hearing, the parties entered into a settlement agreement. Ferguson agreed to serve a 160-hour suspension for conduct unbecoming a police officer and waive his right to an administrative appeal in exchange for the city rescinding his discharge. If Ferguson was convicted at trial or pled guilty to a crime that would limit his ability to carry a firearm, however, he was obligated under the agreement to resign. If criminal charges were filed against him, he was required to "take all reasonable steps to bring the criminal proceedings to an expeditious conclusion."

Ferguson served his suspension and returned to work. He then went on temporary disability leave when he had an on-the-job injury. His criminal charges were still pending.

While he was on leave, his attorney wrote a letter to the police chief. The attorney claimed that police department management had contacted the district attorney's office about Ferguson's case and attempted to influence the criminal case. Assuming that the department was trying to undermine the settlement agreement, the attorney wrote that Ferguson "now considers the agreement including the condition that he resign in the event he is convicted of or pleads guilty to any related offense null and void." Approximately three weeks later, the city's attorney responded that there had been no improper contact with the district attorney's office and accepted the repudiation of the settlement agreement. He informed Ferguson's attorney that disciplinary proceedings were being resumed.

Ferguson was served with another notice of intent to discharge. Ferguson's new lawyer wrote the department, retracting the statement that the agreement was null and void. Although a Skelly hearing was scheduled, Ferguson's attorney asked that it be rescheduled to a different location because he had a scheduling conflict and because his client's injury prevented him from driving the long distance to the hearing. Initially, the city's attorney refused to move the Skelly hearing and asserted that Ferguson's failure to appear would be deemed insubordination. Even after various options were offered, including moving the hearing nearer to Ferguson's home and allowing Ferguson to participate by conference call, Ferguson objected. In response, the city immediately discharged him.

Ferguson appealed his termination. The hearing officer recommended that the settlement agreement not be enforced, that Ferguson should serve an additional 160-hour suspension, and that he should be reinstated subject to his temporary disability. The city manager rejected reinstatement, but agreed the settlement agreement should not be enforced and upheld the discharge. Ferguson asked the court to find that the city breached its agreement with him and order his reinstatement.

Agreement Repudiated

The court found that Ferguson had repudiated the agreement by stating that it was null and void, implying that he would no longer attempt to expedite his criminal case or resign if convicted. The city had the option of waiting to see if Ferguson fulfilled his promises or treating the repudiation as a breach of contract and terminating the agreement. Since it chose to accept the repudiation, the court held, it was no longer bound by its agreement to reinstate Ferguson.

The court rejected Ferguson's argument that his former counsel had no authority to take an action that would impair his rights, as there was no evidence that Ferguson did not authorize the letter. The court refused to assume that the letter was not authorized or that he was not adequately informed of its

The court declined to address Ferguson's argument that his second attorney retracted the repudiation. Deciding the question would have required evidence at the trial court level, and the issue was not raised there.

Finally, the court found that Ferguson's misconduct warranted termination as a police officer. It ruled that he was not entitled to a Skelly hearing since he had already received notice of the proposed discharge, the reasons for his discharge, and an opportunity to respond to the first notice. The second notice was based on the same misconduct, and he had rejected the city's attempts to schedule the second Skelly hearing. (*Ferguson v. City of Cathedral City* [2011] 197 Cal.App.4th 1161, 2009 Cal.App. LEXIS 978.)

CPER Journal Online

Legislature Passes Two Bills That Affect PERB

Updated 10-13-11

The Public Employment Relations Board may reexamine the way it prioritizes cases now that the governor has signed S.B. 609 (Negrete McLeod, D-Montclair). The bill amends the Meyers-Milias-Brown Act, the Dills Act, the Educational Employment Relations Act, the Higher Education Employer-Employee Relations Act, the Trial Court Employment Protection and Governance Act, the Trial Court Interpreter Employment and Labor Relations Act, and the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act. Each act will now provide that an administrative law judge's decision regarding recognition or certification of an employee organization becomes final 180 days after the ALJ decision is appealed to the board if the board does not issue a ruling that supersedes it. The new statute does not contain any exceptions for unusually complicated cases. The timeline begins to run from the day the decision is appealed, not from the day the last brief to the full board is filed.

According to the Assembly Appropriations Committee, PERB advised it that, "of the 95 cases filed since January 1, 2009 involving petitions for recognition or certification, only three have involved an appeal filed with the board. Of these three, one appeal was decided after 52 days, another in 279 days, and the third is still pending."

Another bill affecting PERB, S.B. 857 (Lieu, D-Torrance), is awaiting the governor's signature. The bill is sponsored by several unions to overturn PERB's ruling in *California Nurses Assn. v. Regents of the University of California* (2010) Dec. No. 2094-H, 201 CPER 39. In that case, the board decided that it has authority to award monetary damages for an employer's direct economic losses from the *threat* of an unlawful strike, even if the strike never occurs. If signed, S.B. 857 would amend each of the public sector labor relations statutes under PERB's jurisdiction to provide:

[T]he board shall have no authority to award strike-preparation expenses as damages, and shall have no authority to award damages for costs, expenses, or revenue losses incurred during, or as a consequence of, an unlawful strike.

The bill further provides that the amendments to the statutes do not change existing law, and do not affect the authority of courts to award damages under current law.

The bill is opposed by many public employers, which contend that it would encourage more unlawful strikes and remove the incentive for unions to pursue a strike as a last resort rather than as a negotiating tactic. The University of California wrote to the legislature, "This bill would perhaps be most problematic in its effects on the UC medical centers, where modifying operations and hiring replacement staff during strikes is particularly costly, and impacts patient services."

Supporters assert that the employer's entitlement to strike preparation damages even where no strike occurs interferes with worker's rights. They fear that many organizing activities, such as membership rallies and strike authorization votes, could be used to justify strike preparation damages.

UPDATE:

The governor signed S.B. 857 on October 7, 2011, stating that the PERB decision in *California Nurses Association* was "not faithful to current law and could not have reasonably been anticipated by the parties." However, his signing message invited legislation that would allow PERB to award damages to a public employer "in the event of an unlawful strike or strike threat that necessitates expenditures by the employer to preserve the health and safety of the public." He continued, "The employer should be required to prove that the claimed expenses were reasonable, were necessary to preserve the public health and safety, and that the employer had no alternative to respond to the emergency without incurring the claimed expenses."

CPER Journal Online

Project Manager Overstated Progress, But Was Not Deceitful

Urged by the California Energy Commission to submit a final report even if minor aspects of the project were not completed, a project manager for Orange County prematurely certified that a compressed natural gas (CNG) fueling station project was finished. Arbitrator Walter Kaufman ruled that his discharge for falsification and improperly contracting for services was clearly excessive.

The grievant was a project manager for a CNG fueling station that was to be financed in part with a Department of Energy grant that was administered by the CEC. As the station neared completion, the grievant met with the CEC's senior energy project specialist to tour the construction site. He told the CEC representative that two aspects of the project were unlikely to be completed by the grant deadline of December 31. The CEC specialist assured him that it would be acceptable to submit a final report, even if billing software was not ready and the county's board of supervisors had not yet approved CNG pricing. The CEC specialist urged him to submit the report in early December, before the grievant was scheduled to go on leave, and offered to provide a sample report as a template.

The grievant had often worked with an alternate-energy consultant under prior contracts with the county. He arranged with her to complete the report on the fueling station and the cover letter for the grievant's signature even though her contract had not yet been approved. The consultant testified that she had done so as a favor to the grievant while he was on leave, and that she also had done research preliminary to setting the CNG rates to charge the public.

By November, construction was completed and the station could pump fuel. In late December, the county submitted the report and cover letter, which the grievant had had the opportunity to review.

The cover letter for the report asserted the station was operating and serving the county fleet and vehicles driven by the public. The report stated that the county had developed fuel costs for the station and was preparing a comprehensive report on fuel use. In fact, the county did not obtain a certificate of use and occupancy until January 14. Software to enable credit card purchases was not installed, and the board did not set rates until January 26.

In early January, while the grievant was on leave, an administrative manager in his department noticed the discrepancies. He alerted the CEC grants and loans manager, who seemed surprised but did not request a corrected report. Notwithstanding the CEC project specialist's letter explaining that he knew about the unfinished aspects of the project, the grievant was discharged.

Arbitrator Kaufman agreed with the county that it needed to be able to trust employees to present truthful information to funding agencies. He pointed out, though, that the grievant had submitted the report with the knowledge and consent of his CEC contact that some minor details were not completed. In addition, the grievant previously had demonstrated his honesty when he refused to submit an untruthful report on the same project even though the coworker's suggestion to falsify the report was approved by his division director.

The county argued that it was concerned about the falsehoods even if the CEC was not. But the arbitrator pointed out that the grievant's supervisors were not called to contradict the grievant's testimony that he had informed them that CEC would approve the grant notwithstanding the unfinished aspects of the project. The arbitrator rejected the county's contention that the grievant's overstatements risked loss of the grant funding.

Because the grievant realistically expected that his overstatements would soon be correct and knew that the report recipient was aware of the actual status of the final details necessary to beginning operations, Kaufman found that he had not acted with a deceitful state of mind.

The county's ordinance requires outside vendors to be vetted and under contract regardless of how many times they have worked for the county. The arbitrator pointed out that it was not his job to dispute the rationale for the ordinance and that the activities the consultant performed were significant, not incidental matters.

Arbitrator Kaufman found that the grievant's overstatements and use of the consultant in violation of the contracting ordinance were not acceptable. However, the grievant had worked for the county for 30 years. His most recent evaluation rated his performance as exceeding performance objectives. Considering the case in context, he found the discharge clearly excessive. He asserted that the county's concerns about being able to trust the grievant to be truthful on future projects would be unwarranted.

The county was ordered to reinstate the grievant with his seniority restored, but without back pay. (*County of Orange v. Orange County Employees Assn.* [1-8-11] 13 pp. *Representatives:* Teri L. Maksoudian, deputy county counsel, for the employer; Tim Steed, labor relations representative, for the association. *Arbitrator:* Walter N. Kaufman, CSMCS No. ARB-09-0667.)

(Binding Interest Arbitration)

CPER Journal Online

Public Sector Arbitration Log

ATTENTION ATTORNEYS AND UNION REPS

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- **Discharge — Termination**
- **Off-Duty Conduct**
- **Dishonesty and Unlawful Conduct**
- **Due Process**

Sacramento County and Sacramento County Deputy Sheriff's Assn. (3-25-11; 19 pp.)

Representatives: James R. Wood, deputy county counsel, for the employer; Daniel T. McNamara (Mastagni, Holdstedt, Amick, Miller, Johnsen & Uhrhammer) for the union. *Arbitrator:* Matthew Goldberg.

Issue: Did the employer have just cause to terminate the grievant?

Employer's position: (1) Under penalty of perjury, the grievant filed a false statement with the Department of Motor Vehicles that he had purchased a diesel truck for \$1,000, when he paid \$28,000, plus a gun in trade. The DMV valued the truck at \$36,000, finding it had sold for \$78,000 a year prior.

(2) The grievant's action was intentional and fraudulent, for the purpose of avoiding the taxes and fees he would owe if the truck were correctly valued. To enable the falsification, he took the ownership transfer form before the seller had entered the actual sales price, and brought it to the DMV himself.

(3) The grievant became loud and belligerent when the DMV manager told him that his stated value was unreasonable, and that if he insisted, she would send the paperwork to be investigated. He refused to change his claimed value.

(4) The grievant also argued with the on-duty CHP officer assigned to the DMV, when the officer advised him that no one should devalue a vehicle to avoid fees, and doing so would prompt an investigation and get him into serious trouble.

(5) The grievant did file a new statement giving the actual purchase price, admitting that the initial statement had been false, but not until several months later and only in an effort to get the vehicle registered.

(6) The department terminated the grievant after an internal affairs investigation and the DMV investigation both found he violated the vehicle code by intentionally making a false statement, under penalty of perjury, with the intent to defraud.

(7) The employer had just cause to terminate the grievant for intentionally unlawful and dishonest conduct. Peace officers are held to a higher standard of conduct. Dishonest conduct cannot be tolerated because an officer's credibility is crucial to the performance of his duties.

(8) The grievant's off-duty conduct brought discredit on the department because the DMV investigator knew that the grievant was a sworn peace officer.

(9) Progressive discipline need not be followed. The grievant's two years as a deputy sheriff is outweighed by the seriousness of his misconduct, so that termination was justified.

Union's position: (1) Dishonesty requires evidence of an intent to deceive. The county has not born its burden of proving the grievant intended to defraud the DMV.

(2) The grievant was honest and forthcoming when he told the DMV agent he was attempting to devalue the truck to lower his costs. He understood from prior telephone discussions with the DMV that he could claim a value lower than the vehicle's worth if the sales price was "by agreement."

(3) When he realized his conduct was improper, he returned to the same DMV agent the next day, apologized for being rude, and asked to correct his statement. He contacted the DMV frequently, fully cooperated in the investigation, and ultimately signed a corrected statement and paid the fees in full.

(4) Dishonesty is a character trait, rather than an isolated act, and a dishonest peace officer usually displays that trait on more than one occasion. Witnesses testified to the grievant's outstanding reputation.

(5) Dismissal is an excessive penalty, as he had no significant prior discipline and his character, reputation, and work performance mitigate against termination.

(6) The grievant is entitled to reinstatement because the employer violated due process when it considered the fact that he had not reported the DMV investigation to the department. That charge was not included in the notice of discipline, and the grievant had no opportunity to respond to the charge prior to arbitration.

Arbitrator's decision: The grievance is denied.

Arbitrator's reasoning: (1) The grievant was dishonest when he willfully and intentionally misrepresented the value of the vehicle, to avoid paying the full taxes and fees due. He signed a document under penalty of perjury memorializing a claim he knew was false.

(2) The grievant's behavior brought discredit to his department and to himself by engaging in unlawful conduct — providing false information to the DMV is a misdemeanor — even though he received clear instruction from the CHP officer at the DMV that what he was doing was questionable and probably illegal.

(3) The grievant's claim that he immediately attempted to change his course of action is not credible. Recognition that he had done anything wrong was not fully manifested until he found he was subject to an official investigation. It took him 10 months to reappear at the DMV to fill out a corrected statement.

(4) His claim that \$1,000 was a mistake, that he meant \$10,000, is not persuasive as he repeated the \$1,000 figure several times to the DMV agent. Both figures were deliberately inaccurate.

(5) Credibility and trustworthiness are essential qualifications for a peace officer's job. Reliability of an officer's testimony or reports must not be subject to doubt, as it would if these events became known. Therefore, the penalty of discharge for the grievant's dishonest act is neither arbitrary nor unreasonable, and is fully consistent with just cause requirements.

(6) The grievant's due process rights were not violated. Although the Skelly hearing officer considered his failure to report the DMV investigation, management did not base its discipline decision on that rule violation, but only on the evidence of his dishonesty and the discredit brought to the department.

(Binding Grievance Arbitration)

- **Discipline — Dishonesty**
- **Discipline — Just Cause**
- **Discipline — Full and Fair Investigation**

San Joaquin County and SEIU Loc. 1021 (3-7-11; 18 pp.) *Representatives:* Lisa Ribeiro, deputy county counsel, for the employer; Yuri Gottesman (Weinberg, Roger & Rosenfeld) for the union.

Arbitrator: Bonnie G. Bogue.

Issue: Did the employer have just cause to suspend the grievant for two weeks?

Employer's position: (1) The county had just cause to suspend the grievant for dishonesty, in the course

of an investigation into possible conflict of interest between the grievant's duties with the county and a non-profit group home owned and operated by her husband. In the conversation with her supervisor and in her written history of the home, she said it did not make money and that she was an unpaid volunteer, without admitting she previously had received a salary.

(2) In a subsequent oral statement, she changed her story to say she was not currently paid but had been paid "off and on," still intentionally misleading and contrary to the information on the home's tax returns that showed she had received a substantial salary every year. She did not explain to management, as she did in arbitration, that "off and on" meant she sometimes returned her salary.

(3) The grievant was dishonest when she supplied the tax return by omitting the page listing the salary she was paid, a page discovered independently by the county.

(4) The grievant's claim she misunderstood what she was being asked is not credible, as she clearly knew the supervisor's questions were intended to determine her financial connection with the group home.

Union's position: (1) The grievant was not dishonest, but truthfully answered "no" when asked, in the present tense, if she was being paid. She had been an unpaid volunteer for the prior six months since she had resigned from the home's board. The supervisor admitted she never asked her if she previously had been paid and that the grievant never said she had never received compensation.

(2) The grievant's written statement was not misleading but told what she was asked to explain — how the group home started and her connection with it. She never was asked to include her financial involvement.

(3) The grievant was truthful when stating she had been paid "off and on" prior to when she began volunteering. When paid, she often returned her salary to help cover operational expenses, so actual compensation was intermittent.

(4) The grievant did not intentionally withhold the payroll attachment when providing the tax return. She brought the 44-page tax file to her supervisor and was told to copy only the "return," which she believed she had done. Although not told why they wanted the tax return, she made every effort to comply.

(5) The suspension was not for just cause. The county failed to prove any dishonesty.

Arbitrator's decision: The grievance is granted.

Arbitrator's reasoning: (1) To prove dishonesty, the county must show that the grievant understood she was directed to provide information and then failed to do so or provided false or misleading information intended to cover up her compensation. The county failed to meet that burden of proof, so it has no just cause for the suspension.

(2) The grievant's claim in the first meeting and in her written "story" that she was a volunteer was accurate, as she had been an unpaid volunteer for the prior six months.

(3) The grievant's statement in the second meeting, that she had been paid "off and on," was accurate, even though not very enlightening, since she testified without contradiction that she often had returned her salary and kept no compensation.

(4) Although the county believed her statement was not true, it failed to conduct a full and fair investigation. It did not ask her what she meant by being paid "off and on," which there was reason to do because of the inconsistency with the payroll attachment to the home's tax return. Nor did they ask her to explain the discrepancy between her statements and the payroll attachment, which the county had discovered in an Internet search of the home's tax records. Had they done so, they would have heard, prior to imposing discipline, the grievant's explanation that she returned her salary to help the home pay its bills.

(5) The grievant's failure to provide a complete tax return, omitting the payroll attachment, was an honest error. She offered the entire file to the employer, but then complied with their request to provide only the "return." The grievant, who had no role in preparing the tax return, reasonably believed she had complied by providing all the pages entitled Form 990, ending with the signature page. Although the supervisor said

she assumed the grievant knew, she admitted she never told her they wanted the tax return in order to identify compensation she may have received; therefore, the grievant had no reason to search the 44-page file for the attachment that detailed the payroll deduction. Her failure to include it was not intentionally dishonest or misleading.

(6) The grievant credibly testified that she had always been open at her county job about the group home, and that she was never told and did not understand that the county's conflict-of-interest inquiry centered on her compensation; therefore, she was not trying to hide anything by not providing detail about her earnings. The supervisor never asked her to include in her written "story" of the home anything about her earnings, nor ever asked her to add that information or to explain what she meant by being paid "off and on." Her failure to provide unrequested information did not make her oral or written statements intentionally false or misleading.

(Binding Grievance Arbitration)

- **Layoff — Special skills vs. Seniority**
- **Shop Stewards — Super-Seniority**
- **Arbitrability**

University of California, Berkeley, and Alameda County Building and Construction Trades Council (12-23-10; 13 pp.) *Representatives:* Kenneth T. Phillippi for the employer; Matthew J. Gauger (Weinberg Roger & Rosenfeld) for the union. *Arbitrator:* Paul D. Staudohar. (FMCS Case No. 100722-58481-A)

Issue: Did the university violate the contract or a side letter regarding furloughs and layoffs by laying off the two grievants out of seniority order?

Union's position: (1) The university presented no evidence that the retained employee, who had less seniority than the two grievants, had special skills in HVAC or athletic equipment repair to justify his retention. Rather, the two grievants had the same or greater skills, experience, and training, and should not have been laid off out of seniority order.

(2) One grievant, who was a shop steward, was protected from layoff even if another employee has greater seniority, unless the other employee possessed special skills; the retained employee did not have special or superior skills.

(3) The layoffs violated the side letter, in which the union agreed to a furlough program in exchange for the university's assurance that layoffs would not occur unless compelled by mid-year reductions in state funding. It laid off the grievants one week later, before any funding reductions.

(4) Although the university contends the side letter did not "guarantee" against layoffs, the letter did not say "no guarantees," and the union would never have entered the furlough agreement if it had known the university planned layoffs.

Employer's position: (1) The grievance is not arbitrable because nothing in the layoff clause states that out-of-seniority layoffs are grievable.

(2) The contract allows layoff out of seniority order if the retained employees have special skills or abilities not possessed by more senior employees. This retained employee had special skills because he had been performing HVAC and athletic equipment repair for three years and had prior experience and training, whereas the grievants performed pool and general maintenance and had no HVAC training or experience repairing athletic equipment.

(3) The grievance only referred to special skills for equipment repair, so the union cannot raise the issue of HVAC skills for the first time at arbitration.

(4) The union waived the right to claim the layoffs violated the furlough side letter because that issue was raised for the first time in arbitration.

(5) The layoffs did not violate the side letter because the letter did not promise no layoffs. Rather, the letter

stated the “belief” that, as a result of the furlough program, additional layoffs “may not be necessary,” but warned that mid-year funding reductions may “compel additional cost reductions.” The only promise was that the university would meet to “discuss alternatives.”

Arbitrator’s decision: The grievance is sustained in part and denied in part.

Arbitrator’s reasoning: (1) Layoff out of seniority order is arbitrable. The definition of a grievance is a dispute over interpretation or application of an express written contract provision. The layoff article prescribing layoff order is an express written provision, so that a dispute over its application is grievable and arbitrable.

(2) The super-seniority clause creates a presumption that the steward has superior seniority and is not subject to layoff, unless the university shows that the retained employee has special skills.

(3) The university violated the clause when it laid off the shop steward. It did not show that his skills were more special than the steward’s. The retained employee did not testify and no comparative skills assessment or other direct evidence verified that his skills were superior. The steward testified to significant prior experience and training in HVAC and athletic equipment repair.

(4) While the union presented evidence that the second grievant had several years experience and training in HVAC and equipment repair, his layoff out of seniority order did not violate the contract. The union failed in its burden of proving that the retained employee’s skills were not superior or special.

(5) Although the union did not refer to the side letter, or to HVAC skills or training, in the grievance, it stated a broad claim of wrongful layoff. As the issues of HVAC experience and the side letter were points raised to explain why the layoffs were wrongful, it is appropriate for the arbitrator to consider them.

(6) The university did not violate the side letter. The union was understandably upset when layoffs occurred shortly after the letter was signed, as the letter seemed to “imply” that the furlough program would result in no layoffs. But the university hedged its bets by using permissive rather than conclusive language about there being no layoffs; the letter stated no promise not to layoff.

(Binding Grievance Arbitration)

- **Holiday pay**
- **Overtime**
- **Seniority**

Val Verde Unified School Dist. and California School Employees Assn., Chap. 567 (6-24-11; 11 pp.) *Representatives:* Spencer E. Covert (Parker & Covert) for the employer; Gary Snyder for the association. *Arbitrator:* Joseph F. Gentile.

Issues: What is the appropriate rate of pay for security personnel working an “extra work opportunity” for a high school football game on the Friday after Thanksgiving? Did the employer violate the contract by not offering the extra work to the most-senior security officer?

Union’s position: (1) The appropriate rate of pay is holiday pay (two-and-a half times the regular rate) for extra work on the day after Thanksgiving. The district violated the agreement by paying employees who worked that date only at time-and-a-half.

(2) The district violated the agreement by not giving the extra work opportunity to the grievant, the most-senior security officer.

Employer’s position: (1) After a contract amendment, the Friday after Thanksgiving is no longer a “holiday” for purposes of overtime pay; therefore, the district did not violate the agreement by paying employees at the “call in” overtime rate rather than at the holiday overtime rate.

(2) The grievant was not entitled to work the overtime opportunity. Her normal worksite was not at the high school; she did not request to work the opportunity when it was offered, and the district made a reasonable effort to find employees to cover two last-minute vacancies before hiring substitute personnel.

Arbitrator's reasoning: (1) The contract calls for holiday overtime to be paid at two-and-a-half-times the regular rate for specified holidays that include the Friday after Thanksgiving. However, shortly before this incident, the parties negotiated an agreement that reduced the work-year salary by nine days and eliminated four paid holidays, which included the day after Thanksgiving.

(2) Since that Friday was eliminated as a holiday and was not a paid work day, the “extra work opportunity” for that day is equated to “call-in time.” The district properly paid the security officers at the call-in overtime rate of time-and-a-half.

(3) The district did not violate the agreement by hiring two substitutes rather than the grievant, even though she was the most senior security officer. The contract states that the most-senior employee should be offered an extra work assignment first, but also states that when extra work is required at a particular site, the district is not required to offer the opportunity to employees not regularly assigned to that site. The high school was not the grievant's regular site.

(4) The grievant did not request the work opportunity when it was first offered. When the district found it was short three officers, it “scrambled” to locate anyone available. The evidence is not clear whether the district attempted to contact the grievant. However, given her doctor-imposed work restrictions that forbid her from “restraining students,” it is not clear she would have been “available” to work the football game, which could have required such a task. Therefore, the district did not violate the agreement by not giving the work opportunity to the grievant.

(Binding Grievance Arbitration)

- **Arbitrability**
- **Past practice**
- **Settlement agreement**
- **Zipper clause**

Riverside Sheriff's Assn. and Riverside County (8-__-10; 16 pp.) *Representatives:* Sarah M. Franco for the employer; Adam E. Chaikin (Law Offices of Dennis J. Hayes) for the union. *Arbitrator:* Christopher Burdick.

Issue: Is the grievance arbitrable?

Employer's position: (1) The grievance is not arbitrable. The grievance petition did not meet the MOU definition of a “grievance” because it did not identify any part of the MOU that was violated, nor any dispute over ordinances, rules, regulations, or policies concerning wages, hours or conditions of employment.

(2) The claimed violation of the duty to bargain under the MMBA is within the exclusive initial jurisdiction of the courts and is not an arbitrable issue under the MOU.

Union's position: (1) The grievance — contesting the county's adoption of a policy that eliminated the long-standing past practice of providing D.A. investigators with take-home vehicles — is arbitrable.

(2) The county breached a prior grievance settlement in which it agreed not to change working conditions, including vehicle policies, prior to meeting and conferring in good faith.

(3) The county violated the meet-and-confer requirements of the Meyers-Milias-Brown Act.

(4) By amending the policy on vehicle use mid-contract, the county violated the MOU's zipper clause, which requires that wages, hours, and conditions of employment set forth in salary ordinance, resolutions, or regulations, continue in effect for the life of the MOU.

(5) The change in practice violated employees' personal contracts of employment that include use of take-home vehicles, a benefit stated in a job announcement for investigators.

Arbitrator's decision: The grievance is arbitrable.

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Arbitrator's reasoning: (1) The evidence is undisputed that there is an established, 20-year past practice of allowing investigators to take home county-owned vehicles. The union can arbitrate the merits of its claim that changing that practice violated the MOU.

(2) The zipper clause binds both parties to the status quo, whether the subject is covered by the MOU or is in employer policies (unlike some zipper clauses that waive the right to bargain about subjects not in the contract and that eliminate the binding force of past practices). Therefore, the claim that the county modified an established past practice which affects working conditions is grievable and arbitrable under this zipper clause.

(3) The failure of the county to give notice to the union of the intent to change the policy, or to bargain, may be a violation of the MMBA. However, a statutory violation is not grievable or arbitrable under the grievance procedure, which defines grievances as violations of the MOU or ordinances, rules, or policies. Neither the MOU nor any rule or policy imposes any MMBA duty on either party.

(4) Settlement of a prior grievance, also dealing with vehicle policy, included a written agreement that the county would not change working conditions within the scope of representation, including vehicle policies, prior to meeting and conferring. That settlement is a past practice and hence an implied term of the MOU, violation of which is arbitrable.

(5) The individual contract concept is enforced by the courts primarily in the pension area. The theory, eroded over time for public employees by the development of collective bargaining, would require the employer's promise at the inception of employment of a benefit that becomes vested, fixed and immutable, and therefore a constitutionally protected property right. The evidence does not show that the county offered the car-use benefit to all investigators at the inception of their employment. Unlike pensions, the benefit is not immutable but rather is a negotiable and changeable benefit. Therefore, even assuming investigators do have individual employment contracts, violations are not grievable or arbitrable as the grievance procedure is limited to violations of the MOU or county ordinances, rules or policies.

(Advisory Grievance Arbitration)

CPER Journal Online

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

TRIAL COURT ACT CASES

DILLS ACT CASES

Unfair Practice Rulings

Release of probationary employee not linked to protected activity: County of Riverside.

(Whitney v. County of Riverside, No. 2184-M, 6-7-11, 19 pp. By Member Dowdin Calvillo, with Chair Martinez and Member McKeag.)

Holding: The charging party engaged in protected activity when he sought the assistance of his union representative; however, the evidence did not demonstrate that the county's decision to release him from his probationary position was unlawfully motivated. The evidence showed the county would have terminated his employment even if he had not engaged in protected activity.

Case summary: The charging party alleged that the county released him from his probationary position as a public defender investigator after he requested union representation during a meeting with his supervisor and copied a union representative on a memo to the chief investigator. An administrative law judge dismissed the complaint.

On appeal, the board first found that, while the charging party's exceptions to the ALJ's proposed decision were as "not as lucid as the County may wish," they provided adequate notice of the issues raised on appeal. As to factual allegations asserted in his exceptions, the board found no evidence was presented at the hearing in support of them and they were not considered by the board.

PERB found that the charging party engaged in protected activity when he sought the assistance of an exclusive representative in connection with a workplace issue. Contrary to the ALJ's conclusion, the board found insufficient evidence that the charging party requested union representation during a meeting with his supervisor.

The charging party's supervisor and the chief investigator were aware of the protected activity. The public defender who made the decision to release the charging party, however, had no knowledge of the protected activity; he based his decision solely on the recommendation of the charging party's supervisor. Therefore, in assessing whether there was a nexus between the protected activity and the charging party's release on probation, the adverse action, the board applied the subordinate bias theory of liability. Finding that the supervisor's recommendation was intended to result in the charging party's release on probation, and that it had that result, the board focused on whether the charging party's protected activity was a motivating factor in his supervisor's recommendation.

Although there was a close temporal relationship between the charging party's protected activity and his

release on probation, the board found no other indicia to support an inference of an unlawful motive. The county did not depart from an established procedure when it failed to provide the charging party with a three-month performance evaluation. The decisionmaker's reliance on the supervisor's recommendation did not evidence a cursory investigation where the public defender had no reason to believe the supervisor's report was untruthful. The county's failure to interview the charging party did not demonstrate an unlawful motive absent evidence that the county routinely interviewed employees in connection with a probationary release.

The board also found no evidence that management harbored animus toward employees who relied on union representation. Failure to provide the charging party with a reason for his release on probation did not indicate an unlawful motivation where, as here, the employer was under no obligation to do so.

Assuming that the charging party demonstrated his protected activity was a motivating factor in his release on probation, the board concluded that the county proved it would have rejected the charging party despite his protected activity.

Legality of post-impasse implementation of final bargaining proposals turns on impact on union's bargaining rights, not length of imposed terms: DPA

(California Correctional Peace Officers Assn. v. State of California [Department of Personnel Administration], No. 2130-S, 9-20-10, 16 pp. By Chair Member Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: Dills Act Sec. 3517.8(b) authorizes the state to implement "any or all" of the provisions of its last, best, and final offer of settlement following a bargaining impasse, provided that the bargaining rights of the exclusive representative are not waived or limited. Here, DPA's failure to implement a LBFO provision concerning activist released time did not violate the act.

Case summary: CCPOA charged that DPA violated the act when, having reached impasse, it implemented the terms of its last, best, and final offer for a three-year duration and failed to implement the activist released time provision of the final offer.

An administrative law judge found that DPA did not implement the final offer for a three-year term and that CCPOA waived its right to pursue the allegation concerning the released time provision by entering into an agreement with DPA concerning union paid leave.

On appeal, the board also concluded that DPA's implementation letter to CCPOA did not include the "term of agreement" provision of its final offer. Furthermore, the legislature did not authorize funding of the economic terms, and according to the parties stipulation, DPA withdrew the economic proposals for the second and third year of the final offer. Nothing in the record indicates that DPA intended to implement non-economic proposals from the implementation plan, the board noted, finding that DPA's failure to withdraw those proposals did not indicate that the final offer was implemented for a three-year period.

The board clarified that its decision in *Rowland USD* (1994) No. 1053, 109 CPER 61, should not be read to mean that implementation of a final offer for more than one year is an unfair practice. The board's holding in *Rowland* was not based on the length of the term but on the effect the implemented provision had on the union's bargaining rights. The inquiry is whether the implemented term has the effect of waiving or limiting the union's statutory right to bargain. In this case, PERB said, even if DPA did implement the final offer for a three-year term, the record did not establish that that had any effect on CCPOA's right to bargain should impasse be broken. The final agreement did not waive the right to negotiate a limit on the subjects over which the parties could negotiate during the term of the implemented proposals. Nor did DPA indicate that it would refuse to bargain over any negotiable subject during the term of the implemented agreement. In fact, the board noted, DPA responded to CCPOA's offer to resume successor negotiations by inviting the union to sunshine its economic proposals.

The board agreed with the ALJ that CCPOA waived its right to pursue its allegation that DPA eliminated activist released time by executing the union-paid leave agreement. Because the allegation was not pending at the time the agreement was executed, it was subject to the waiver provision of the parties' settlement agreement, the board reasoned.

Even if CCPOA had not waived its right to pursue the allegation concerning activist released time leave, DPA's failure to implement the leave provision did not violate the act. Relying on *State of California (DPA)* (2008) No. 1985-S, 194 CPER 75, the board reiterated that the state is not required to implement its entire last, best, and final offer. The board rejected the union's reliance on *Laguna Salada Union S. D.* (1995) No. 1103, 112 CPER 80, where PERB found that an employer's authority to implement a post-impasse change is limited to matters reasonably comprehended in the employer's last, best, and final offer.

The board noted a "tension" between the "reasonably comprehended" requirement in EERA cases and the requirements of the Dills Act. It resolved the tension by holding: "[T]he 'reasonably comprehended' requirement only applies to provisions of the LBFO that are actually implemented," as was the case in *Laguna Salada USD*. To apply the "reasonably comprehended" requirement to last, best, and final provisions that were not implemented, "would eviscerate the plain language of section 3517.8, subdivision (b) granting DPA the authority to implement 'any or all' of its LBFO."

The board did not interpret Sec. 3517.8(b) to grant DPA absolute discretion as to which provisions of its last, best, and final offer it may implement upon impasse, however. An employer may not implement a provision that waives or limits the union's right to bargain over a particular subject for a specified period of time. Here, PERB found no harm to CCPOA's bargaining rights resulted from DPA's failure to implement the activist released time provision.

The Court of Appeal denied CCPOA's petition for review, on August 25, 2011.

Representation Rulings

Severance petition aimed at State Bargaining Unit 1 dismissed: IT Bargaining Unit 22 and SEIU Loc. 1000.

(State of California, IT Bargaining Unit 22, and Service Employees International Union, Loc. 1000, CSEA, No. 2178-S, 5-23-11, 6 pp. By Member Dowdin Calvillo, with Chair Martinez and Member McKeag.)

Holding: The petition to sever certain employee classifications from State Bargaining Unit 1 was properly dismissed because the petitioner failed to demonstrate that its proposed unit was more appropriate than the existing one.

Case summary: IT Bargaining Unit 22 sought to sever a group of information technology classifications from State Bargaining Unit 1, represented by SEIU Loc. 1000, CSEA. An administrative law judge found the petitioner had not rebutted the presumption that an existing unit is more appropriate than a proposed unit, and dismissed the severance petition.

The board affirmed the ALJ's dismissal. It found that IT Unit 22 failed to establish a conflict of interest on the part of SEIU that prevents the union from adequately representing IT employees. The evidence did not demonstrate that automation caused by the work of IT employees eliminated non-IT jobs represented by SEIU.

The board also reviewed the ALJ's decision declining to take judicial notice of a policy letter issued by the state chief information officer changing the lines of supervision of IT employees. The policy letter is an official letter subject to judicial notice under Evidence Code Sec. 452(c), the board ruled, and is relevant to one of the community of interest factors, common lines of supervision. However, PERB said, the supervision change did not outweigh evidence that the IT employees still interact on a regular basis with other Bargaining Unit 1 employees; share similar working conditions, qualifications, skills, and duties; and still operate under the same salary and benefit structure.

The board rejected the petitioner's argument that the ALJ improperly gave greater weight to the testimony of witnesses opposed to severance than those in favor of severance. Even if the ALJ erred in weighing the evidence, the board added, that error would not change the outcome because employee dissatisfaction is only one factor to be considered in severance cases.

IT Unit 22 also argued the ALJ failed to consider evidence that established SEIU's failure to implement MOU terms that addressed IT issues. The board found this did not demonstrate that SEIU had

disregarded the interest of IT employees. Rather, delays in implementing the MOU provisions were due to protracted negotiations and SEIU's desire to make the contract terms most favorable to IT employees. The evidence did not support the assertion that severance was necessary because the interests of IT employees were being ignored.

Duty of Fair Representation Rulings

Union's conduct did not breach its duty of fair representation: SEIU Loc. 1000.

(*Gutierrez v. Service Employees International Union, Loc. 1000*, No. 2191-S, 7-19-11, 2 pp. + 8 pp. B.A. dec. By Member McKeag, with Chair Martinez and Member Dowdin Calvillo.)

Holding: The charging party failed to plead sufficient facts to demonstrate that the union abused its discretion, or that its conduct was without a rational basis or devoid of honest judgment.

Case summary: The charging party alleged that the union breached its duty of fair representation when it sent three uninformed representatives to assist him with his disputed adverse action and by refusing to represent him in his appeal of his adverse action. The charging party also asserted the duty was breached when the union proposed a settlement agreement that required the charging party to waive his future legal rights against his employer but did not expunge all adverse actions from his record.

A board agent noted that the union is permitted to refuse to appeal an adverse action when it makes a reasonable determination that the appeal lacks merit, which it did in this case. The charge did not show that the union failed to investigate the matter. The fact that the union representatives appeared uninformed did not change the analysis.

The B.A. also explained that a union settlement agreement that is contrary to the grievant's wishes does not necessarily breach the duty of fair representation.

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

EERA CASES

Unfair Practice Rulings

Charging party's appeal of dismissal was untimely filed and failed to provide specific basis for appeal: CSEA

(*Perez v. California School Employees Assn. and its Chap. 746*, No. 2187, 6-15-11, 6 pp. By Member Dowdin Calvillo, with Chair Martinez and Member McKeag.)

Holding: The charging party failed to file a timely appeal to the board agent's dismissal of his charge alleging a duty of fair representation breach, and failed to allege a procedural, factual, or legal basis for his appeal.

Case summary: The charging party alleged that the union breached its duty of fair representation by failing to adequately represent him in a grievance filed on his behalf with the Downey Unified School District. The B.A. dismissed the charge, finding that it failed to state a prima facie case.

The board declined to hear the charging party's appeal and upheld the dismissal of his charge. PERB concluded that the appeal was untimely filed and found no good cause to accept the late filing. Further, the board noted, the appeal merely restated the facts alleged in the original unfair practice charge; it did not reference any portion of the B.A.'s determination or identify any procedural, factual, or legal deficiencies.

Charge dismissed as untimely, not based on collateral estoppel: Alvord Educators Assn.

(*Bussman v. Alvord Educators Assn.*, No. 2189, 6-29-11, 5 pp. + 14 pp. B.A. dec. By Member McKeag,

Holding: The dismissal of a charge for failure to state a prima facie case does not serve to collaterally estop a subsequent charge raising the same issues. However, the charging party's subsequent charge is untimely.

Case summary: The charging party alleged that the union breached its duty of fair representation by failing to represent him, retaliating against him, and defaming him. With one exception, the parties, facts, and issues were the same as those raised in a previous case, *Alvord Educators Assn. (Bussman)* (2009) No. 2046, 197 CPER 75, which was dismissed by the board. The exception was the allegation that the association failed to respond to the charging party's renewed request for representation, in December 2008, in litigation against the Alvord Unified School District regarding the legality of certain contract provisions. Here, the board agent dismissed that charge as untimely.

On appeal, the board focused on the doctrines of res judicata and collateral estoppel, which were relied on by the B.A. as a basis for dismissing this matter.

In *Grossmont Union High School Dist.* (2010) No. 2126, 201 CPER 73, the board overruled its decision in *City of Porterville* (2007) No. 1905-M, 185 CPER 103. In *Grossmont*, the board explained that to be "actually litigated" for purposes of collateral estoppel, an issue must have been decided based on the presentation of evidence at a hearing. Since a B.A.'s review of a charge to determine whether it establishes a prima facie case is not based on the presentation of evidence, review does not meet the "actually litigated" requirement for collateral estoppel.

Accordingly, to the extent that the board agent gave preclusive effect to the B.A.'s dismissal in *Bussman I*, the board struck those portions of the warning letter and dismissal letter that rely on *Porterville*.

Notwithstanding the reversal of *Porterville*, however, the board said the charge restating the previously adjudicated issues must be dismissed as untimely. Repeated union refusals to process a grievance over a recurring issue do not restart the statute of limitations period anew.

Representation Rulings

Appeal in unit modification case withdrawn: Coalinga-Huron Joint USD.

(*Coalinga-Huron Joint Unified School Dist. and Coalinga-Huron Teachers Assn.*, No. 2180, 5-26-11, 2 pp. By Member McKeag, with Chair Martinez and Member Dowdin Calvillo.)

Holding: The board granted the district's request to withdraw its appeal of the ALJ's proposed decision to the association's unit modification petition.

Case summary: The association filed a unit modification petition with PERB requesting the inclusion of school psychologists in the district's certificated bargaining unit. An administrative law judge granted the petition, finding a community of interest between the psychologists and the employees in the unit. The district appealed the ALJ's proposed decision.

The district notified the board that the parties had resolved their dispute regarding the unit placement of psychologists and asked to withdraw its appeal. The board granted the district's request.

Peralta presumption applied to charter school teachers: Orcutt Union S.D.

(*Orcutt Union School Dist. v. Orcutt Education Assn.*, CTA/NEA, No. 2183, 6-7-11, 8 pp. + 26 pp. H.O. dec. By Member Dowdin Calvillo, with Chair Martinez and Member Huguenin.)

Holding: The district failed to demonstrate that teachers in its charter school did not share a community of interest with the teachers in its other schools. Therefore, the association's unit modification petition was granted. See the complete story in the Public Schools section.

HEERA CASES

Representation Rulings

Reclassified positions reflect additional duties; no longer part of the clerical bargaining unit: U.C.

(*Regents of the University of California and Coalition of University Employees*, No. 2185-H, 6-9-11, 6 pp. + 79 pp. ALJ dec. By Member McKeag, with Members Dowdin Calvillo and Huguenin.)

Holding: The newly acquired duties of incumbents in 14 positions reflect the exercise of independent judgment and professional skills; they no longer share a community of interest with employees in the clerical bargaining unit represented by CUE.

Case summary: The university filed a unit modification petition seeking to remove certain positions from the clerical and allied services bargaining unit through the process of reclassification. The university asserted that the incumbents' positions had changed with the assignment of new duties and, as a result, the majority of their duties no longer constituted bargaining unit work. CUE responded by filing its own unit modification petition concerning the same positions. It argued that the unit should be clarified or modified to encompass the work of the disputed positions and those positions should be reclassified into the clerical "assistant IV" classification.

An administrative law judge first rejected CUE's contention that the current unit assignment of the 14 contested positions was presumptively valid as the position reclassifications were based on changes in job duties. The ALJ applied the community of interest factors to determine whether incumbents in the reclassified positions should continue to be part of the clerical bargaining unit. He concluded that five analysts are outside the bargaining unit because of their independent decisionmaking authority; two student affairs officers engaged in professional-level work outside the bargaining unit; the program representative is a position where the incumbent exercises independent judgment and is outside the unit; three administrative specialists are professional positions engaged in independent decisionmaking; two coordinators demonstrate sufficient independent judgment to warrant their exclusion from the clerical unit; and a computer resource specialist engages in specialized skills of a technical, not clerical, nature.

Thus, the ALJ concluded that all 14 positions share a greater community of interest with employees in non-clerical bargaining units and are properly reclassified in positions outside the clerical and allied services bargaining unit.

On appeal, the board found that the ALJ appropriately resolved the parties' dispute under PERB Reg. 32781(b)(3), a dispute regarding unit placement (rather than under PERB Reg. 32781[b][2], clarification of a unit description). This is not a case where the employer has retitled a position without any changes in duties, the board emphasized. Here, the duties performed by individual employees have changed over time, and the appropriate inquiry is whether these changes support the proposed reclassification and whether the incumbents continue to share a community of interest with the employees in the clerical unit.

The board rejected CUE's contention that the university proposed the reclassifications to reduce the union's strength or for the purpose of retaliating against CUE. The reclassifications reflect the addition of new duties and responsibilities. The fact that incumbents are offered promotional opportunities outside the clerical unit does not constitute unlawful discrimination, PERB said.

The board also rejected CUE's argument that since the positions in question are not "professional," the ALJ should have applied the presumption set out in HEERA Sec. 3579(b), that professional and non-professional employees should not be placed in the administrative professional unit. By its terms, the presumption can be rebutted by examining the community of interest factors in HEERA Sec. 3579(a), the board instructed. The ALJ conducted a thorough community-of-interest analysis for each position and correctly found the positions were reclassified as non-clerical positions.

CUE's attempt to compel the university to create a new systemwide position within the clerical unit that encompasses the work of the 14 positions is not warranted the board said, since each of the reclassified positions falls within a position outside the clerical unit.

Unfair Practice Rulings**Union entitled to redacted versions of reports investigating harassment and working conditions: City of Redding.**

(*Service Employees International Union, Loc. 1021, v. City of Redding*, No. 2190-M, 6-30-11, 11 pp. + 22 pp. B.A. dec. By Member McKeag, with Chair Martinez; Member Dowdin Calvillo dissenting.)

Holding: The city violated the act when it refused to provide the union with investigative reports that examined charges of harassment and general working conditions of its customer service representatives.

Case summary: The charge alleged that the city unlawfully refused to provide the union with a copy of investigative reports involving employees working in the customer service division. A customer service representative filed a harassment complaint and the city retained an outside private investigator. As a result of information obtained in this investigation, the city ordered a second investigation into general workplace concerns raised by customer service representatives. No specific grievances had been filed by individual employees or the union.

When the investigation was completed, the personnel director informed union leaders that the results would be summarized in a confidential report and not shared with SEIU. The union requested a copy of the report. The city refused to share the report.

An administrative law judge concluded that the investigative report was sought to further the union's duty to represent customer service representatives in the bargaining unit. The fact that no grievance was pending did not invalidate the information request. The ALJ ordered that the two investigative reports and witness statements gathered during the investigations be provided to the union, but with all employee names and other identifying information redacted.

On appeal, the majority affirmed the ALJ's proposed decision. While noting that personal privacy rights may limit an otherwise lawful demand for production of confidential information, in balance, the board found the disclosure of the reports and witness statements was warranted.

In her dissenting opinion, Member Dowdin Calvillo found that the information sought by SEIU was necessary and relevant to the union's duty to represent bargaining unit employees, but that the ALJ failed to adequately address the city's concerns about confidentiality. She specifically noted that the investigator had told employees that the information they provided would remain confidential.

She also noted that SEIU had access to the employees who raised the issues under investigation and was made aware of the changes instituted as a result of the investigator's reports. Therefore, she concluded, SEIU's interest in obtaining the reports was slight while the city's interest in maintaining the confidentiality of the report was strong.

The City of Redding has filed a petition for judicial review of this decision, Case No. C068825.

Duty of Fair Representation Rulings**No duty of fair representation breached where available remedies were not contractually based: California Nurses Assn.**

(*Rosa v. California Nurses Assn.*, No. 2182-M, 5-26-11, 3 pp. + 10 pp. B.A. dec. By Member Dowdin Calvillo, Chair Martinez, and Member McKeag.)

Holding: The charging party failed to show that the association breached its duty of fair representation or that CNA's conduct extinguished her right to pursue a claim against her employer.

Case summary: The charging party alleged that the association breached its duty of fair representation by failing to help her address claims of workplace harassment. A board agent dismissed the charge, finding there was no showing that issues of concern to the charging party were covered by the collective bargaining agreement between the hospital and CNA. Thus, they were not contractually based remedies

Even if the duty of fair representation were applicable to her claims, the board agent added, she failed to establish that the association's conduct was arbitrary, discriminatory, or in bad faith, or that CNA's conduct extinguished her right to pursue claims against the hospital. Allegations concerning actions that occurred after the charging party voluntarily terminated her position with the county did not establish the existence of a duty of fair representation after she resigned.

On appeal, the charging party argued that the alleged instances of workplace hostility and harassment could have been the subject of a formal grievance pursued by the association on her behalf. Even so, said the board, the charge failed to allege facts demonstrating that the association's failure to file a grievance was arbitrary, discriminatory, or in bad faith. PERB noted that, in considering her complaints, the union advised her to pursue other remedies, such as filing a workers' compensation claim or a discrimination claim based on the FEHA. In addition, the charging party acknowledged CNA did pursue some "grievance adjustment and arbitration" based on her complaints, although CNA concluded that she did not have a meritorious grievance.

Union's conduct satisfied its duty of fair representation: SEIU Loc. 1021.

(*Jacala v. Service Employees International Union, Loc. 1021*, No. 2188-M, 6-29-11, 2 pp. + 17 pp. ALJ dec. By Member McKeag, with Chair Martinez and Member Dowdin Calvillo.)

Holding: The charging party failed to demonstrate that the union breached its duty of fair representation in the manner by which it represented her in her dispute with her supervisor.

Case summary: The charging party alleged that the union breached its duty of fair representation by failing to respond to requests for a *Weingarten* representative and for failing to properly assist her regarding a demotion, discipline, and supervisor harassment.

An administrative law judge dismissed her complaint. The ALJ interpreted the charging party's contention to be "that if the union falls below some level of adequate investigation, fails to participate in face-to-face meetings with the employer, or fails to advocate vigorously enough on the employee's behalf regarding workplace conflicts with management, it breaches the duty of fair representation regardless of whether any particular issue can be pursued as a grievance." The ALJ rejected that premise, and found the evidence did not support the charging party's claim that SEIU failed to make an honest effort on her behalf.

The charging party's dispute with her employer centered on the claim that her supervisor engaged in a pattern of harassment after she complained to human resources and sought assistance regarding her need for time off to obtain medical treatment. Her union representative determined that no grievance could be pursued because no language in the MOU affords protection against harassment or prohibits retaliation or discrimination on the basis of medical condition. Transferring duties to another employee, as the charging party asserted, is not prohibited by the contract. Any grievance alleging timekeeping errors by management without supporting evidence "would be problematic," the ALJ said.

Assuming that a union has a duty to provide a representative when the *Weingarten* right may be involved, the ALJ found SEIU did not breach its duty when it failed to attend meetings per the charging party's request because the meetings were not for the purpose of investigation.

The board affirmed the ALJ's proposed decision.

Events alleged to breach union's representation duty occurred outside limitations period: IFPTE, Loc. 21.

(*Hosny v. IFPTE, Local 21, AFL-CIO*, No. 2192-M, 7-27-11, 9 pp. By Member Member Dowdin Calvillo, with Chair Martinez and Member Huguenin.)

Holding: The charging party failed to show good cause why the board should consider new supporting evidence first produced on appeal that concerned events predating the dismissal of the charge. The

Case summary: The charging party alleged that the union breached its duty of fair representation by not securing a settlement agreement with his employer over his discrimination claim, and for not pursuing his grievance contesting a five-day suspension to arbitration. A board agent found the charge was untimely and that he failed to state a prima facie case.

On appeal, the charging party presented new evidence not provided in the original April 2010 charge, including a series of email correspondence from 2008. The board found no good cause to consider the new allegations or evidence as the dates of the events alleged for the first time on appeal predated the dismissal of the charge. The charging party failed to provide any reason why this evidence could not have been alleged in the original or amended charge.

PERB agreed that the original charge was untimely. When the union representative stopped communicating with him, the charging party knew or had reason to know it was unlikely that the union would provide him further assistance in pursuing a resolution of his discrimination complaint, and his continued attempts to seek the union's assistance did not extend the statute of limitations period or relieve him of the obligation to file a timely charge.

Likewise, the charge that the union refused to pursue through arbitration the grievance challenging the 2008 suspension was untimely filed. Even if the charging party reasonably waited until the union reorganization was completed, as the union president requested, the allegations fail to establish when the reorganization occurred or that the delay in filing the charge after the reorganization was reasonable. The charging party knew or should have known that further union assistance was unlikely when the union president failed to respond to his inquiries, yet he waited a year to file his charge.

TRIAL COURT ACT CASES

Duty of Fair Representation Rulings

Appeal withdrawn and proposed decision vacated: Los Angeles Superior Court.

(*California Federation of Interpreters Local 39521 v. Los Angeles Superior Court*, No. 2179-I, 5-26-11, 2 pp. By Member McKeag, with Chair Martinez and Member Dowdin Calvillo.)

Holding: The board granted the parties' request to withdraw and dismiss the court's appeal and to vacate the ALJ's proposed decision.

Case summary: The federation alleged that the court violated the Trial Court Interpreter Employment and Labor Relations Act when it took adverse action against two employees in retaliation for protected activity. An administrative law judge issued a proposed decision; the court appealed.

The parties notified PERB that they had reached a settlement and asked to withdraw the court's exceptions to the proposed decision. The board granted their request.