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CPER Journal Online

Letter From the Editor

Dear CPER Readers,

Everyone in our field knows that limiting retirement benefits for new employees does little to help public employers meet current fiscal challenges. And Chris Platten explained in our last issue that the constitutional Contract Clauses protect employees from alterations to retirement benefits promised during their employment. But several public employers, such as the City of San Jose, are not accepting the assertion that vested benefits cannot be changed for current employees. In this issue, Jon Holtzman explains how a public employer may make some alterations to vested benefits if it can show it truly had no alternatives that would stave off fiscal calamity. Being on the verge of bankruptcy is not required, he asserts.



For those employers who hoped retirement health benefits would not be found to have the same legal protections as pensions, those hopes were dashed when the California Supreme Court ruled last month that employees may obtain vested rights to retirement health benefits, and that those rights may be implied from legislative actions like resolutions of a board of supervisors. This case will provide plenty of work for lawyers as they litigate whether resolutions and employer practices made a clear promise to provide those benefits.

The chapter from Fred Glass' upcoming book, *From Mission to Microchip: A History of the California Labor Movement*, relates the birthing pains of teachers' unions and the struggle to enact a real collective bargaining law. Readers of this history may find it ironic that the United Teachers of Los Angeles has now agreed that certain "local initiative schools" may ignore parts of the collective bargaining agreement if enough teachers agree. Or, you may see the agreement as similar in spirit to an AFT local union's proposal to the Richmond school district in 1966 that Glass describes. While the Los Angeles district may be gaining flexibility in labor relations, Jon Yeh's article shows why charter schools may need to become more versed in labor relations as their teachers unionize.

While we all deal with recurrent fiscal challenges such as mid-year cuts, the law keeps developing. In the Local Government section, courts reached different conclusions on whether an officer can waive rights under the Public Safety Officers Procedural Bill of Rights Act. In addition, A.B. 646 has changed the rules of impasse resolution for local public employers, but raises new questions. PERB's new emergency regulations provide some answers, but confusion over certain issues, such as the continuing validity of existing local impasse rules, remains.

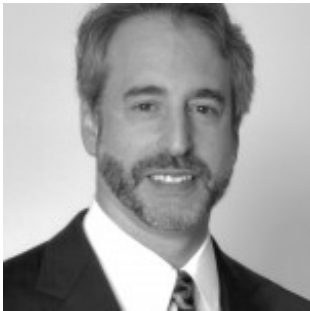
Please note that PERB has provided us with an Activity Report to inform our community of the status of its litigation, disposition of injunction requests, and administrative law judge decisions. This issue of the journal also includes a Resources section.

In the midst of all the challenges, the CPER staff hopes you have some time to relax and enjoy the season.

Katherine J. Thomson, Editor, CPER

CPER Journal Online

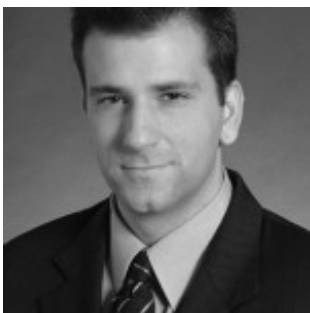
Declarations of Fiscal Emergency: A Viable Option as Cities and Counties Fight to Maintain Essential Services



Holtzman and Cikes respond to Christopher Platten's article, "Declarations of Fiscal Emergency: A 'Dead on Arrival' Means of Limiting Public Pension Costs and Impairing Local Agency MOUs."

Readers are encouraged to share their own opinions in the Comments section, below.

By Jonathan Holtzman and Steve Cikes, Renne Sloan Holtzman Sakai



Few would dispute that the magnitude of the challenges faced by local public agencies today are unprecedented. Absent dramatic action, the current economic crisis threatens to turn many agencies into a public version of pre-bankruptcy General Motors — pension and health care providers for retired employees, with some incidental public services. But before public agencies consider bankruptcy or take actions that seriously jeopardize the health and welfare of the residents, they should consider the alternative of declaring a fiscal emergency.

Downward Spiral

The combination of the recent economic downturn, the collapse of the housing market, the fiscal disaster at the state level, rapidly increasing pension costs, the recognition of deferred funding of retirement health costs, and other employee benefit issues has left many California cities on the financial brink. Local government agencies have been hit particularly hard.

Since cities and counties are service providers, 75 to 80 percent of their general-fund operating costs typically are labor-related. Because of rapidly escalating benefit costs and declining revenues, services are being cut at an alarming pace. Libraries, community centers and programs, health, roads, and general government operations have been most at risk. But recently, a number of cities, including those with high crime rates like Oakland, Stockton, and Vallejo, have also been forced to cut police and fire staffing. These public safety reductions lead to demonstrably worse outcomes for the public. And there is little hope for improvement in sight. One sees the same graph in city after city: the top line (personnel-related expenses) is rising at a rate that far exceeds the bottom line (revenue projections). In other words, there is a widening structural gap between costs and revenues.

Liberal or conservative, pro-union or anti-union, these trends should be alarming. Reducing public services not only puts workers out on the street and jeopardizes the security of the remaining employees' benefits, it makes the communities in which they work less desirable and leads to a declining perception (and perhaps reality) of public safety. Ironically, as cities and counties reduce the number of employees, the unfunded liabilities of their pension and retiree health plans remain, and grow as a percentage of payroll. Cities and counties need more revenue; but in the post-Proposition 13 world, most revenue enhancements require a popular vote. Perceptions about the efficiency and effectiveness of government, combined with declining home values, make it difficult to win these votes, even in cities starving for services. The overwhelming defeat in 2011 of revenue measures in Oakland is emblematic.

The struggle to reduce the costs of government while maintaining at least a modicum of services has become as futile as a dog chasing its tail. By the time the policymakers adopt a balanced budget, the financial picture has worsened, triggering yet another round of cost-cutting.

To make matters more challenging, some of the most expensive benefits — pension costs for example — are often vested, meaning that employees and retirees have a contractual right to the benefits. In some

cases, that right is said to accrue from the first day of employment. While public agencies are free to adopt different plans for new employees, the savings from such changes are miniscule in the short run, and therefore insufficient solutions for agencies facing long-term fiscal difficulties.

One way out of this death spiral is bankruptcy. Both vested and other contractual benefits can be discharged in bankruptcy, although unions and retirees may argue otherwise as they fight to maintain or even increase compensation packages. Nearly everyone agrees, however, that bankruptcy should be the very last option. Among other things, access to credit markets is likely to be suspended, the costs of Chapter 9 bankruptcy are very high both in terms of staff time and legal fees, and the stigma of bankruptcy may make new businesses reluctant to locate in the community, depress real estate sales, and generally depress the overall business climate.^[1]

This article addresses another tool that cities, counties and other public agencies are increasingly considering to achieve short-term relief from contractual obligations: declarations of fiscal emergency. It must be noted at the outset, however, that emergencies are at best a means to an end — the goal being to allow a public agency to maintain essential services. As Christopher Platten's recent article ^[2] demonstrates, declarations of emergency are likely to be challenged legally and factually. However, as even Platten is forced to concede, case law developed by the U.S. Supreme Court, and recognized in California, permits government to impair contractual obligations when the public's health and welfare is jeopardized. The battle, which has yet to be fought, is factual in nature: When is the diminution in services so great and so inevitable that the impairment will be upheld?

Declarations of Fiscal Emergency: An Overview

Courts have long recognized that the constitutional prohibitions against the impairment of contracts do not bar a public agency from "exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public" — i.e., a public agency's inherent police powers.^[3] Thus, for example, in *Home Building and Loan Assn. v. Blaisdell*, the United States Supreme Court considered the constitutionality of a Minnesota law that restricted mortgage foreclosures during the Great Depression.^[4] The court held that the law was valid even though it impaired contract rights, recognizing: "the reservation of state power appropriate to...extraordinary conditions may be deemed to be as much a part of all contracts as is the reservation of state power to protect the public interest in other situations."^[5] Indeed, the court found that the state has the power "to give temporary relief from enforcement of contracts in the presence of disasters due to physical causes such as fire, flood, or earthquake," as well as "when the urgent public need demanding such relief is produced by other and economic causes."

Consistent with the above, other courts have likewise recognized that implicit within every public contract is the caveat that the agreement shall not preclude or otherwise hinder the public agency from exercising its inherent police powers for the greater good.^[6] This is especially true with respect to contracts governing public employment. As one court noted, "Public employees — federal or state — by definition serve the public and their expectations are necessarily defined, at least in part, by the public interest. It should not be wholly unexpected, therefore, that public servants might be called on to sacrifice first when the public interest demands sacrifice."^[7] Consequently, courts have recognized that public employers may impair their own employee contracts when circumstances justify such an impairment.

The standards for assessing whether a government agency may exercise its police powers to impair contractual obligations have evolved over time. In *Sonoma County Organization of Public Employees v. County of Sonoma*,^[8] the California Supreme Court, following *Blaisdell*, identified a four-factor test in determining whether a legislative impairment of a contract violates the federal or state Contract Clause. Those factors include whether (1) the contract modification arises out of an actual emergency; (2) relief from the contract is necessary to protect a basic societal interest; (3) the modification or relief is appropriately tailored to the emergency it was designed to address; and (4) the modification imposed is temporary and limited to the exigency that prompted the legislative response.^[9]

These factors are not necessarily absolute. Subsequent decisions have departed from these rigid factors.^[10] Indeed, in *United States Trust Co. v. New Jersey*,^[11] the United States Supreme Court held that while "the existence of an emergency and the limited duration of a relief measure are factors to be assessed in determining the reasonableness of an impairment,...they cannot be regarded as essential in every case." Thus, the court held that a public agency may constitutionally impair its own contracts if "it is reasonable and necessary to serve an important public purpose."^[12]

But the devil is in the details. Many public agencies are — or will be — facing circumstances in which they will not be able to provide vital services to the public. Despite broad judicial language defining emergencies, most declarations of emergency in California have been invalidated. And, while a legislative finding of an emergency will be afforded some deference, courts will be less deferential to the decision when a government agency impairs its own contractual obligations.

Not All Emergencies Are Alike

Two sets of contractual relationships that may be the subject of government actions based on emergency powers have been in the news recently: labor agreements and allegedly “vested” post-employment/retirement benefits, such as pension benefits.

Labor agreements. This issue generally arises when a city is locked into a long-term contract and then suffers a steep decline in revenues or a sharp, unanticipated spike in costs, or both. For example, many public agencies entered into contracts shortly after the beginning of the great recession, not anticipating the depth and length of the recession. The decline was exacerbated by two additional elements few anticipated: the rupture of the real estate bubble and resulting massive loss of tax revenue, and the secondary effect of the decline of equity markets on pension costs. But because the negative effects of the recession have dragged on for three years, many (if not most) public agencies have had an opportunity to renegotiate contracts, so the need for emergency declarations in connection with labor contracts has likely declined — unless, of course, the bottom falls out again.

Post-employment/retirement benefits. Some public agencies have also attempted to modify or alter employee pension benefits, citing their inherent police powers as a basis for authority. Where those efforts have been unsuccessful, it has not been because the courts have rejected the application of fiscal emergency as a legal matter. Rather, it is because the agencies involved have been unable to demonstrate the existence of a true “fiscal emergency” or because agencies were unable to demonstrate that there were no other, less intrusive, alternatives available.

For example, in *Board of Administration v. Wilson*,^[13] the legislature changed the manner of funding for the California Public Employees’ Retirement System from a “level contribution” system, by which payments flowed to the retirement system fund as liability was incurred, to an “in arrears” system, where contributions were not paid during the same fiscal year that employee services were rendered. As a result, the contribution of hundreds of millions of dollars that would otherwise have been paid into the retirement fund was postponed for at least six months, resulting in lost earnings to the retirement plan in general. When the PERS board challenged the funding change, the state argued that the modification was necessary to address its ongoing fiscal emergency.

In rejecting this defense, the court — while assuming the “existence of a fiscal emergency” — found that, prior to implementing the financing changes, the state failed to obtain actuarial input from the PERS board, failed to cite “evidence of any effort to deal narrowly with the exigencies of the emergency,” and failed to give “considered thought to the effect the emergency provisions might have on PERS or the possibility of alternative, less drastic, means of accomplishing its goals.”^[14] Accordingly, the court concluded, “PERS members have a contractual right to an actuarially sound retirement system and the ‘in arrears’ pension financing unconstitutionally impaired that contractual right.”^[15]

In *United Firefighters of Los Angeles v. City of Los Angeles*,^[16] the city attempted to place a 3 percent cap on any cost-of-living increases provided under the city’s pension plan. Previously, cost-of-living increases were based on changes in the Consumer Price Index, and were not subject to any maximum increase. Two employee organizations challenged the cap, arguing that it impaired a vested right. In arguing that the contractual impairment was reasonable and necessary to serve a public purpose, the city “took the position that unexpected and unforeseen increases in the rate of inflation had caused pension costs to escalate sharply, exceeding salary increases.” The city further argued that, “the enactment of Proposition 13 destroyed the traditional funding mechanism for the pension systems and these factors combined to create a budgetary crisis in an era of increasingly scarce public revenue.”^[17]

The court rejected these arguments, finding that the city’s desire to “spend city revenues on other things they deemed more important...never justifies the impairment of a public entity’s contractual

obligations.”^[18] The court also noted that capping cost of living increases bore “no material relation to the theory of a pension system and its successful operation,” given that “the theory of a pension system is affording retirees with a reasonable degree of economic security, and the sole legitimate purpose of a cost of living adjustment is the preservation of a retiree’s standard of living.”^[19]

But the *Wilson* and *United Firefighters* decisions were products of their time, based on underdeveloped facts— and facts that are quite different from the problems public agencies are currently facing. Public agencies must now address severe underfunding of pension plans — a problem that has a direct nexus to the security of future pension benefits. And the problem is not going away any time soon. As one expert recently noted, “Pension fund assets are rebounding from the 2008-09 market crash, but not fast enough to make up for the lost growth and to close the gap of what is needed to fulfill retirement promises to public employees.”^[20] Consequently, a number of public agencies across the country (not just in California) are exploring various options to reform pensions.^[21]

The Evidence Necessary to Prove an Emergency

California case law addressing fiscal emergencies is a bit of an enigma. On the one hand, the principles allowing the use of emergency powers to impair contracts are settled and parallel the principles articulated by the U.S. Supreme Court. Moreover, California cases have often repeated that the state constitutional protection of contracts is identical to the protection of the federal constitution. Yet, when California public agencies have invoked emergency powers, they often have been rebuffed due to insufficient evidence of an emergency, insufficient nexus between the emergency and the actions taken, or failure to explore alternatives. Given the fact that many California cities and counties, and pension plans, are facing unprecedented fiscal challenges and diminution in services, the evidence is there. But it must be marshaled properly.

To justify its use of emergency powers, a public agency should prepare a comprehensive set of legislative findings based upon *evidence*. This is not a simple undertaking. At a minimum, that document should show the following:

(1) An actual emergency exists. A common argument raised by most employee advocates is that a fiscal emergency is not a true emergency because the depletion of public funds usually occurs over an extended period of time and largely stems from a public employer’s own decisions, including labor relations decisions. Accordingly, advocates claim that such circumstances do not qualify as an “emergency,” which courts have defined in other contexts as “an unforeseen situation calling for immediate action.” ^[22]

But not all emergencies occur in an instant, like an earthquake. A public employer’s dire financial condition — which worsens over an extended period of time — may, in some cases, qualify as an emergency requiring immediate action. This is especially true where an agency’s resources are stretched so thin that it can no longer provide essential services to the public and/or maintain those services at acceptable levels. This type of “service level emergency” may, in an appropriate case, justify the impairment of certain contractual obligations.

For example, in *Subway-Surface Supervisors v. N.Y.C. Transit Authority*,^[23] the New York Court of Appeals upheld the deferral of a negotiated wage increase where the city’s fiscal emergency would have rendered it unable to “provide essential services to its inhabitants or meet its obligations to the holders of outstanding securities,” and where, without cuts, the city would not have been able to pay employee salaries or its vendors and would have defaulted on payments due on other outstanding obligations.^[24]

Similarly, in *Buffalo Teachers Federation v. Tobe*,^[25] the Second Circuit Court of Appeals upheld a wage freeze imposed by the city after forecasting an increase in its budget deficit from \$7.5 million to \$97-127 million in four years. The court had no difficulty concluding that the wage freeze was reasonable and necessary. The city had already exhausted other drastic measures, including school closings and layoffs, and only implemented the wage freeze as a last resort. Turning to whether a more moderate course was available that would have alleviated the crisis, the court found that the city’s only other option was the elimination of more municipal jobs and school closures. Based on these facts, the court found that the wage freeze was both reasonable and necessary to address the “very real fiscal emergency in Buffalo.”^[26]

As the foregoing illustrates, a public agency's "fiscal crisis" may, in an appropriate case, qualify as an emergency justifying the impairment of certain contractual obligations. However, this will typically require a showing that, absent a declaration of fiscal emergency, public services will be cut in a manner that jeopardizes the health, safety or viability of the community. Alternatively, as in the case of pension obligations, it may show that the public agency is unlikely to be able to continue to make required contributions while, at the same time, fulfilling its duty to the public..

(2) The agency has taken reasonable steps to address the problem prior to invoking the emergency. Implicit in the concept of emergency is the notion that the public agency must have taken reasonable steps to avoid the emergency. Thus, if, for example, the agency has excess reserves, a court would undoubtedly look to those reserves. Also, if there are matters which can be negotiated without impairing a contract, a court might look to those as well.

Some have argued that a public agency must drain all its reserves, sell all of its property, and essentially be insolvent before an emergency can be properly declared. While the case law does not speak directly to this issue, it is simply illogical to assert the agency must take imprudent actions, such as draining its workers' compensation reserve, before declaring an emergency. Aside from the fact that the agency would be trading one emergency for another, one-time money is rarely sufficient to plug large operating deficits for very long.

And critically, a fiscal emergency does not necessarily require that a public agency be on the verge of insolvency. Declarations of emergency are an attempt to turn the ship around *before* it hits the iceberg. The distinction is that public agencies should not need to prove they have plundered every reserve and taken other irresponsible actions in order to show they face an emergency. Nor should they need to prove, as one recent piece of state legislation suggests, that they are on death's doorstep.^[27] As a public finance expert recently put it in an arbitration: "You shouldn't need to wait until the patient is dead before you call the doctor."

Depletion of available reserves would have the same effect. Use of this one-time money to fund ongoing operations only increases the likelihood of insolvency. As the court presiding over the Vallejo bankruptcy proceedings explained, "In prior fiscal years, Vallejo used its General Fund reserves to cover shortfalls in other funds" and "[b]y the end of the 2007-2008 fiscal year, the reserves were exhausted."^[28] When Vallejo reached insolvency, it "could not borrow from private credit markets because it had no reserves and insufficient cash flow to pay back loans....In the end, due to an inability to borrow, Vallejo's fiscal situation became bleak."^[29]

It is also critical to understand that fiscal emergencies — justifying the suspension or temporary modification of certain contractual obligations — and bankruptcy are fundamentally different in a number of respects. First, as discussed above, a fiscal emergency turns on the level of *services* remaining, not solely on whether bankruptcy is imminent. When high-crime cities are cutting their sworn police staffing, that is a good indication that fiscal distress is very real. After all, there is never a political incentive to cut police officers and firefighters. Yet in recent years, major California cities such as Stockton, Oakland, and San José have done just that. Moreover, when cities are faced with the prospect of closing libraries and community centers, one begins to see why the pre-bankruptcy G.M. analogy is so appropriate here.

Second, declarations of emergency are generally temporary measures — to enable a city to arrest its slide. This, in turn, provides an agency with time to develop strategies for raising revenues, to find ways to provide services more efficiently, to out-source, to bargain with employee organizations, or to simply attempt to maintain services in the hope that the economic picture will brighten. The word "temporary," of course, is necessarily elastic. In collective bargaining settings, temporary might suggest one or two fiscal years. When viewed in the context of pensions, on the other hand, it could mean five years. This is because, in view of a dramatic rise in unfunded pension liabilities, it is unlikely that any change in benefits lasting only a year or two would "move the needle."

Thus, in determining when to declare a fiscal emergency, the focus should not be whether a public agency can merely scrape by. Rather, an agency must look at whether, in the next couple of years, revenues will be sufficient to cover the expenditures necessary to provide a service level consistent with public health and safety.

(3) The public agency should demonstrate a nexus between the emergency and the actions taken. As noted above, in evaluating the legitimacy of a public employer's emergency measures, a court will look

to see whether the measures were “reasonable and necessary” to serve an important public purpose. To satisfy this burden, an employer will have to show that the measures imposed were narrowly tailored to deal with the emergency at hand. As one court explained, “[A] law that works substantial impairment of contractual relations must be specifically tailored to meet the societal ill it is supposedly designed to ameliorate.”[30]

What this means on a practical level is that there must be some connection between the contractual impairments and the underlying emergency. The recent efforts by the City of Stockton to address its ongoing fiscal crisis are illustrative of this principle.

The recession that began in fall 2008 has hit Stockton particularly hard. Property values have fallen by 66 percent. The city’s unemployment rate has skyrocketed, and is nearly double the state’s rate. Because of these events, city revenues have plummeted.

The city did the best it could to ride out the recession without taking actions that would implicate bargainable issues. Stockton cut police staffing by 25 percent — despite having one of the highest crime rates in California. It cut its general workforce by an even greater amount. The city sought tax increases. Stockton depleted its general fund reserves to the point where the reserves only covered two days of operation. It drained its Workers’ Compensation fund. And, the city reached agreements with various unions to forego raises and to change some benefits.

But these efforts were not enough; Stockton still needed to address a \$23 million budget deficit for fiscal year 2010-11. Faced with closed contracts with its police and fire unions, Stockton was going to have to eliminate an additional 40 police officer positions in order to close the budget deficit — an untenable and dangerous option given the city’s critical public safety needs. Accordingly, the city declared a state of fiscal emergency and authorized the imposition of limited emergency measures on members of the police and fire bargaining units that would allow the city to close its budget gap.[31] Stockton was forced to take additional measures the following year with respect to its police union contract.[32]

While Stockton’s emergency measures are currently in various stages of litigation, they illustrate precisely the type of tempered approach public employers must adopt in exercising their inherent emergency powers to impair contractual obligations. Stockton did all it could to cut costs and reach negotiated resolutions with its employee organizations. When these efforts proved insufficient to solve its budgetary issues, the city implemented limited measures narrowly tailored to the emergency at hand — in particular, measures that allowed the city to balance its budget without having to lay off an additional 40 police officers in the face of high public safety needs.

(4) The agency must consider alternatives to emergency measures. Employee advocates also argue that budgetary pressures can never justify the impairment of contractual obligations because public agencies always have other, less intrusive options at their disposal, including raising taxes, renegotiating labor agreements, and consolidating or eliminating services. But the fact that a public agency has not exhausted all other cost saving measures before declaring a state of fiscal emergency should not automatically render the declaration invalid. As discussed above, some options — such as depleting reserve funds — will only exacerbate long-term financial difficulties. Other options — such as reaching agreement with unions on concessions and/or obtaining voter support for tax increases — are not available or are insufficient.

What is required, however, is that impairing contractual obligations cannot be considered as just one of several policy options. Rather, a declaration of fiscal emergency should only be used after a public agency has fully and meaningfully explored available alternatives and ultimately determined these alternatives are insufficient to solve the agency’s long-term financial issues.

Significantly, courts have recognized that such policy decisions by governing legislative bodies are entitled to deference. For example, in *Baltimore Teachers Union v. Mayor and City of Baltimore*,[33] the city imposed salary reductions on police and teachers in light of a sharp decline in city revenues and the city’s legal duty to pass a balanced budget. The teachers’ union claimed that the salary reductions were improper because there were less intrusive measures available to the city, such as raising taxes. The court rejected this argument, stating: “It is not enough to reason...that ‘[t]he City could have shifted the burden from another governmental program,’ or that ‘it could have raised taxes.’ Were these the proper criteria, no impairment of a governmental contract could ever survive constitutional scrutiny, for these courses are always open, no matter how unwise they may be.”[34] The court stated that although “[t]he

authority of the states to impair contracts, to be sure, must be constrained in some meaningful way,” the Contract Clause “does not require the courts — even where public contracts have been impaired — to sit as superlegislatures.”[35]

The court in *Buffalo Teachers Federation v. Tobe* reached a similar conclusion. In that case, the court stated: “[i]t cannot be the case...that a legislature’s only response to a fiscal emergency is to raise taxes” and that “it is reasonable to believe that any additional increase would have exacerbated Buffalo’s financial condition.”[36] The court expressed deference for the city’s decision to impose a wage freeze in response to its fiscal emergency, “find[ing] no need to second guess the wisdom of picking the wage freeze over other policy alternatives, especially those that appear more draconian, such as further layoffs or elimination of essential services.”[37]

The court presiding over the Vallejo bankruptcy proceedings likewise rejected the unions’ argument that Vallejo could have avoided bankruptcy for another year if it had made “many minor changes,” including deferral of salary increases promised in the parties’ collective bargaining agreement.[38] With respect to the unions’ proposed deferral of salary increases, the court noted that “to the extent the Unions’ offer would keep Vallejo out of bankruptcy, the offer would not provide long term solvency beyond the first year.”[39] With respect to the unions’ suggestion that municipal services could be cut further, the court found that the city “had reduced expenditures to the point that municipal services were underfunded” and, more importantly, that “further funding reductions would threaten Vallejo’s ability to provide for the basic health and safety of citizens.”[40]

As the foregoing demonstrates, a public agency need not exhaust *all* cost-saving measures prior to impairing its own contractual obligations, particularly where those alternatives will not solve the underlying problem. What is required, however, is that a public agency fully considers and makes appropriate legislative findings regarding why those alternatives are insufficient, prior to impairing any contractual obligations.

The recent federal district court decision in *Donohue v. Paterson*[41] highlights the importance of this requirement. In *Donohue*, the governor of New York submitted, and the state legislature passed, an emergency appropriations bill that enacted unpaid furloughs, a wage freeze, and a benefits freeze on a number of state employees in contravention of their union-negotiated labor agreements, in order to address the state’s ongoing fiscal crisis. The unions promptly filed suit and sought a temporary restraining order (TRO) preventing the emergency measures from going into effect. In evaluating the unions’ TRO request, the court did not question whether the state’s “fiscal crisis” constituted a legitimate public purpose warranting the impairment of its contractual obligations. However, the court found that the state had failed to show that it properly considered alternatives to the emergency measures imposed. In particular, the court stated, “Defendants do not, and evidently cannot, direct the Court to any legislative consideration of policy alternatives to the challenged terms in the bill; rather, the only support offered by Defendants for their assertion that the contractual impairment was not considered on par with other alternatives is a list of asserted expenditures decisions made by the State over the past years, such as a hiring freeze and delays of school aid.... This will not do.”[42] In particular, the court pointed to “the conspicuous absence of a record showing that options were actually considered and compared....”[43]

Conclusion

Emergencies should not be lightly invoked. To the extent they are invoked as a legal basis for temporarily impairing contracts, they pose a risk. If subsequent negotiations and actions do not solve the problem, a public agency is in danger of spending money to preserve services and then later having to pay the money it thought it saved to employees or retirees if it loses in a court action. But handled properly, a declaration of fiscal emergency can be a final opportunity to correct course if the evidence suggests the current course will decimate services.

No one likes to hear that promises cannot be fulfilled. But promises to employees and retirees are not the only promises a government makes; it also makes promises to the residents — promises that induce them to come to a particular city or county. The failure to live up to the latter promises has had a devastating effect on the public’s view of government and contributes significantly to the death spiral in which we find ourselves. For those who work for or with public agencies, it is a broken promise we ignore at our peril.

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firm representing primarily local government agencies, educational institutions and non-profits. The firm's work is focused in the areas of labor, employment, municipal law and public interest litigation. Mr. Holtzman assists cities and counties in financial distress, through strategic consulting, negotiations, arbitration and litigation. [Steve Cikes](#) is senior counsel with the firm. He represent cities, counties, school districts, and non-profits on a broad range of public sector law issues.

[1] See John Knox and Marc Levinson, "Municipal Bankruptcy: Avoiding and Using Chapter 9 in Times of Fiscal Distress," pp. 11-12, available at <http://www.orrick.com/fileupload/1736.pdf>.

[2] See Christopher E. Platten, "Declarations of Fiscal Emergency: A 'Dead on Arrival' Means of Limiting Public Pension Costs and Impairing Local Agency MOUs," *CPER* No. 203.

[3] *Manigault v. Springs* (1905) 199 U.S. 473, 480; see also *U.S. Trust Co. of New York v. New Jersey* (1977) 4 U.S. 1, 22.

[4] (1934) 290 U.S. 398.

[5] *Id.* at 439.

[6] *Hudson County v. Water Co. v. McCarter* (1908) 209 U.S. 349, 357; *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 305 ("The state's police power remains paramount, for a legislative body 'cannot bargain away the public health or the public morals'").

[7] *Baltimore Teachers Union v. Mayor and Council of Baltimore* (4th Cir. 1993) 6 F.3d 1012, 1021.

[8] (1979) 23 Cal. 3d 296.

[9] *Id.* at 305-06.

[10] See *Veix v. Sixth Ward Bldg. and Loan Assn.* (1940) 310 U.S. 32, 39-40 (recognizing that an emergency need not be declared and relief measures need not be temporary for an impairment to be deemed constitutional).

[11] (1977) 431 U.S. 1, 23 n. 19.

[12] *Id.* at 25.

[13] (1997) 52 Cal.App.4th 1109.

[14] *Id.* at 1161.

[15] *Id.* at 1118.

[16] 210 Cal. App. 3d 1095.

[17] *Id.* at 1112.

[18] *Id.* at 1115.

[19] *Id.* at 1113.

[20] See Daniel Hancock, Chair of the Little Hoover Commission, "Pension Changes Can't Wait," Op-Ed article in *Sacramento Bee*, Aug. 28, 2011, available at: <http://www.sacbee.com/2011/08/28/3864677/pension-changes-cant-wait.html>.

[21] See, e.g., Ronald K. Snell, "Pension and Retirement Plan Enactments in 2011 State Legislatures," National Conference of State Legislatures website, available at: <http://www.ncsl.org/?tabid=22763>

[22] See *Sonoma County Organization etc. Employees v. County of Sonoma* (1991) 1 Cal.App.4th 267, 276.

[23] (1978) 44 N.Y.2d 101.

[24] *Id.* at 101. It is important to note that the California Supreme Court in *Sonoma County Organization of Public Employees v. County of Sonoma*, *supra*, “seriously question[ed]” the Subway Surface court’s rationale in regards to its finding that “employees had not rendered consideration for the second year of the contract when the freeze was imposed.” 23 Cal.3d at 313. It is also important to point out that before Subway-Surface Supervisors reached New York’s highest court in the opinion cited, a lower court had invalidated the portion of the city’s measure “barring the calculation of pension benefits on wages increases” promised in the parties’ labor agreement based on a provision in the New York Constitution, which expressly states: “membership in any pension or retirement system of the state or of a civil division thereof shall be contractual relationships, the benefits of which shall not be impaired.” See *Subway-Surface Supervisors v. N.Y.C. Transit Authority* (1977) 392 N.Y.S.2d 460, 466-67. The high court expressly declined to rule on the propriety of the city’s pension changes because an agreement had been reached between the parties on this issue. 44 N.Y.2d at 109.

[25] (2d Cir. 2006) 464 F.3d 362.

[26] *Id.* at 373.

[27] In October 2011, Governor Brown signed Assembly Bill 506, which requires that before a local agency can declare bankruptcy, it must participate in a “specified neutral evaluation process with interested parties” or declare fiscal emergency upon a finding that “the financial state of the local public entity jeopardizes the health, safety, or well-being of the residents of the local public entity’s jurisdiction or service area absent protections of Chapter 9” of the bankruptcy code.

[28] *In re City of Vallejo* (B.A.P. 9th Cir. 2009) 408 B.R. 280, 286.

[29] *Ibid.*

[30] *Sanitation and Recycling Indust., Inc. v. City of New York* (2d Cir. 1997) 107 F.3d 985, 993.

[31] See http://stockton.granicus.com/MetaViewer.php?view_id=48&clip_id=2937&meta_id=261498.

[32] See http://stockton.granicus.com/MetaViewer.php?view_id=48&clip_id=3612&meta_id=309952. Because its fire contract had expired, it was not required to use emergency powers with respect to firefighters, and was able to reach a negotiated resolution.

[33] (4th Cir. 1993) 6 F.3d 1012.

[34] *Id.* at 1019-20.

[35] *Id.* at 1021-22.

[36] 464 F.3d at 372.

[37] *Ibid.*

[38] *In re Vallejo, supra*, 408 B.R. at 293-94.

[39] *Id.* at 294.

[40] *Ibid.*

[41] (N.D.N.Y. 2010) 715 F.Supp.2d 306.

[42] *Id.* at 322.

[43] *Id.* at 323.

CPER Journal Online

Charter Schools and Collective Bargaining: The Unholy Alliance



By *John R. Yeh, Burke, Williams & Sorenson*

Charter schools are often cited as having freedom from the bureaucratic processes of the public school system. Yet, the Charter Schools Act states that the Rodda Act,^[1] California's law governing collective bargaining in school districts, applies.^[2] And while the unionization of charter school employees has not reached the degree that it has in the traditional public school system, the Public Employment Relations Board recently affirmed the modification of a school district's existing unit of

certificated employees to include charter school teachers.^[3] Therefore, the Charter Schools Act does provide a path through which charter school employees could join or form a union.

Moreover, charter schools electing exclusive employer status are subject to other obligations as public school employers under the Rodda Act, even if their employees do not unionize. This article addresses how these two behemoths of public education policy — charter schools and unions — potentially intersect in a way that could eventually impact the operational flexibility accorded to charter schools.

The Charter Schools Act

One of the stated policy directives of the Charter Schools Act^[4] is to provide charter schools with increased flexibility and operational independence from the "existing school district structure."^[5] Charter schools have been made exempt from laws governing school districts in an attempt to free them from the bureaucratic forces burdening the traditional public school system.^[6]

The act states that "[a] charter school charter shall contain a declaration regarding whether or not the charter school shall be deemed the exclusive public school employer of the employees at the charter school for the purposes of [Section 3540.1 of the Government Code](#)."^[7] As a default position, "[i]f the charter school is not so deemed a public school employer, the school district where the charter is located shall be deemed the public school employer for the purposes of [the Rodda Act.]" Moreover, as part of the charter formation process, a petition to form a charter school must contain, "[a] declaration whether or not the charter school shall be deemed the exclusive public school employer of the employees of the charter school for the purposes of [the Rodda Act.]"^[8] Therefore, at the outset of the charter formation process, a charter school must decide whether it will assume the status of exclusive employer under the Rodda Act.

Implications of the Charter School's Election Whether To Be Exclusive Employer

The majority of charter schools, especially those choosing to operate as nonprofits public benefit corporations under Education Code Sec. 47604(a), elect to be deemed the exclusive public school employer for the purposes of the Rodda Act. If the charter school does elect to be the exclusive employer, that election by itself does not trigger collective bargaining obligations. In many cases statewide, charter school employees do not certify a union, at least not initially. In this case, the terms and conditions of employment are often determined by individual employee contracts or school policy, and often bear more similarity to private sector "at-will" employment than to the heavily regulated and statutorily driven nature of public school employment (unless the school's charter agrees to give its employees the statutory protections of the Education Code.) In the event that the charter school employees do certify an exclusive representative, the traditional duty to bargain the terms and conditions of employment are triggered.

The Charter School as Employer

Several portions of the Charter Schools Act recognize the charter school's role as employer. Regardless of whether the charter petition contains the election for the charter school to be the exclusive employer, or the district, the petition still must address the following employer-related elements:

- the qualifications to be met by individuals to be employed by the school;^[9]
- the manner by which staff members of the charter schools will be covered by STRS,

PERS, or federal Social Security;[10]

- a description of the rights of any employee of the school district upon leaving the employment of the school district to work in a charter school, and of any rights of return to the school district after employment at a charter school.[11]

Under the Charter Schools Act, the charter school is subject to the obligations of a “Public School Employer” under the Rodda Act, which include:

- the duty to meet and negotiate with representatives of employee organizations with regard to matters within the scope of representation,[12] defined as “matters relating to wages, hours of employment, and other terms and conditions of employment”:[13]
- the obligation not to interfere with employee selection or formation of an exclusive representative:[14]
- the duty not to retaliate against employees for exercising rights under the Educational Employment Relations Act.[15]

California courts, as well as PERB, have applied these obligations to charter schools, even where an exclusive representative has not been certified for its employees.

Moreover, there does not appear to be any statutory limitation against imposing the prohibition against retaliation and interference against a charter school, regardless of which entity it elects as exclusive employer. In one reported instance, a PERB judge has applied the prohibition against interference against a charter school prior to the charter school’s election as to which entity would assume exclusive employer status.[16] The plain language of Education Code Sec. 47611.5(a) (“[the Rodda Act] shall apply to charter schools”) would tend to support this view. In *Ravenswood Teachers Assn. v. Ravenswood City School Dist.*,[17] the PERB judge dismissed an unfair practice charge against a district arising out of the alleged retaliatory dismissal of charter school teachers where the charter school elected to be the exclusive employer, and held that the charges should be adjudicated against the charter school.

CTA v. PERB

A 2009 California Court of Appeal case demonstrated the application of the exclusive employer’s obligations under the Rodda Act to a charter school employer. In *California Teachers Assn. v. Public Employment Relations Board*,[18] the Court of Appeal held that PERB should not have dismissed a complaint against a charter school alleging the retaliatory firing of three teachers. In so holding, the court cited the charge in Education Code Sec. 47611.5(d) that PERB “shall take into account the Charter Schools Act...when deciding cases brought before it related to charter schools.” The court noted that Education Code Sec. 47601(d) enunciated the policy that charter schools are intended to “[c]reate new professional opportunities for teachers, including the opportunity to be responsible for the learning program at the schoolsite.” It saw no indication that, in dismissing the retaliation complaint, PERB took into account “the unique role played by the teachers in a charter school” as where teachers’ “interests as employees” differ from those of teachers at a traditional public school.[19]

The CTA case illustrates that courts recognize that the provisions of the Rodda Act, such as the duty not to retaliate, can be imposed on charter schools. As noted above, Ed. Code Sec. 47611.5(a) states that the provisions of the Rodda Act shall apply to charter schools. In a twist unique to charter schools, the Court of Appeal in CTA also established that the charter school’s duties as employer are to be assessed with reference to the policy directives of the Charter Schools Act. That is, virtually any portion of the Charter Schools Act — whether it be the statement of legislative intent in Ed. Code Sec. 47601 or any other of its provisions — can be considered by PERB in evaluating whether a charter school’s actions constitute an unfair practice under the Rodda Act.

As the CTA decision shows, courts will apply the obligations under the Rodda Act to charter schools even in the absence of an exclusive representative and corresponding duty to bargain the terms and conditions of employment. In other words, charter schools must be prepared to comply with all obligations of the Rodda Act upon inception, even if their employees have not recognized an exclusive representative.

The Orcutt Case

While it is less frequent for charter schools to elect the district to be the exclusive employer of the charter school’s employees, when this election is made, the line of demarcation between charter school

employees and district employees is not as distinct. One example of the potential implications of such an election occurred in *Orcutt*.

In *Orcutt*, the charter petition identified the district, and not the charter school, as the exclusive employer of the charter school's employees. PERB found that the charter school teachers shared a community of interest with district teachers for the purposes of the unit modification determination. However, PERB stated that "we do not address the issue of whether charter school teachers may appropriately be included in a bargaining unit of non-charter employees where the charter school, rather than the public school district, is designated as the public school employer...."[20] Given that the more common designation in charter petitions is for the charter school to be designated as the exclusive employer, rather than the district, PERB might well reach a different result under the community of interest test for a charter school with exclusive employer status, that has incorporated as a nonprofit public benefit corporation under Ed. Code Sec. 47604(a). A charter school assuming exclusive employer status is likely to employ its staff under different terms and conditions than district employees, which would tend to diminish the community of interest between charter school and district teaching staffs.

Charter Schools that elect the district to be the exclusive representative of the charter school's employees necessarily cede operational independence with respect to performing traditional employer functions such as setting the terms and conditions of employment, and perhaps supervising their employees. Though allowed under the law, electing the district to assume exclusive employer status is the less frequent option selected by charter schools.

Conclusion

Whether unionization of charter school employees reaches widespread status depends on whether the necessary political and cultural forces eventually converge. Legally, however, a path exists for collective bargaining to take root in charter schools. Charter schools still must comply with the obligations of the Rodda Act, separate from the duty to bargain terms and conditions of employment with the exclusive representative.

California courts, as well as PERB, have applied the other obligations under the Rodda Act to charter schools. These obligations include the obligation not to retaliate against protected activity and not to interfere with the formation of a representative. Charter-authorizing agencies must ensure that charter schools assuming exclusive employer status understand and comply with the obligations under the Rodda Act, including those duties that might arise prior to the recognition of an exclusive representative, and that exist independent of the duty to bargain the terms and conditions of employment.

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[1] Gov. Code Secs. 3540 et seq.

[2] Ed. Code Sec. 47611.5(a).

[3] *Orcutt Union Elementary School Dist.*, PERB Dec. No. 2183, [CPER 203](#).

[4] Ed. Code Secs. 47600 et seq.

[5] Ed. Code Sec. 47601.

[6] Ed. Code Sec. 47610, *Wilson v. State Board of Education* (1999) 75 Cal.App.4th 1125, 1139, 130 CPER 22.

[7] Ed. Code Sec. 47611.5(b).

[8] Ed. Code Sec. 47605(b)(5)(M).

[9] Ed. Code Sec. 47605(b)(5)(E).

- [10] Ed. Code Sec. 47605(b)(5)(K).
- [11] Ed. Code Sec. 47605(b)(5)(M).
- [12] Gov. Code Sec. 3543.3.
- [13] Gov. Code, Sec. 3543.2 (a).
- [14] Gov. Code Sec. 3543.5 (d);
- [15] Gov. Code Sec. 3543.5 (a).
- [16] *Chula Vista Educators v. Chula Vista Elementary School Dist.* (2002) 26 PERC 33031 (No. LA-CE-4125-E).
- [17] (2002) 26 PERC 33118 (Nos. SF-CE-2218-E, SF-CE-2236-E).
- [18] (2009) 169 Cal.App.4th 1076, 194 CPER 21.
- [19] *Id.* at 1089.
- [20] *Orcutt*, *supra*, n. 9.

CPER Journal Online

The Conditions for Teaching and Learning to Happen



Below is the second of three chapters CPER is publishing to give readers a first look at an upcoming book on the history of public sector labor relations. The author, **Fred Glass**, is 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. 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.

From the beginning, we did not say to ourselves, “We’re going to get power by going to Sacramento and getting a bill that tells us that we have the right to collective bargaining.” We wanted that, but that was not the source of our authority. The source of our authority was in collective action, and watching the peace movement, and the civil rights movement, we could see the strategies one used.

—Miles Myers, Oakland teacher

Raoul Teilhet, a Korean War veteran, went to work teaching history at Pasadena High School in the late 1950s. When he was first hired, the principal handed him, along with his employment papers, membership applications for the Pasadena Education Association, California Teachers Association, and National Education Association. As a former member of a “real union,” the Teamsters, he concluded that this must be a company union, since it was his boss who was signing him up.

Teilhet’s idea was correct, as far as it went. The full picture, as Teilhet discovered over time, was more complex, since in the public sector there is no “company.” But the California Teachers Association was not a union. It functioned as a statewide lobbying organization for K-12 public education and offered an array of services for its members, including a credit union, travel assistance, discount purchase arrangements, and insurance programs. Despite its name, and the presence of teacher advocates within the organization, the CTA was dominated by school administrators, school district superintendents, and elected school board officials. It did not support collective bargaining for teachers. In fact, it had opposed collective bargaining bills for teachers and other school employees every time they had appeared before the Legislature beginning in 1953.

The sponsor of those bills was the California State Federation of Teachers (the organization dropped the redundant “State” from its name in 1963). The CFT had been formed during the first wave of public sector union organizing in 1919. But it wasn’t until the 1960s that the CFT, affiliated with the national American Federation of Teachers and with the AFL-CIO, gained the ability to mobilize thousands of teachers over pay, working conditions, and academic freedom issues. Sparked by the success of the national AFT, which had won a number of collective bargaining agreements in large east coast cities through strikes, and backed by organizing grants from the United Auto Workers, the CFT’s idea of classroom unionism began to look attainable to the state’s teachers. The CFT waged battles on many fronts — legal, legislative, political, and organizing — on behalf of the goal of collective bargaining for “teacher power.”

No one was more effective in pursuit of this goal than Raoul Teilhet, a transplanted Ohioan whose father’s living room wall displayed the three typical icons of the mid-century coal miner: Jesus Christ, FDR, and John L. Lewis. A gifted public speaker, energetic and fearless organizer, and charismatic union leader, the high school teacher carried the CFT’s message about collective bargaining with messianic fervor to the farthest corners of the state — and not just to K-12 teachers, but community college and university faculty as well. Teilhet also extended CFT’s tradition of social unionism to active support for the United Farm

Workers (Cesar Chavez was a regular speaker at CFT conventions) and to the anti-Viet Nam War movement. According to Teilhet, no education policy could make sense without fully funding the classroom and without freeing teachers from worries about their job security to concentrate on teaching.

Luisa Ezquerro's experiences were typical of the reasons why Teilhet and other CFT organizers connected to growing numbers of teachers. She became a San Francisco teacher in the footsteps of her immigrant mother and aunt, who had taught in Nicaragua. Ezquerro recalled what happened one afternoon in the early 1960s after her principal developed a dislike for her:

I got called in by the principal, this old character. There was a phone booth out in the hall. He reaches into his pocket and pulls out some coins and says, "Here, here's some coins, why don't you call around and see where you can get a job." Well excuse me!.... See, there wasn't a contract. He had no right to do that, but there wasn't anything that prevented him from doing it....

Along with the petty insults came violations of basic rights. There was John Muir High School teacher Paul Finot, placed on leave by the Pasadena School Board in 1963 because he refused to shave his beard. The school principal worried publicly about the dire impact his appearance would have on Negro students. (Apparently no one noted the irony that the school's famous namesake bore a heavy beard.) When asked at a court hearing whether his beard wasn't an "outgrowth of his radicalism," he replied, "No, it was an outgrowth of my six week fishing trip." The appeals court, ruling that a beard represented a constitutionally protected form of individual expression, restored Finot to his classroom.

Despite high recommendations for tenure from his principal, a Long Beach teacher, Ray De Groat, was dismissed in 1958 because the district superintendent disliked his "independence of spirit," an apparent reference to youthful left wing political activism 10 years earlier and his current enthusiasm for the AFT. Two other teachers were removed by the superintendent when they spoke up on behalf of De Groat. A lengthy and unsuccessful legal defense of the three teachers led to passage in 1961 of a state law providing modest protections for probationary teachers.

Teachers resented paternalistic restrictions imposed by administrators, superintendents, or school boards, not only on academic freedom within the classroom to teach as they saw best, but also freedom of speech outside school. Jack Owens was fired in 1959 for "unprofessional conduct" in Shasta for organizing educational forums, and writing letters to the editor of the local newspaper critical of school district policy. With CFT support, he was returned to his job in 1962 through a lawsuit.

Events like these occurred all the time. They reinforced teacher union activists' belief that the only lasting protection for teacher rights would come with collective bargaining, through contracts that mandated salary schedules based on education and experience instead of administrative whim, grievance procedures to settle individual and group problems peacefully, seniority provisions for fairness in determining layoffs and transfers, and transparent rules to evaluate teachers for the purpose of retention and promotion.

A small cadre of AFT members held these values and ideas throughout the post-World War II years, nurturing the seeds of collective bargaining in the minds of colleagues and legislators. Mostly men, mostly veterans, they spent countless volunteer hours after school, attending board meetings, representing teachers in informal hearings, writing and distributing mimeographed newsletters, and occasionally finding themselves looking for new jobs as a result. In the face of hostile school administrators, an entrenched, anti-union teacher association, and a mostly indifferent public, they pursued their chimerical vision.

The CTA sponsored a halfway measure toward collective bargaining in 1965. The Winton Act, AB 1474, was in fact intended to stave off collective bargaining. The Act established the right of school district negotiating councils to "meet and confer" with administration over employment issues. School boards placed representatives of teacher organizations on the councils in proportion to their membership. These negotiations *could* be used by school boards to inform their decisions, which nonetheless remained final. In his organizing conversations with teachers across the state, Raoul Teilhet provided a metaphor to describe the process: "Meet and confer is what you do with your children. Collective bargaining is what you do with your spouse."

AFT activists like Ezquerro derisively called the practice "meet and defer" or "collective begging." Although the Winton Act was intended to stack the deck in favor of the much larger CTA, in some districts CFT was

able to use the council as a recruitment tool, arguing that this was a step toward collective bargaining. In other districts, the union boycotted the council and called for elections instead of appointment to the body.

The Mayor Who Went on Strike

In 1966, local CFT activists used the failure of one district Winton council as a catalyst for the first teacher strike in California. This took some doing, since fears of chaos and anarchy during public employee strikes had been stoked by politicians and conservative media every time the possibility arose since the calamitous 1919 Boston police walkout. Of some encouragement were the successful job actions of New York teachers, which in addition to collective bargaining agreements had resulted in a state collective bargaining law. But in California no laws addressed the issue. Public sector strikes also went against the emotional grain carried by most public employees, their sense of public service.

In spring 1966, the Richmond School District found itself with an unexpected tax windfall of \$600,000 when local industrial property values were reassessed upwards. Richmond, a few miles north of Berkeley, contained a population of 80,000, down from its wartime peak of 100,000. Just a few hundred skilled workers found seasonal employment in the sole remaining ship repair facility, Willamette Iron and Steel Shipyard. Although shipbuilding had come and gone, Richmond remained an industrial town. With 11,000 workers employed in manufacturing — by far the largest job category — it was also a heavily unionized area. The biggest employer was the Standard Oil refinery. Most of the 3,500 construction workers were dispatched from local union hiring halls, and the larger retail establishments were likewise organized.

Leaders of the Contra Costa Federation of Teachers, AFT Local 866, told the school board that it wasn't worth the \$300 per year per employee to distribute the money in salary increases to the district's 1,700 teachers. Instead, the union suggested the board could do more good by reallocating the money to educational improvements. These included reducing class sizes by hiring more teachers, equalizing the resources and staffing of school libraries, purchasing more textbooks and other curriculum materials, strengthening the remedial reading program, and — in tandem with African American parents threatening a boycott — taking steps to desegregate the district.

The school board responded that it was bound by the Winton Act to negotiate with the Winton Council, not the AFT. Of the nine seats on the council, the board had appointed eight representatives of the Richmond Association of Educators (CTA) and one AFT member. That chair remained vacant, however, since the AFT wanted a vote of all teachers to determine representation on the council; its leaders, confident of better results through an election, refused to take the token seat. The Council recommended that the money be distributed as a 3 percent raise for teachers and administrators. This was the same proposal as the superintendent had made, and left out classified employees, who were not represented on the Winton Council.

Embarrassed by the publicity generated around these discussions, the board asked the council to make a new recommendation, including improvements to instruction. It did, this time including the classified employees (who were threatening to strike) in a blanket 2¼ percent raise, which would have eaten up \$537,000 of the \$600,000, leaving \$63,000 in program proposals for remedial reading, inservice training, and a study of further educational improvements.

AFSCME Local 1675, like AFT, had no official bargaining rights, but counted a majority of members among maintenance, cafeteria, and clerical workers in the Richmond District. After taking a vote, its secretary-treasurer, Henry Clarke, offered to reduce the classified employees' salary request if the teachers' educational improvement proposals were agreed to. He also demanded that the Board authorize an election among classified employees to recognize the AFSCME local for purposes of collective bargaining.

Clarke was a colorful figure. He had, for instance, once been temporarily suspended as a delegate to the Contra Costa Central Labor Council for a fistfight in the Council parking lot with a delegate from another union. Although projecting a tough, street-wise image, he was a college graduate, and had taught school briefly himself. Serving a stint as AFT staffer in New York City, he was one of the three principal organizers of the first New York teacher strike. After the Richmond Board refused to budge, Clarke directed Local 1675 members to set up pickets at 45 of the 60 school sites in the district on the first day of school, September 12, 1966.

Perhaps a few hundred teachers refused to cross the picket lines. The teacher unionists were strong in the secondary schools, and virtually non-existent in the elementary sites. Counselors, gym teachers, and administrators held “classes” in the high schools and middle schools that amounted to babysitting up to one hundred students behind the pickets. Some high school students joined the picket lines. At an evening meeting in the Richmond library, the teachers voted to ask the Contra Costa Labor Council for strike sanction, which was granted immediately. Teachers and parents — many of whom were members of other unions themselves — began to organize makeshift schools and childcare centers.

On September 19, the teachers joined the classified workers outside the schools once more. But this time, they weren’t walking in support of the other school employees; the teachers were themselves on strike. Among the picketers was Milton Spinner, a teacher at Adams Junior High School, and mayor of Richmond.

Spinner had taught social studies for 10 years in the district, and been football coach at Roosevelt High School. After serving in the Army during World War II, he had earned a masters degree in history from Stanford, where he met and married his wife, Helen, who had worked as a welder in the Kaiser shipyards. At the time of the strike, the Spinners had four children in the Richmond schools. Spinner and the union’s newsletter editor, Howard Mackey, went to talk with the head of Standard Oil to seek his support for the teachers. The oil executive was willing to meet with Mayor Spinner, but not inclined to support teacher Spinner on strike.

Spinner took out an ad in the local newspaper, paid for by Local 866, explaining to the people of Richmond his view that if the school board supported American-style democracy and allowed an election of the teachers they would return to work.

Some local newspapers inaccurately reported the teachers were on strike for higher salaries. The *San Francisco Chronicle*’s coverage landed closer to the mark because its reporter, Dick Meister, was a union activist himself. The local *Richmond Independent* consistently undercounted the numbers of classified employees on the picket lines. The weekly Central Labor Council newspaper, *Labor Journal*, ran articles on the issues for weeks prior to the strike and provided the most in-depth coverage while events were unfolding.

But after the teachers walked out, events didn’t unfold for long. By Monday evening, the school board obtained a restraining order from a judge, and the following day teachers were back in the classroom. Mackey, another World War II vet and math teacher, later ruefully second-guessed his response to a question from a district administrator:

We had taken the final step. We couldn’t do any more. The district asked us if you’d go back if the judge ruled you had to. I said yeah, we don’t want to disobey the law. Perhaps that was the wrong answer. Because then they went ahead and got the injunction.

AFSCME Local 1675 defied the injunction for a day, and then went back to work. The school board agreed to ask the state attorney general for an opinion as to whether teachers could vote for council representation, and to hold an election among classified employees within 90 days.

At the next central labor council meeting, one union leader advised the teachers to go back out. Said Slim Brady, an electrical worker and council vice president, “Can the employer just go down to the court and twist the faucet and out comes a two-bit injunction, all stamped and ready to stop a strike? If I were the teachers, I’d ignore it.” Striker Tom Lundy, Local 866’s delegate to the Council, told Brady that while some teachers agreed with him, the majority had decided to wait for an election before taking to the streets again.

That election never came. It had been within the board’s power all along to allow an election, instead of appointing teachers to the Winton council. But pressured on one side by the Association of Richmond Educators, which feared a loss of seats to AFT, and by the anti-union superintendent, the board waffled for months before ruling against an election. In addition, the board went ahead and distributed the tax reassessment money as a raise. Despite the lack of apparent results, the strikers felt it had been worth it. According to Mackey, “We knew it was historic. We were really idealistic at that time. We thought we could make a difference.”

CFT members across the state applauded the action of the Richmond local. San Francisco teachers sent

a donation of a thousand dollars to help defray the loss of a day's salary. Seven years later, the CFT at its convention bestowed a plaque on the local commemorating the first time California teachers collectively walked out of their classrooms on behalf of a principle.

Like the social workers enrolled in Local 535 who felt a responsibility to join with their clients for needed reforms in social services (see the previous chapter reprinted in last issue of *C P E R*, No. 203), CFT members thought it was their duty to improve public education itself, starting with listening to the community. As Oakland teacher Miles Myers put it:

We were trying to create the conditions for teaching to happen, and for learning to happen....If you think of the African American leaders in the civil rights movement, the young ones, we had them right in Oakland or growing up in Oakland. Bobby Seale's cousin was a teacher in the Oakland system. We had an awareness of that and the students did too. I remember the Black Student Union at Oakland High School proposing that the books ought to be more integrated, and they were.

Through alliance building, direct action, and tenacious defense of teachers' rights, the CFT chartered scores of locals in the late sixties and early seventies, picking up thousands of members each year. Its leaders and activists viewed the CFT as a movement organization, much as members of the United Farm Workers did their union. And they viewed collective bargaining as one important means to achieve movement ends.

They also received crucial support from their sisters and brothers in manufacturing unions. CFT offices and organizing positions were funded by grants from the United Auto Workers, whose leader, Walter Reuther, understood the importance of extending labor's flanks to the public sector.

As CFT grew, the CTA saw the writing on the wall. In 1971, it kicked out its administrator members and embraced collective bargaining. Soon Association chapters were going on strike as often as AFT locals. Between 1970 and 1974, CTA chapters and CFT locals engaged in 38 walkouts. San Francisco teachers, led by Jim Ballard, a teacher from a West Virginia miners union family, struck four times in a dozen years beginning in 1968, in a rivalry pitting CFT and CTA local organizations against one another in a militancy contest for teachers' allegiance.

Los Angeles teachers, following a 1969 walkout, brought CFT and CTA members into the first merged teacher union local in the country in 1970, creating a much more formidable instrument of the teachers' will. The direct action fever wasn't limited to K-12. A fierce strike at San Francisco State University by students demanding an expansion of curriculum to include previously neglected studies of minority cultures and histories was bolstered when United Professors of California, AFT Local 1352, joined the picket lines. The campus, and to a lesser degree the San Jose State University campus, was shut down for months. These activities built pressure on the Legislature to pass a collective bargaining bill in 1973, but it was vetoed by Governor Ronald Reagan.

A "Real NLRA" for Public Employees

In 1975, the bill that most public employee unions, associations, and managers wanted was a comprehensive one, a "real NLRA," that would fold all types of public employees, and all levels of public education, within its guidelines, and with enforcement teeth. Senator Dills of Los Angeles offered such a bill in SB 275. Newly elected Governor Jerry Brown hired former social worker and union leader Marty Morgenstern to run his labor relations office, and charged him with getting a bill to his desk that satisfied everyone. Despite Morgenstern's best efforts, the bill fell apart late in the legislative process.

As a consolation prize, Brown fulfilled a campaign promise and signed SB 160, the Educational Employment Relations Act (EERA). It was carried by a former AFT local president, State Senator Al Rodda, and supported by CTA and, reluctantly, CFT. It also received important backing from the California School Boards Association, which belatedly understood collective bargaining as a way to achieve a more peaceful and less disrupted school environment.

The EERA enabled K-12 and community college employees — certificated and classified — to elect exclusive representatives and engage in collective bargaining, district by district, of which there were more than a thousand in K-12 and 70 in community college districts. Unlike the Meyers Milius Brown Act, SB 160 created a board with enforcement powers. But it excluded four-year higher education, and placed a

teacher voice in developing curriculum policies outside the scope of collective bargaining.

Debate within the CFT over support of the Rodda Act was intense. If SB 160 had been in place in 1966, the Richmond AFT's demand to negotiate educational improvements would have had no legal basis. The United Professors of California-AFT, with thousands of members in the California State University, and University of California systems, wanted an inclusive bill. Ultimately the CFT backed the Rodda Act because it offered more than it left out, and friendly legislators promised to immediately draft a new collective bargaining bill for higher education. SB 160 went into effect January 1, 1976.

The EERA set up local competitions between the CTA and CFT for the next decade for the allegiance of teachers, and among the California School Employees Association, SEIU, AFSCME, and other unions and associations for the various units of classified school employees. Despite its limitations, the Educational Employment Relations Act established basic rights for public education employees: especially the right to resolve workplace disputes as equals with their employers through collective bargaining.

SB 160 represented a decisive step forward for public employee unionism, putting in place the means for public education workers to achieve rough parity with their private sector counterparts. And for teacher unionists like Howard Mackey, it vindicated what had often seemed a quixotic quest in the 1950s and 1960s.

CPER Journal Online

Prospective Waiver of PSOPBRA Rights Is Permissible in Context of Settlement Agreement

A waiver of appeal rights in the event of future disciplinary incidents as part of a last chance settlement agreement was held valid in *Lanigan v. City of Los Angeles*. The Court of Appeal held that a police officer's waiver of his rights under the Public Safety Officers Procedural Bill of Rights Act was valid and enforceable in a second disciplinary action where he avoided termination in a prior case by agreeing that he would resign if charged with similar conduct in the future. The validity of PSOPBRA waivers is not a settled area of law, and the officer has petitioned for review in the California Supreme Court. In addition, a Court of Appeal in a different part of the state frowned on prospective waivers in *Jaramillo v. County of Orange* (2011) 200 Cal.App.4th 811. (See "Invalid Waiver of PSOPBRA Rights; Back Pay Due Until Criminal Conviction," also in the Local Government of this issue.)

Altercation With Outside Officer

Lanigan was a Los Angeles police officer. While he was driving in his personal car, a Los Angeles Unified School District police officer pulled him over for improperly driving in the carpool lane. Based on his interaction with the LAUSD officer, his employer charged Lanigan with harassment and refusal to comply with the officer's instructions. The police chief proposed to terminate him.

The city charter gave Lanigan the right to have his case heard by a board of rights. Before the hearing, however, he negotiated a settlement that reduced the penalty to a 22-day suspension in exchange for his agreement that he would submit a letter of resignation that the department could accept in the future if he were again charged with harassment of or failure to cooperate with officers of an outside agency. He agreed that he would not pursue legal and administrative remedies, and waived his rights under the city charter and state law. The agreement also recited that, before signing the agreement, he had consulted with counsel regarding the release of claims he may have had against the city and that he understood the terms of the agreement and voluntarily accepted them.

Six months later, he went to an emergency room for lacerations to his hand. As a result of his behavior at the hospital, he was charged with having entered the hospital intoxicated and being sufficiently discourteous that the hospital staff had called the Los Angeles County Sheriff's Department. Lanigan was also charged with lying to the sheriff's deputies about whether he drove to the hospital and with failing to cooperate with them. The police chief processed the resignation letter Lanigan had submitted when he signed the settlement agreement, and removed him from employment.

Lanigan filed a petition to obtain judicial review of the chief's decision. He argued that the settlement agreement was unenforceable because the waiver of PSOPBRA rights was invalid and that the agreement was unconscionable. Lanigan's contention that the waiver was invalid was based on Civil Code Sec. 3513, which provides that a law established for a public benefit cannot be waived. He relied on *Farahani v. San Diego Community College Dist.* (2009) 175 Cal.App.4th 1486, 2009 Cal.App. LEXIS 1225, 197 CPER 28, where the court held a professor could not waive his rights under the Education Code in a disciplinary proceeding.

The city distinguished *Farahani* because the Education Code states that the rights cannot be waived but the PSOPBRA does not contain an express ban on waivers. That case relied on *County of Riverside v. Superior Court* (2002) 27 Cal.4th 793, 2002 Cal. LEXIS 1878, 154 CPER 43, in which a limited waiver of PSOPBRA rights was allowed. The trial court followed *Farahani* and reinstated Lanigan as an officer in good standing. The city appealed.

Waiver Permissible

The PSOPBRA's procedural protections include the right to an administrative appeal in disciplinary actions, rights during investigations and interrogations, and the right to inspect one's personnel file, among others. In *County of Riverside*, the Supreme Court held that a blanket waiver of the PSOPBRA's provisions is not permissible because the PSOPBRA was enacted for a public purpose — to prevent labor unrest and police work stoppages. But the court found a narrow waiver was permissible in the

circumstances presented in that case.

The waiver in *County of Riverside* related to an officer's right to view his personnel files. The officer had been employed by a city that was discontinuing its police department and contracting with the county for police services. The county agreed to employ the officer as a probationary employee, contingent on completion of a background investigation. But it required him to waive, for a period of one year, the right to view background investigation reports prepared by the county. After the officer was dismissed, he sued to gain access to the background report.

The Supreme Court recognized that the PSOPBRA would become meaningless if law enforcement agencies could require applicants to waive their PSOPBRA rights prospectively. It found the limited and temporary waiver permissible, however, because the law requires peace officers to meet standards of good moral character as determined by a background investigation, which usually is performed prior to employment. Since the waiver facilitated the officer's hiring prior to a background check, and the PSOPBRA's public purpose was not undermined, the court enforced the waiver.

In addition to the *County of Riverside* case, the *Lanigan* court cited a case allowing waiver of PSOPBRA appeal rights when an officer negotiates a reduced level of discipline. In *Alhambra Police Officers Assn. v. City of Alhambra Police Dept.* (2003) 113 Cal.App.4th 1413, 2003 Cal.App. LEXIS 1812, the court noted that the officer had consented to the discipline imposed and rejected his claim that the waiver of the right to appeal the negotiated disciplinary action was invalid.

Relying on *County of Riverside* and *Alhambra*, the court found Lanigan's waiver valid even though it applied to possible future incidents, not just the disciplinary action to which he had agreed. The court explained that it was not a blanket waiver of PSOPBRA rights, and was not made as a condition of employment. The future condition that might trigger the resignation without right of appeal was "within his control," the court said. In addition, the court found Lanigan waived his rights, knowing that he could be removed from employment without appeal based on future conduct, in order to avoid the probability that the board of rights would decide that termination in the present case was appropriate. By signing the agreement, he acknowledged that his waiver was voluntary, the court pointed out.

Agreement Not Unconscionable

Having found the waiver permissible under the PSOPBRA, the court examined whether the settlement agreement was the product of duress. The courts require that a party seeking to escape a contractual obligation on grounds of duress must show that he had no reasonable alternative to signing the contract. Here, the court found that Lanigan had the alternative of having a hearing before the board of rights.

The court examined whether there was procedural unconscionability, which turns in part on whether there was unequal bargaining power that resulted in an inability to engage in meaningful negotiation of the terms of the contract. The court found that the agreement was not procedurally unconscionable because it was the product of real negotiation. Lanigan had an attorney, and there was evidence that the LAPD sometimes agrees not to include a waiver of appeal rights in its last chance agreements. In addition, there was equal bargaining power since Lanigan could have opted for the board of rights hearing.

The court looked at whether the agreement was substantively unconscionable, resulting in one-sided and harsh terms. It found that the agreement protected Lanigan's employment, and to that extent cost the city its right to proceed with the termination in the initial case. Although the court recognized that possible abuse could have occurred if the city had retained Lanigan's resignation letter until presenting it on the eve of retirement, it found that the potential for abuse was ameliorated because the agreement was freely negotiated.

The court upheld the settlement agreement and reversed the trial court's decision. (*Lanigan v. City of Los Angeles* [2011] 199 Cal.App.4th 1020, 2011 Cal.App. LEXIS 1262.)

CPER Journal Online

Invalid Waiver of PSOPBRA Rights; Back Pay Due Until Criminal Conviction

Orange County could not avoid complying with a back pay judgment to a former assistant sheriff on the grounds that he had agreed to be an at-will employee, the Court of Appeal held in *Jaramillo v. County of Orange*. His prospective waiver of rights to notice, cause, and appeal of disciplinary action were invalid. The court found that a back pay award was not barred by the unclean hands doctrine, and that he was entitled to compensation from the time of his termination to the date he pled no contest to state law felonies unrelated to the reasons for his termination. The appellate court also upheld the trial court's decision that Jaramillo was fired in violation of the whistleblower statute, Labor Code Sec. 1102.5, and affirmed the award of attorneys' fees against the county.

Fired for Disloyalty

In 1998, Orange County Sheriff Mike Carona appointed George Jaramillo assistant sheriff after Jaramillo helped him campaign for office. Before he was appointed, Jaramillo signed a waiver of rights, agreeing to be an at-will employee. The waiver stated he was being offered the job on the condition that he sign the waiver, that he was serving "solely at the pleasure of the sheriff," and that he could be released from this position "at any time without notice." In February 2000, he signed another waiver that reiterated the first waiver of rights and added that Jaramillo could be terminated "without notice, cause or rights of appeal." It promised a severance package in the event of termination.

In about 2002, Carona asked Jaramillo to intercede with the district attorney for another assistant sheriff whose son had been charged with a serious crime. Jaramillo resisted. Over the following year, he warned Carona against such improprieties as using the department helicopter to have affairs and "selling" badges and concealed weapons permits to campaign donors.

In 2003, Carona told Jaramillo that he was considering running for lieutenant governor. Jaramillo expressed his interest in succeeding him as sheriff and asked for his endorsement. Carona refused, saying he was disloyal. Jaramillo responded that he was "done covering" for the sheriff, that he was no longer loyal because Carona was no longer the clean-cut sheriff he had been, and that Carona was doing illegal and stupid things with which Jaramillo did not want to be involved. Within a few months, Carona asked him to resign. When Jaramillo refused, he fired him without granting him a hearing, pointing to the waiver he had signed in 2000. Jaramillo sued the county.

Two years later, Jaramillo was indicted by a grand jury for perjury relating to a payment his wife received and for misappropriating funds by using a sheriff's department helicopter for personal travel. About the same time, federal charges were filed against him for failing to file a tax return and another charge. Jaramillo pled no contest to the state grand jury charges and pled guilty to the federal charges. Later, one of the federal charges was overturned. Jaramillo testified in his civil case that he had entered the no-contest pleas because of the financial and emotional toll of the criminal proceedings.

In the civil case, the trial court ruled that Jaramillo's firing without an opportunity to appeal his dismissal violated the Public Safety Officers Procedural Bill of Rights Act, constitutional due process rights, and Labor Code Sec. 1102.5. He was awarded back pay from the date of his termination until the date he entered his no-contest pleas in January 2007. The court also awarded him \$336,800 in attorneys' fees. The county appealed.

Waivers Unenforceable

Jaramillo contended that the waivers of rights he signed were invalid. Both parties argued that their position was supported by the ruling in *County of Riverside v. Superior Court* (2002) 27 Cal.4th 793, 2002 Cal. LEXIS 1878,154 CPER 43, in which a limited waiver of PSOPBRA rights was allowed. In that case, an officer claimed his waiver of the right to view background reports in his personnel files was invalid because Civil Code Sec. 3513 provides that a law established for a public benefit cannot be waived. The Supreme Court agreed that a blanket waiver would be invalid, but held that a narrow waiver that served the purpose of PSOPBRA, rather than undermining it, would be allowable.

The officer in *County of Riverside* had been employed by a city that was discontinuing its police department and contracting with the county for police services. The county agreed to employ the city officers as probationary employees, contingent on favorable background investigations. But it required them to waive, for a period of one year, the right to view background investigation reports prepared by the county. The officer who sued the county had been under investigation before the transition. After the county discharged him without giving him a reason, he went to court to gain access to the background report.

The Supreme Court accepted the county's contention that a narrow, temporary waiver which applied to pre-hiring conduct, not post-hiring conduct, would not undermine the purposes of the PSOPBRA. By statute, peace officers must meet standards of good moral character as determined by a background investigation, which usually is performed prior to employment. The court found the waiver facilitated the officer's hiring prior to a background check and held it was enforceable.

The *Jaramillo* court ruled the waivers that Jaramillo signed were not permissible. They were essentially blanket waivers, the court said. They applied prospectively to circumstances that Jaramillo had no reason to expect when he signed away his rights, unlike the officer in *County of Riverside*, who knew that the prior misconduct allegations might surface during his background check. Most importantly, the purpose of PSOPBRA would be undermined if Jaramillo's waivers were enforced. "[P]rotections afforded high-ranking peace officers by POBRA could be easily circumvented," the court emphasized.

Unclean Hands Defense

The county argued that Jaramillo should receive no back pay because his felony convictions would have led to his discharge even if he had not been terminated by Carona in 2004. The court agreed, but noted that nearly three years elapsed between his discharge and the convictions. The Government Code prohibition on employing an officer with a felony conviction applies only after the officer has been convicted, not at the time he has been charged or accused of a felony, the court explained. It found the back pay period appropriate.

The court rejected the county's argument that Jaramillo should be barred by the doctrine of unclean hands from receiving back pay. The defense applies when a party who has won a lawsuit has himself engaged in wrongdoing related to the lawsuit. Even if there had been proof of Jaramillo's crimes before January 2007, none of them related to the reason he was fired by Carona, said the court. He was fired for disloyalty.

Whistleblower Retaliation

Labor Code Sec. 1102.5 prohibits retaliation against an employee for disclosing violations of state or federal laws or regulations "to a government or law enforcement agency." The county argued that Jaramillo's report to his own employer, Carona, should not be covered by the statute.

The court observed that Jaramillo's warnings to Carona that his conduct was "illegal and stupid" fit within the Labor Code's language of the statute. The court pointed to California precedent that allowed a housing authority employee to sue her employer even when she reported misconduct only to the housing authority commissioners. The county's reliance on a federal case was not persuasive, since the federal whistleblower statute encompassed in its protections broader, more subjective reports of "gross mismanagement" and waste of funds. The court understood that federal courts might not want to turn disagreements about management or use of funds into protected activity, but found that reasoning does not apply to Labor Code Sec. 1102.5. The county's disagreement with the statute's coverage of an employee who blows the whistle to the wrongdoer should be addressed to the legislature, the court advised.

The court upheld the trial court's injunction requiring the county to amend its executive management waiver forms to exclude waiver of PSOPBRA rights. Once a violation is found, PSOPBRA requires an injunction "to remedy the violation and to prevent future violations of a like or similar nature," not just to prevent the department from taking punitive action against the officer, the court said.

The court also upheld the award of attorneys' fees under Civil Code Sec. 1021.5, which authorizes a court to award fees when litigation has enforced "an important right affecting the public interest" that conferred "a significant benefit" on the general public or a large class of people where "the necessity and financial

burden of private enforcement renders the award appropriate.” Not only will the litigation benefit high-level sheriffs, but it will benefit the citizens of Orange County “by lessening the probabilities of abuse and corruption in the sheriff’s office,” the court said. If he had been unable to fire Jaramillo without affording him a hearing, Carona might have stopped his improper conduct when Jaramillo objected, the court theorized. The court upheld the award of attorneys’ fees. (*Jaramillo v. County of Orange* [2011] 200 Cal.App.4th 811, 2011 Cal.App. LEXIS 1397.)

CPER Journal Online

A.B. 646 Raises Many Questions

The Public Employment Relations Board held meetings in November to discuss the implementation of A.B. 646, which provides factfinding for all employees covered by the Meyers-Milias-Brown Act. The question, "Is mediation required before the union can request factfinding?" may be the most obvious point of confusion created by the statute, but others exist. Some questions have been answered in PERB's emergency regulations, adopted on December 8.

The statute is effective January 1, 2012. Under Labor Code Sec. 3505.5(e), the only bargaining units that are clearly exempt from the procedures are those that have an agreement with a charter city, county, or charter city and county to submit a bargaining impasse to binding interest arbitration. The only entity that can totally ignore the statute is the City and County of San Francisco, since it has interest arbitration agreements with all of its bargaining units.

Early drafts of the legislation called for both mandatory mediation and mandatory factfinding, but the mediation sections were dropped before the bill passed. Unfortunately, the mediation concept remained in the new Sec. 3505.4 (a), which reads, "If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel." The law then requires each party to appoint a factfinder, and PERB to select a chairperson of the panel.

This discrepancy has encouraged some employer representatives to contend that factfinding is not mandatory if there is no mediation of the impasse. Even if factfinding is required, when must the employee organization request factfinding if there is no mediation?

PERB's proposed emergency regulations assume that factfinding is mandatory if the employee organization requests it. The union must file a statement that the parties have been "unable to effectuate settlement" within 30 days of the date one party declared impasse if there is no mediation. If the parties have first used a mediator, the emergency rules would allow the union to request factfinding beginning 30 days, but not more than 45 days, after the mediator has been selected.

PERB must notify the parties within five working days of the request whether it finds the declaration of impasse sufficient. If so, the emergency regulations would require the parties to select party factfinders and require PERB to provide a list of neutral factfinders to the parties within five working days. The parties will have only five working days after the list is provided to select a neutral chair, or PERB will appoint one.

Once a panel has been selected, A.B. 646 requires that the panel meet with the parties within 10 days and make findings of fact and advisory recommendations within 30 days. These timelines are the same as exist under the Educational Employment Relations Act and the Higher Education Employer-Employee Relations Act, but the parties frequently waive them.

In making its recommendations, the factfinding panel must consider four factors in addition to state and federal laws, local rules, regulations and ordinances, and stipulations of the parties. The panel must weigh the public interest and the financial ability of the agency. It must examine and compare the wages, hours, and conditions of employment of "employees performing similar services in comparable public agencies." It must consider the consumer price index and assess the total compensation of the employees involved in the factfinding. These factors are nearly identical to the factors prescribed for factfindings under EERA.

Another question that the proposed PERB regulations do not answer and that may end up in court is whether an agency should follow its own local employee relations ordinance if it requires factfinding. Some public sector labor law attorneys are advocating for an interpretation of the statute that would allow agencies to follow their own impasse procedures, so that only those agencies with no impasse procedures would be subject to the A.B. 646 factfinding mandate.

PERB currently has 40 neutral factfinders on its list. Although PERB paid factfinding chairs up to \$600 a day in the past, the pay is now limited to \$100 for HEERA and EERA factfindings. Under A.B. 646, the parties would be entirely responsible for the costs and fees of the panel chair. Undoubtedly, that will increase the number of neutrals applying to the factfinding panels for local agency impasses.

Once the panel's report is issued to the parties, the public employer may not disclose it for 10 days. If the parties do not settle the contract, the agency must hold a public hearing before implementing its last, best, and final offer. Employee organizations still are entitled to bargain matters within the scope of representation each year, even if there is no contract.

As factfinding delays the point at which an employer can impose its last, best, and final offer, many agencies are not in favor of factfinding. There have been reports of employers pushing to declare impasse before January 1 to avoid the factfinding mandate. With many questions unanswered, time is running out.

CPER Journal Online

One Union Challenge to Interest Arbitration Modifications Advances, But Others Fail

Another interest arbitration charter provision bit the dust in November. Voters in Palo Alto decided to repeal the provisions for interest arbitration of bargaining impasses between the city and its firefighter and police unions. International Association of Fire Fighters, Local 1319, lost its bid for an injunction to remove the measure from the ballot, and a Public Employment Relations Board administrative law judge issued a proposed decision in the related unfair practice case that found the union did not request to meet and confer over the proposed ballot measure. PERB has issued a complaint in a San Francisco case, however, where voters changed the criteria that the arbitrator may consider in interest arbitration and made past practices non-binding. Both cases are challenges under Government Code Sec. 3507, which requires the employer to consult in good faith with employee organizations before amending its local rules.

Palo Alto

In the summer of 2010, the Palo Alto City Council began considering a ballot measure to repeal interest arbitration of bargaining impasse disputes. At that time, several union representatives took the position that the city was required to meet and confer before putting a measure on the ballot to change the impasse resolution procedure of the city charter. The city countered that interest arbitration was a permissive subject of bargaining, and that it was not required to meet and confer before placing it on the ballot.

In the spring of 2011, the matter again arose. The president of the firefighters union was informed that a standing committee of the council would be considering whether to recommend repeal or amendment of the interest arbitration provision to the council. The city notified the firefighters union president of upcoming committee meetings. The parties were at impasse in contractual negotiations at the time. They met a couple of times in an unsuccessful attempt to break impasse, but did not discuss the potential interest arbitration ballot measure.

In July, the city council voted to place on the November ballot a measure repealing interest arbitration. The union filed an unfair practice charge with PERB and requested an injunction to remove the measure from the ballot. PERB denied the injunction. In September, PERB issued a complaint and decided to expedite the hearing in the case.

September was a busy month for the parties. The interest arbitration hearing on the bargaining impasse was held just before the PERB hearing on the unfair practice charge. After one day of arbitration, the parties settled the contract. The PERB hearing followed.

Despite having reached an agreement in which the union conceded its position on contentious minimum staffing issues, binding interest arbitration was repealed by the voters. Days later, the union lost the unfair practice case.

The ALJ's ruling did not reject the premise that an agency must meet and confer with affected unions before placing a measure on the ballot to repeal or amend an impasse resolution procedure in its local rules. Prior PERB decisions have held that a ballot measure to amend a binding interest arbitration measure did not violate the duty to bargain under Government Code Sec. 3505 because the measure was not within the scope of representation. Here, the union alleged a violation of Sec. 3507, which requires "consultation in good faith" with employee organizations before an employer amends its local rules. The union's problem was that the evidence showed the city informed the union of the proposed changes to its charter, but the union did not timely request to meet and confer over the options.

San Francisco MTA

Another unfair practice alleging a violation of Sec. 3507 is pending. In November 2010, San Francisco voters approved a proposition that dramatically changed the city charter for employees of the Municipal Transit Agency. In addition to changing some of the parameters for wages and benefits, the charter amendment enacted binding interest arbitration in the event the parties' negotiations went to impasse.

Along with factors that arbitrators traditionally use, such as changes in the consumer price index and wages of comparable employees in other cities, the charter requires that unions prove to the MTA arbitration board by clear and convincing evidence that any proposal on scheduling, assignment, staffing, sign ups, or use of part-time personnel “outweighs the public’s interest in effective, efficient, and reliable transit service and is consistent with best practices.” It also scuttled any past practices and side letters that are not in writing and approved by the MTA executive director or board of directors.

The Transport Workers Union of America, Local 250, filed an unfair practice charge claiming that the new provisions are unreasonable rules that are in conflict with the policy and provisions of the MMBA in violation of Sec. 3507. PERB issued a complaint in September. Local 250 expects the case will be heard next spring.

CPER Journal Online

No First Amendment Violation When Teacher Ordered to Stop Religious Speech

The Ninth Circuit Court of Appeal, in *Johnson v. Poway Unified School Dist.*, readily found no First Amendment violation when a school district ordered a high school math teacher to remove two banners containing religious speech from his classroom. The teacher did not have the right to “use his public position as a pulpit from which to preach his own views on the role of God in our Nation’s history to the captive students in his mathematics classroom,” instructed the court.

The Speech in Question

Bradley Johnson, a high school calculus teacher, had two large banners, each about seven-feet wide and two-feet tall, on the wall in his classroom. One had red, white, and blue stripes, and stated, in large type: “IN GOD WE TRUST”; “ONE NATION UNDER GOD”; “GOD BLESS AMERICA”; and, “GOD SHED HIS LIGHT ON THEE.” The other one read: “All men are created equal, they are endowed by their CREATOR.” The word “creator” occupied its own line, and each letter of the word was nearly double the size of the rest of the text.

The school board ordered Johnson to remove the banners. It determined that Johnson’s prominent display of the phrases out of any context, all of which included the word “God” or “Creator,” had the effect of promoting a sectarian viewpoint using his influence as a teacher. Johnson complied with the order and then filed a lawsuit alleging that the district had violated his rights under the First and Fourteenth amendments to the United States Constitution and articles 1 and 4 of the California Constitution.

The district court granted Johnson’s motion for summary judgment on each claim. It reasoned that the district had created a limited public forum for teacher speech in its classrooms and had impermissibly limited Johnson’s speech based on his viewpoint. The district appealed.

Pickering Applies

The Court of Appeals strongly criticized the lower court’s refusal to apply the balancing test set out in *Pickering v. Board of Education of Township High School Dist. 205* (1968) 391 U.S. 563, 1968 U.S. LEXIS 1471. In *Pickering*, the Supreme Court ruled that, where the government acts as both sovereign and employer, a court must balance the interests of a public employee, as a citizen, in commenting on matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services that it performs through its employees. The district court reasoned that because Johnson’s speech occurred *in school*, *Pickering* did not apply. Saying that *teachers* retain their constitutional rights to freedom of speech or expression while in school, the district court used a traditional forum-based analysis instead.

The appellate court found no justification for refusing to apply a *Pickering* approach to the facts of this case. To do so would require that the court ignore the fact that *Pickering* itself involved a school district’s attempt to limit the out-of-school speech of a high school teacher, it said. It would have to forget the rationale underlying the *Pickering* doctrine — that “when a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom” so that public services may be provided efficiently. And, the court continued, failing to balance the needs of the employer would give greater protection to a teacher’s in-school speech than his or her out-of-school speech, a result that would directly conflict with *Pickering*.

The Ninth Circuit also noted that, in prior decisions, it has consistently refused to narrow *Pickering*’s application. And, it instructed, other circuits have uniformly used the *Pickering* test to analyze claims concerning in-school teacher speech.

“In sum,” said the court, “we think it plain that the appropriate guide for measuring the legality of the government’s curtailment of employee speech in the workplace, including that of teachers, would be that Supreme Court ‘case law governing employee speech in the workplace.’”

Pickering Applied

The Ninth Circuit recognized that the *Pickering* test has evolved since that case was decided, and “distilled” this evolution into five sequential steps in *Eng v. Cooley* (9th Cir. 2009) 552 F.3d 1062, 2009 U.S. App. LEXIS 577:

(1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff’s protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech.

A plaintiff’s failure to satisfy a single step concludes the court’s inquiry.

Regarding the first step, Johnson must prove that the speech on his banners addressed a matter of public concern. The court instructed that, while it must consider the content, form, and context of the speech, “content is king.” Here, in spite of Johnson’s claims that his banners expressed only patriotic sentiments, the court found no question but that they concerned religion. And, religious speech is “unquestionably of inherent public concern,” said the court.

The second step requires two separate inquiries to determine whether Johnson spoke as a private person or as a public employee. The first involves a determination of the scope and content of the employee’s job responsibilities. The second requires a finding as to the “ultimate constitutional significance” of those facts. The court determined that Johnson’s government position was a math teacher who performs the ordinary duties of a math teacher, and that the scope and content of his job responsibilities included speaking to his class in his classroom during class hours. And, it is clear that Johnson was speaking as an employee when he displayed his banners, said the court, and not as an ordinary citizen. Because of the position of trust and authority held by teachers, “and the impressionable young minds with which they interact, teachers *necessarily* act as teachers for purposes of a *Pickering* inquiry when at school or a school function, in the general presence of students, in a capacity one might reasonably view as official,” the court explained. Because Johnson spoke as a government employee, the court found his free speech rights were not violated.

The court determined that it did not have to reach a different conclusion simply because the district allowed its teachers some leeway in decorating their classrooms. The district’s policy does not create a limited public forum, said the court, citing *Downs v. L.A. Unified School Dist.* (9th Cir. 2000) 228 F.3d 1003, 2000 U.S. App. LEXIS 22534. In *Downs*, the district permitted teachers and other staff to post material related to “Gay and Lesbian Awareness Month” on a hallway bulletin board. As with the district’s policy in this case, the materials did not need to be approved before posting but were subject to the oversight of the principal. *Downs*, a school employee, put up his own bulletin board on which he posted anti-homosexual materials. The court concluded that *Downs*’ bulletin board, like all others in the school’s halls, were the property and responsibility of the district and that it had the right to restrict the materials displayed on them so that its message “was neither garbled nor distorted.” The court found no reason to apply a logic different from that in *Downs* to the facts in the case before it.

Establishment Clause Claim

Johnson claimed, and the district court agreed, that the district’s policy, practice, and custom of prohibiting the banners, while permitting other displays of religious speech, “conveys an impermissible, government-sponsored message of disapproval of and hostility toward the Christian religion...and our Nation’s Judeo-Christian heritage.” In support of his argument, he pointed to displays in other classrooms that were permitted by the district: a John Lennon poster with “Imagine” lyrics; a Mahatma Gandhi poster; a Dalai Lama poster; a poster that says, “The hottest places in hell are reserved for those who in times of great moral crisis, maintain their neutrality”; a poster of Malcolm X; and Tibetan prayer flags.

The Establishment Clause requires “governmental neutrality” — neutrality between religions and between religion and non-religion, the court explained. In order to determine whether the district overstepped its bounds, the court looked to the test set out by the Supreme Court in *Lemon v. Kurtzman* (1971) 403 U.S. 602, 1971 U.S. LEXIS 19. Under that test, a government act does not violate the Clause if it has a secular purpose and does not have the effect of endorsing religion. When applying this test, “context is critical,”

admonished the court.

Here, the court found no violation. If the district were to have allowed the banners to continue to be displayed, there would have been the possibility of an Establishment Clause claim brought against it. Prior decisions have made it clear that governmental actions taken to prevent potential violations of the Clause have a valid secular purpose, said the court.

Regarding the other displays, the court instructed that government speech which simply has religious content or promotes a message consistent with religious doctrine does not violate the Clause. It found nothing in the record to indicate that the posters and flags were used to endorse or inhibit religion.

Equal Protection Claim

The district court also erred when it granted summary judgment on Johnson's claim that by ordering him to remove his banners and allowing the other displays to remain, the district had violated his rights to equal protection, said the appellate court. It reiterated its conclusion that all of the speech contained in the displays, including Johnson's banners, belongs to the government and that the government has the right to select the views it wishes to express. "Because Johnson had no individual right to speak for the government, he could not have suffered an equal protection argument," the court reasoned.

Ruling

The Court of Appeals reversed the district court and, finding that no genuine issue of material fact remained, sent the case back to the lower court with instructions to vacate its rulings and enter summary judgment in favor of the district on all claims. (*Johnson v. Poway Unified School Dist.* [9th Cir. 2011] 658 F.3d 954, 2011 U.S. App. LEXIS 18992.)

CPER Journal Online

School Districts Brace for Massive Mid-Year Cuts

It's *not* beginning to look a lot like Christmas for many of California's school districts this year — instead it's looking like their worst nightmares might be turning into reality.

As reported in the last issue of *CPER*, A.B. 114, a trailer to the budget bill passed last June, required districts to assume they would receive the same amount of funding this fiscal year that they received in 2010-11 and to "maintain staffing and program levels commensurate with this funding level." (See "[New Legislation Saves Teachers' Jobs — For Now](#)," *CPER* No. 203.) In response, some districts, like San Diego Unified and Elk Grove Unified, rehired teachers and other employees who had previously been laid off. But now, mid-year budget cuts seem certain.

According to the budget bill enacted last summer, if, by December, there is a projected \$4 billion in revenue shortfall, automatic mid-year cuts are triggered. If the shortfall is less than \$2 billion, K-12 schools and community colleges are not impacted. However, if the gap exceeds that amount, up to \$1.4 billion can be cut from K-12, and up to \$72 million from community colleges. School bus programs may be cut by up to \$238 million mid-year, and districts may implement a reduction of up to seven instructional days. However, the reduction must be achieved through the bargaining process where contracts are in effect.

In its November 16 economic forecast, the state legislative analyst projected that revenues will be \$3.7 billion less than expected. If that figure holds, school transportation will be cut by \$248 million, and general support for schools by \$1.1 billion. The Department of Finance will be submitting its estimate this month. The higher of the two forecasts will be used to determine the exact level of reductions set to go into effect for schools on February 1.

The news set off a flurry of activity. Senate majority leader Ellen Corbett (D-San Leandro) called for lawmakers to reopen the budget to avoid the deepest cuts. However, a similar attempt to reconfigure cuts in the face of a revenue shortfall was vetoed by the governor in September. Some districts, such as San Juan Unified, Sacramento City Unified, and Stockton Unified, started talks with their employee unions to discuss spending cuts, with furlough days at the top of the list. San Juan Unified unions already have agreed to take up to five furlough days if the cuts are implemented. And, Governor Brown put forth a proposal to be placed on the ballot in November to increase taxes.

San Diego Unified School District, the state's second-largest, will be one of the worst hit. After passage of the budget, the district refilled 300 full-time teaching positions to restore smaller class size. Now, it faces a \$30 million reduction in its budget for the balance of the fiscal year. With teachers protected from mid-year layoffs by state law, it will have to lay off other staff, such as cafeteria workers, clerks, and janitors, and hope that it can negotiate a shortened school year. The board will vote this month on a plan to close a number of schools. Superintendent Bill Kowba has warned that the cuts could push the district into insolvency.

Rural schools, such as those in Humboldt and Mariposa counties, and those urban schools with a large percentage of poor students will be disproportionately affected by the transportation cuts. They will see a decrease in revenue if students are unable to get to school. The transportation cuts will also threaten Los Angeles Unified's lauded 172 magnet schools, where students are bused in from all over the county.

Santa Rosa City Schools would lose \$4.9 million if the full cuts are implemented. Both the school board and the union have acknowledged this would mean that the three school days the board added back to the school year in September would again become furlough days.

However, reducing the number of school days may not be possible for many of the state's districts. More than half are already below the normal 180-day calendar. And, while under the current budget, districts can have as few as 168 days, doing so requires an agreement between the districts and the employee unions where there is a contract. Unions that have already agreed to furlough days are unlikely to be open to more. And, teachers must work at least 175 days to qualify for a year of service credit with the State Teachers Retirement System.

Many districts are hopeful that their reserves will carry them through, at least for this year. But a number of

others with insufficient funds may have to seek state emergency loans. There are already 110 school districts on the state's watch list that could be headed for insolvency, even without the mid-year cuts. It is anticipated that number will grow substantially if the cuts are implemented.

UPDATE: On December 13, as *CPER* was being published, Governor Brown announced that the trigger cuts, although substantial, will be less than feared. New projections indicate that the budget shortfall will be closer to \$2.2 billion, rather than the \$4 billion anticipated by the legislative analyst. The difference is due to recent higher-than-anticipated receipts of corporate and personal income taxes.

K through 12 school budgets will be cut by about \$330 million, which includes the \$248 million for school bus programs, and community colleges will lose \$102 million. While these are much lower figures than the almost \$2.2 billion in cuts that they could have experienced, the reduction will still be felt.

Los Angeles Unified School District, which will be hit with \$38 million in transportation cuts, has threatened to file suit to keep the state from taking the money. Other districts, such as San Diego Unified, have said they can survive without having to reduce bus service. Many districts plan to pay for the service out of their reserves.

Community college students will have to pay an extra \$10 per unit fee starting May 1.

The good news is that most school districts will not have to negotiate with teachers unions for furlough days, allowing them to keep the school calendar intact through the end of the year.

CPER Journal Online

LAUSD and UTLA Propose Groundbreaking Agreement

The Los Angeles Unified School District and United Teachers Los Angeles have reached a tentative agreement to give local schools more independence and to suspend the two-year-old Public School Choice (PSC) plan that has allowed charter schools, nonprofit groups, and internal teams of educators to take over certain schools. (See story describing the plan at *CPER* No. 198, pp. 20-21.)

The agreement came out of negotiations mandated by the school board as part of a plan to amend the PSC adopted in August. It gave priority to internal teams' bids to run new schools, provided that the teachers' and administrators' unions agreed to certain contract changes by November 1. (See story at *CPER* No. 203.)

The proposal, to be voted on by teachers this month, grants local schools more autonomy over hiring, curriculum, and work conditions. It also essentially ends the ability for outside groups, including charter schools, to take over low-performing and new campuses, placing district schools off-limits for at least three years.

The new rules, known as "the local initiative process," would go into effect at any individual school site where at least 60 percent of the teachers approve. If adopted, the schools will be able to choose their own teaching materials, set their own schedules, and adopt their own campus rules. They can hire a new principal and, to an extent, teachers and other staff. They will also have the ability to affect the school site budget, to a degree yet to be determined. They will be allowed to waive selected district policies, so long as all laws and legal requirements are followed. Similarly, if they want to void certain portions of the district-union contract, they can do so.

At these schools, the principals and teachers must agree on any plan that deviates from the district policies or union contract, and must show that the parents were consulted. The district must approve the alternative plan and monitor it. Two parents will be selected to be on an eight- or nine-person committee that would hire staff, subject to the approval of the principal. Contract requirements must be followed to give priority to laid-off teachers.

Twenty-two low-performing schools will have priority and be able to apply for the 2013-14 school year. Others who seek to become "local initiative schools" will be phased in later.

The three-year moratorium on the ability of charters to take over district schools is a victory for UTLA, which has objected to outside operators coming in. In a UTLA press release announcing the agreement, union president Warren Fletcher was quoted as saying, "Schools have functioned too long in an environment where decisions are made by others about what is best for them, rather than by those who are at the school site and familiar with their school's needs."

The agreement does not resolve all of the outstanding issues in the ongoing negotiations between the district and the union for a new contract to replace the one that expired July 1. One major unresolved issue involves whether student test scores should be considered in teacher evaluations, with the union strongly opposed and Los Angeles Schools Superintendent John Deasy strongly in favor. Deasy soon may be getting support for his position from another interested group. Several parents recently filed suit against LAUSD, UTLA, and the Associated Administrators of Los Angeles, alleging that the district is failing to enforce the Stull Act, the 1971 law that established the teacher evaluations. The act requires that districts evaluate certificated employees using four criteria, one of which is "pupil progress."

CPER Journal Online

NCLB Waiver Too Expensive?

California's State Board of Education is considering whether to accept the Obama administration's offer to the states to apply for a waiver from compliance with the No Child Left Behind Act, given that Congress seems unable to reach agreement on how to change it. The act requires that all children be proficient in math and English language arts by 2014, a requirement that most states, including California, will not be able to reach. (See story in *CPER* No. 203.)

However, as expected, the two-year waiver is contingent on a number of conditions. In order to qualify, the state would have to implement the rigorous national Common Core State Standards, fix 15 percent of the worst-performing schools, and adopt new standards for teacher and administrator evaluations. The cost of implementing those conditions would be between \$2 billion and \$2.7 billion, according to the cost-benefit analysis presented to the state Department of Education's board at its November meeting. Board member John Aschwande called the figures "jaw-dropping,"

The states were given three deadlines to apply for the waiver: November 2011, February 2012, and "by the end of the school year." All requirements must be fully implemented within 12 to 15 months.

State Superintendent of Public Instruction Tom Torlakson has consistently opposed applying for the waiver under the specified conditions, and he did so again at the meeting. In addition to opposing the cost of implementing the requirements, he criticized the waiver as merely substituting a new set of requirements and challenges for those of the NCLB, and cautioned that the timelines would be difficult, if not impossible, to meet.

Torlakson was supported by the California Federation of Teachers and the California Teachers Association. The waiver requires that test scores or other equivalent data be used in teacher evaluations, a condition opposed by the unions. The Parent-Teacher Association also opposed the waiver application.

However, a number of other views were expressed at the meeting. Some, including board member Yvonne Chang, questioned the estimate, noting that many of the items, such as Common Core standards, were initiatives that the state was committed to implementing in any event. A spokesperson for a consortium of school districts, including the Los Angeles Unified School District, endorsed seeking a waiver, and argued that, contrary to the department's analysis, the waiver would save the state money. The Association of California School Administrators recommended delaying the application for six months while lobbying Congress to pass the bipartisan bill to amend the NCLB now being considered by the Senate. Others, including board member Trish Williams, advocated for a "customized" waiver application.

The board took no action on the waiver at the meeting, other than instructing staff to investigate what other states are doing. Eleven states applied for the waiver by the November deadline, and as many as 40 may do so by June.

U.S. Representative George Miller (D-California), the ranking Democrat on the committee that is working to revise the NCLB, blasted California for failing to submit a waiver application by the November deadline. In a press release issued after receipt of the first round of applications, Miller complimented the applicants for being ready to start transforming their schools. "Unfortunately, California is not among these trailblazing states, which is incredibly disappointing to me and to the millions of school children in my state," he said. "Instead, California's state leaders keep making excuses as to why they shouldn't apply, claiming that the waivers are costly, an argument that no other state has made. The reality is that many of the reforms that they have claimed are costly are already happening at the state level with the Common Core or in leading districts with teacher evaluation. Their arguments don't really add up to what's best for students," he continued. "California teaches about 10 percent of the country's children in school. If the state decides to ignore this opportunity to advance its education system, it does a disservice not only to California, but to the nation and our long-term economic security. I remain optimistic that California will change direction and be on the right side of history on this decision."

Torlakson has said that, if California plans to apply for the waiver by the June deadline, it must develop a timeline by January to allow for public input.

CPER Journal Online

CCPOA Loses Challenge to ‘Self-Directed’ Furloughs

The near impossibility of taking off furlough days in the understaffed 24-hour correctional system did not persuade the Court of Appeal to invalidate the furlough program as applied to correctional officers. In *Brown v. Superior Court*, the court dispensed with most of the California Correctional Peace Officers Association’s arguments on the basis of the Supreme Court’s reasoning in *Professional Engineers v. Schwarzenegger* (2010) 50 Cal.4th 989, 2010 Cal.LEXIS 9757, 201 CPER 47. The court acknowledged the possibility that a minimum wage claim might be brought for an officer who is unable to use all his or her furlough credits before discharge or retirement, but held that it could not rule on such claims until the termination of employment caused an actual loss of compensation.

Few Furlough Leaves Granted

In December 2008, Governor Schwarzenegger decided to decree employee furloughs by executive order. Citing an impending \$42 billion deficit over the next 18 months, he directed the Department of Personnel Administration to “implement a furlough of represented employees and supervisors for two days per month,” beginning on February 1, 2009. In July, in the face of a worsening economic crisis, he ordered a third furlough day each month. The furloughs were to continue through June 30, 2010.

Most state employees were required to take furloughs on two or three Fridays each month and suffered pay reductions of 4.6 percent for each furlough day. Employees in some 24-hour operations such as corrections, however, were not directed to take furlough Fridays because it was necessary to have employees at work everyday. Officers were instructed to take furlough days when they could arrange time off without detrimentally affecting operations. If they could not use furlough time during the month it accrued, they received furlough credits for taking leave later. But, the furlough credits have no cash value, and at the time, DPA stated they would become worthless if they were not used by July 2012.

CCPOA charged that it would be impossible for every officer to use all furlough time before July 2012, even though the administration has a policy that employees must use furlough credits before using accrued vacation or other leave. The union filed a lawsuit claiming that the furlough program violated several sections of the Labor Code and the Government Code. The trial court agreed. For the pay periods in which an employee was compensated for fewer hours than she worked, the judge concluded that the furlough order constituted a reduction in salary in violation of Gov. Code Sec. 19826(b) and a change in wage scale in violation of Labor Code Sec. 223. He also ruled that the employee was not paid minimum wage for the uncompensated days. The governor appealed.

In August 2010, DPA removed the June 30, 2012, expiration date for furlough credit. It required that departments ensure all accrued furlough hours are exhausted prior to termination or separation from state employment.

Before the appellate court issued a decision, the Supreme Court issued *Professional Engineers*, ruling the governor lacked the power to order furloughs of state employees, but that the legislature had ratified the furlough program when it passed the revised Budget Act of 2008 in February 2009. Few union trial court victories have survived an appeal since *Professional Engineers* was issued, and this one met the same fate.

Legislature’s Authority Over Salaries

The central teaching of *Professional Engineers* is that the governor and the Department of Personnel Administration have only the authority delegated to them to set salaries for state employees, but that the legislature has plenary authority over employee compensation. Following the Supreme Court’s instruction, the court in this case found that Section 19826 prevents DPA from unilaterally reducing salaries for employees exclusively represented by a union, but does not limit the action of the legislature itself.

The court disagreed with the governor’s assertion, however, that *Professional Engineers* resolved all challenges to the furlough program. The court reasoned that *Professional Engineers* found the furloughs generally valid but did not address every conceivable argument, such as the Labor Code violations that CCPOA alleged.

Wage Claims

CCPOA argued that the furloughs violated Labor Code Sec. 223, which prohibits an employer from secretly paying a lower wage than is set by contract or statute. The court observed that this statute targeted employers who pay the set wage rate but make deductions or demand kickbacks from their employees to hide the lower wages.

The court found that the statute did not apply to this case because “there never was anything secret about the furlough program.” In addition, the officers’ wages were not set by either a contract or statute. At the time the furlough program began, CCPOA’s contract had expired. The parties had reached impasse in bargaining, and DPA had imposed terms and conditions of employment. CCPOA attempted to persuade the court that Sec. 19826(b) kept the salary scales of the prior MOU fixed, and that the state had a duty under Sec. 223 to comply with them. But the court dismissed this argument. The purpose of Sec. 19826(b) is to allow the collective bargaining process to operate, the court said, but when impasse occurs, the Dills Act permits the state to employ workers under the terms of its last, best, and final offer, which is not a contract.

CCPOA contended that a minimum wage violation occurs when an officer is not allowed to use furlough credits. The employee does not receive any compensation for the unpaid workdays, and the law does not allow the employer to escape liability by pointing to the average hourly wage for a pay period when an employee is working unpaid days. The court, though, cited judicial precedent that establishes the phrase “wages” includes deferred compensation. It found that furlough credits have value, as they count toward service credit for retirement purposes, and therefore were encompassed within the concept of deferred compensation.

In addition, the state has now lifted the expiration date for using the furlough credits, allowing officers to use them any time during their employment. Only when employment ends will it be known whether an officer has a claim for unpaid minimum wages, the court reasoned. Not until then will the state have an enforceable duty to pay the officer.

The court also rejected CCPOA’s claim that the furlough credits violated Labor Code Sec. 212, which provides payment must be made in a negotiable form that is payable in cash on demand. The law is a criminal statute that has been applied to prohibit employers from paying wages with store credit or checks with insufficient funds. But the court found the case did not involve “scrip for the company store, rubber checks, or criminal liability.” It found Sec. 212 inapplicable to furlough credits.

The court rejected CCPOA’s contention that the legislature could not have ratified the self-directed furloughs without violating the “single subject rule,” which prohibits the legislature from expanding an agency’s powers using the Budget Act. The court pointed out that the legislature ratified the program which was already in place, and that DPA did nothing to the program after the ratification. It ordered the trial court to deny the petition. (*Brown v. Superior Court* [2011] 199 Cal.App.4th 971, 2011 Cal.App. LEXIS 1259.)

CPER Journal Online

Realignment of Responsibilities for Inmates Will Result in State Corrections Layoffs

In October, low-level criminal offenders were redirected to county jails rather than state prison pursuant to Governor Brown's realignment legislation, A.B. 109, which seeks to reduce state prison overcrowding. As fewer inmates come into the state prisons over the next couple of years, the California Department of Corrections and Rehabilitation will need to shed employees. Unions representing CDCR employees have hammered out agreements that govern processes of voluntary transfer, layoff, and involuntary transfer of employees from overstaffed institutions.

Declining Population

In June, there were approximately 144,000 inmates in 33 prisons built to house 80,000 prisoners. Since the beginning of October, the inmate population has fallen to fewer than 140,000 and is anticipated to decline to 133,000 by the end of December. The department anticipates the number of state inmates will shrink to 111,000 by July 2013. As the population of prisoners decreases, the number of parolees will also decline. That number already has fallen by over 1,000 to about 103,000.

The declining population might have been good news a few years ago, when the department was paying huge overtime costs to cover a correctional officer vacancy rate of 14 percent. Even now, CDCR has about 2,000 correctional officer vacancies, 480 supervising officer vacancies, 880 open parole agent slots, and 200 nurse vacancies. The state loses 1,200 correctional officers, 100 parole agents, and 25 nurses each year through normal attrition.

But, because the department expects to eliminate 3,400 positions, layoffs will happen eventually. In October, more than 20,000 CDCR employees with less than 10 years of service received notices that they were potentially subject to layoff due to elimination of their positions or bumping by employees with higher seniority scores. Employees are being given the opportunity to transfer to ongoing positions before layoffs occur, and limited-term employees and retired annuitants will be terminated if an employee wants the position. In some classifications, very few employees will be laid off at first. For example, it is expected that only one parole agent will be laid off in the first wave at the end of February 2012. But by February 2013, 367 parole agents and their supervisors may have lost their jobs.

Union Agreements

The state has always had an elaborate system to protect employees from layoff that required 120 days notice to those potentially affected. Often, few employees were laid off, once they were given the opportunity to transfer to another department. With layoffs inevitable in some classifications, however, the unions representing CDCR employees pushed for more protections. For its part, the Department of Personnel Administration took advantage of the opportunity to fill vacancies in severely understaffed prisons.

Employees represented by Service Employees International Union, Local 1000, will be able to bid for vacancies statewide during the voluntary transfer period of each layoff wave. Those positions will be awarded by seniority. If there is no placement for an employee, however, the worker will be subject to layoff but may bump less senior workers within the county where the employee works. Time off and per diem pay for voluntary transfers and those who bump or demote is higher than for those who are involuntarily transferred if positions remain open after layoffs of the least senior employees. Workers who need to move over 50 miles will receive a salary advance for moving and \$125 each day for 30 days. Those who move more than 100 miles receive 8 hours of time off, the 30 days of per diem pay, and the salary advance. Additional time off is available for workers who move more than 200 miles.

A big issue in the era of furloughs was how to handle the large leave balances accrued by many employees who could not take three days off every month because they work in 24-hour facilities. Employees will be given maximum opportunities to use the leave before layoff, but furlough and personal leave credits will be cashed out if leave is denied.

Employees represented by CCPOA will have the opportunity to transfer voluntarily to one of five severely understaffed institutions in Crescent City, Folsom, Soledad, Susanville, and Vacaville. They will also have the option to stay at their present institutions by bidding for overtime avoidance pools or permanent intermittent correctional officer positions. CDCR established the overtime avoidance pool jobs to reduce department overtime costs. If an employee is not transferred or successful in obtaining a position at the current institution, there will be an opportunity to bid on vacant positions statewide. Only if that bid is unsuccessful will the employee enter the layoff process. Layoffs will be in inverse seniority by county. For the correctional officers, the chance to bid on jobs on a statewide basis prior to layoffs is a change from prior procedures.

Per diem payments for correctional officers are somewhat different than those for employees represented by SEIU Local 1000. No per diem payments will go to those who move in the first wave unless they agree to transfer to one of the five understaffed institutions or bid to another position after the voluntary transfer process. Per diem payments for moves over 50 miles to three of the institutions will continue for 45 or 60 days. In the second and subsequent waves of layoffs, officers will receive only \$85 per diem for 30 days, unless they move to one of three institutions, in which case they will receive \$125 per diem for 30 days. Time off is similar to that negotiated by SEIU Local 1000, except that CCPOA-represented employees will be able to use up to 10 days of leave credits in addition to the time off for moving.

CPER Journal Online

Spurned Employee Organization Attempts to Repeal Dills Act

For several years, the Peace Officers of California has been trying to sever a group of special agents, game wardens, and other peace officers from the bargaining unit represented by the California Statewide Law Enforcement Association. The major complaint was that CSLEA did not work to address a pay disparity between the agents and wardens and peace officer classifications outside the bargaining unit, such as parole agents and correctional officers. In 2010, an administrative law judge of the Public Employment Relations Board ruled that a separate peace officer unit was not more appropriate than the existing unit. The board upheld the decision in early November 2011.

In October, POC president Victor Sanchez filed an initiative that would repeal the Dills Act and prohibit strikes by any state civil service employee against any elected official or any “agency, board, department, or instrumentality” of the state.

The Legislative Analyst’s Office examined the effect of the initiative in November. It pointed out that the measure, if passed, would not take effect until collective bargaining agreements covering the state’s 21 bargaining units expire because the state and federal constitutions forbid impairment of contracts. After July 2012, when all have expired, the legislature could establish a new labor law for state employees or set terms and conditions of employment without reaching agreements with the employee organizations. It acknowledged that the state would probably set compensation high enough to retain and attract employees, but surmised that the measure likely would result in compensation savings for state government.

CPER Journal Online

U.C. Agrees to Contracts With Raises

As employee contributions to pension plans rise, so will wages for most employees at the University of California. Now that U.C. has reached an agreement with the Coalition of University Employees, U.C. has contracts with the unions representing most of its workers. Only the health care professionals unit represented by the University Professional and Technical Employees is in negotiations for a contract to supersede the agreement expiring December 31. Many of the contracts mirror the 3 percent merit raise granted to non-represented faculty and staff earning less than \$200,000, which was effective October 1, 2011.

Increases for Most

The university has reached agreements with five unions since July 2011. Only the 250 police officers represented by the Federated University Police Officers Association will not receive unitwide raises.

FUPOA's agreement, which was set to expire June 30, 2011, was extended to September 2012, with few changes. In the prior contract, officers had received raises of up to 8 percent in 2008-09, and a new longevity increase of 4 percent became available to officers with at least 10 years of service. The new contract provides monthly payments of \$100 to officers who have been on the top step for at least a year. The payments are not on the salary scale and will end in September 2012. Other officers will continue to receive step increases. FUPOA agreed to the same health benefits and pension contributions that other U.C. employees are making, currently 3.5 percent, but increasing to 5 percent in July 2012.

During 2011-12 wage reopener negotiations with the University Council-American Federation of Teachers, U.C. agreed that its 350 librarians would participate in the one-time 3 percent merit increase which the university granted to non-represented employees effective October 1, 2011. In addition, librarians will continue to be eligible for merit increases as are all academic employees other than students.

UC-AFT also reached agreement with the university on a new three-year contract for its 3,000 lecturers. They will receive the 3 percent 2011-12 merit raise and continue to be eligible for the periodic merit raises that other non-student academic employees receive. But, the lecturers will be required to increase their payment into the U.C. retirement system to 5 percent in July 2012. The parties may reopen the contract to bargain salaries in 2012-13 and 2013-14. They will also bargain any proposals to create a second-tier retirement plan for new hires or to change health benefits for part-time lecturers.

AFSCME Retains Raises

AFSCME Local 3299 represents two units — service care workers and patient care technical employees. Both units have contracts that provided for increases in 2011-12, but the service workers' raise was contingent on the state budget. Although the patient care technical employees were guaranteed a 3 percent increase on January 1, 2011, the university took the position that it could withhold the raise during reopener negotiations on health benefits and pension contributions. The prior contract allowed the university to reopen the nearest scheduled wage increase in the event of health benefits or pension reopeners, which it did in November 2010.

After nearly a year of negotiations, AFSCME regained the original raises for service and patient care workers, but agreed to pay the same health care and pension contributions as other U.C. employees. Retirement contributions will rise to 3.5 percent retroactive to July 1, 2011, and to 5 percent on July 1, 2012.

Patient care technical employees will enjoy raises of 3 percent across the board retroactive to January 1, 2011, and another 3 percent on January 1, 2012, in addition to step increases on July 1, 2012. Service workers will receive a 3 percent general increase effective October 1, 2011, and another 3 percent raise on October 1, 2012, as well as step increases in July 2012. The minimum hourly wage for service employees is now \$13.70 and will rise to \$14.42 on October 1, 2012, slightly higher than the \$14 hourly minimum wage originally bargained.

U.C. disclosed that it intends to propose a second retirement tier and changes to retiree health benefits.

AFSCME has agreed to begin negotiations on these topics in February 2012. The parties hope to conclude those negotiations by April 2013.

CUE-Teamsters

The union representing 12,500 clerical and childcare workers finally has an agreement, after working without a contract since October 2008. In the midst of bargaining, CUE affiliated with the Teamsters in the spring of 2010.

Effective July 2011, employees represented by CUE will receive an across-the-board raise of 3 percent. In February, they will enjoy 2 percent step increases. Three more 3 percent general raises are guaranteed in July of each year through 2014, and a 2 percent boost will be effective July 2015.

In addition, the current step structure will be changed to make current 2 percent half-step increases into full steps. The number of steps for each classification will therefore increase. Two-percent step increases will occur each July, but will vary based on longevity of service. Workers with more than 20 years of service will receive seven step increases by the end of the contract in November 2016. Employees with fewer than 10 years of employment will enjoy three step increases in the same period, and those with 10 to 20 years will benefit from five steps.

Clerical workers will pay the same health contribution rates as other employees, but U.C. will pay any increases over 20 percent in any year from 2012 through 2016. Employees will begin paying 3.5 percent pension contributions effective July 2011 and increase their payments to 5 percent of pay in July 2012, and to 6.5 percent in July 2013.

In the wake of cases at the Public Employment Relations Board regarding positions where work assignments had changed to the point the positions were excluded from the unit, the parties agreed to establish a joint committee to address issues of reclassification, transfer, and reassignment of work. (See PERB Dec. No. 2185-H in [CPER No. 203](#).)

Benefits at U.C.

If the tentative agreement with CUE-Teamsters is ratified in early December, almost all university employees will be paying the same contributions for health benefits. Employees in the lowest pay bands contribute less to their benefits than those in the higher bands. Averaged across the four pay bands, the university pays approximately 87 percent of the cost of health benefits.

In November, U.C. announced that pension contributions for both the university and its non-represented employees will be increasing in July 2013. The university currently pays 7 percent of wages into the retirement system. That will rise to 10 percent in July 2012. In July 2013, the university's contribution will increase from 7 to 12 percent of pay, and employees will pay 6.5 percent of pay into the fund. The retirement system is currently 81 percent funded. The combined contributions in 2013 are expected to cover the annual cost of the benefits that year for the first time since about 1990, when U.C. and its employees stopped contributing to the system, which was funded over 100 percent for nearly two decades.

CPER Journal Online

CFA Strikes Over Equity Increases

On November 17, California State University professors, librarians, and counselors struck over equity increases that the university agreed were necessary in 2007, but that were never implemented. As it was contingent on the state budget, the equity increase plan was dropped halfway through implementation, leaving some tenured associate professors at lower salaries than assistant professors with no tenure. Since then, the California Faculty Association has struggled to win CSU's commitment to address equity issues, while watching the CSU board of trustees give ballooning salaries to CSU executives. The strike is the culmination of bargaining for the 2009-10 year, when the salary provisions of the contract were automatically reopened by failure to meet a budget contingency. Meanwhile, the 2007-10 contract expired on June 30, 2010, except for the grievance and disciplinary action sections the parties agreed to extend during bargaining for a successor contract.

Equity Increases Recommended

The 2007-10 agreement called for a 3 percent raise on July 1, 2008, and a 2 percent boost on June 30, 2009. Eligible employees would receive service salary increases on their employment anniversaries. The contract also required CSU to set aside \$7 million for equity increases to resolve salary compaction and inversion problems in the professor ranks.

The equity increase program was a two-year plan to rectify the fact that new professors have been hired at salaries that are the same or greater than existing professors with more experience. The same problem exists for librarians and counselors. In 2007-08, the university set aside \$7 million to boost the salaries of assistant professors and equivalent ranks with several years of experience so that they would earn more than those with less experience. Only \$6 million was needed to implement the first-year equity program, so \$1 million was available to roll over into the second year. The parties already had determined how they were going to allocate the money to associate and full professors in 2008-09. But the 2008-09 program was contingent on an increase in CSU funding, which did not happen.

In factfinding proceedings relating to the 2008-09 year, the panel chaired by John Kagel found that CSU's abandonment of the equity program at the mid-point had exacerbated the salary inversion problem rather than alleviating it. The factfinders recommended that, because of the passage of time, the equity oversight committee should reexamine who should be eligible for equity increases. After ascertaining where compaction and inversion of salaries remained, they recommended that equity boosts be paid prospectively. Service salary increases — paid for increased length of service — should be paid when necessary to avoid salary compaction.

Despite the recommendations of the factfinding panel, CSU proposed to spend only \$1 million. CSU agreed to pay almost 16 percent of the equity increase, but capped individual increases at \$1,116 annually, about \$93 a month.

In 2009-10, the legislature again cut CSU's funding, and conditional promises of two salary increases totaling 6 percent were scrapped. CSU offered no across-the-board raises and no service salary increases. The parties quickly reached impasse. While the equity increase program had expired in 2008-09 and was not an issue that was reopened, CFA raised it again during an attempt to settle the salary dispute during the factfinding hearing.

Factfinding Report

The parties went to factfinding this last summer. At the beginning of factfinding, the union was demanding a pay package of \$80 million, but modified its package to concentrate on service increases and equity increases, particularly for associate and full professors who previously had not received equity increases as planned. As this approach built on the recommendation of Kagel's panel, the report for 2008-09 was incorporated into the report by the 2009-10 factfinding chair, Phil Tamoush.

Tamoush did not analyze the university's financial condition in 2009-10 or currently. He noted that CSU professors' salaries are presently in the bottom 10 percent of 20 comparable institutions. He also pointed out, "Wage increases for the MPP [Management Personnel Program] and Executive Management group

at the CSU have resulted in an expenditure of 5.9 million dollars, or .5% of faculty salaries.” He then recommended adoption of CFA’s modified proposal worth \$20.6 million, which amounts to an increase of approximately 1.3 percent of the faculty payroll.

The proposal would implement the second year of equity increases, which would cost \$6 million including employer-paid Social Security, Medicare, and retirement contributions. Another \$3.5 million would be spent on service salary increases for those who received the second-year equity awards, and \$644, 215 would go toward service salary increases for some faculty whose first-year equity increases were calculated assuming they would receive future service salary boosts. In addition, the CFA package included a non-base building service salary bonus totaling \$10 million for faculty members who were eligible for SSIs but not equity awards. The CFA-appointed factfinder explained in his concurrence that the service salary bonuses were to address compensation stagnation for “faculty who have had no salary increases for three years, while many administrators have received equity increases and raises.”

The CSU-appointed factfinder tore apart the chair’s report, asserting it contained factual inaccuracies and misrepresentations of CSU’s positions, as well as exceeding the scope of the issues reopened in 2009-10 — general and service salary increases. He pointed out that the \$20 million equates to paying 315 full-time temporary faculty to teach 3,150 course sections, or the funding for 2,800 full-time students. He emphasized that state funding for CSU was cut \$650 million for 2011-12 and faces a nearly certain mid-year cut of \$100 million.

No agreement was reached. Meanwhile, anger has been building over the fact that several new campus presidents have been hired at salaries \$50,000 to \$100,000 above the pay of their predecessors. Last January, CSU’s board raised the top end of the salary range for campus presidents by \$22,000 to \$350,000.

CFA now terms the CSU’s policy, “executives first.” In a chart showing average salaries of faculty and presidents, a nearly flat line indicates the weekly faculty salary has risen from \$1,223 in 1998 to approximately \$1,500. The average weekly presidents’ salary has climbed from \$3,329 in 1998 to \$5,779. Adjusted for inflation, faculty salaries have fallen 10 percent, while presidents’ salaries have risen 23 percent. In response to CSU’s complaints about state funding, CFA claims that the university’s budget is \$213 million or 5 percent larger than it was in 2007-08, and that the factfinders’ recommendations for ongoing salary increases could be implemented for less than .25 percent of the total CSU budget.

Strike

On November 7, CFA president Lillian Taiz announced that the union had decided to strike at two campuses —East Bay and Dominguez Hills — and hold informational pickets at other campuses. The decision followed a strike vote in which 93 percent of the faculty favored a strike.

The November 17 strike was the first in CFA’s history. The union asserts about 2,000 professors picketed in Dominguez Hills and the campus was empty. Over 90 percent of the classes at the East Bay campus were cancelled.

Full Contract Impasse

In his report, Tamoush took a swipe at the parties’ bargaining relationship, noting that there have been multiple factfinding proceedings over the past decade, and predicted the parties would begin another factfinding for the 2010 contract soon. As he foresaw, on November 18, CFA negotiators declared impasse. The union claims that CSU demanded another concession on faculty parking on top of other take-backs it has proposed over the last 18 months of bargaining.

The parties have agreed to retain or amend the language in about 16 articles of the contract, but have not reached agreement on salary, workload, appointment, extension/summer session, benefits, academic freedom, or 30 other issues. The university has proposed to delete any reference to the equity increase program, which it characterizes as “unique” to the 2007-10 contract. It is proposing no salary boosts for 2010-11 or 2011-12, and only reopeners for future years. CFA is demanding equity increases for associate and full professors, as well as 1 percent salary boosts for each of the first three years of the contract.

CPER Journal Online

Plaintiff Raised Triable Issue of Pretext in Age Discrimination Case

Where a 59-year-old terminated employee produced evidence that younger similarly situated employees were not fired, and that her termination was a deviation from company procedure, it was an error for the trial court to dismiss her claim of age discrimination under California's Fair Employment and Housing Act, according to the Ninth Circuit Court of Appeals. In *Earl v. Nielsen Media Research, Inc.*, the court concluded that the plaintiff's evidence raised a triable issue of fact as to whether the company's stated reason for firing her was pretext for age discrimination.

Christine Earl's job was to recruit households to allow installation of devices on their televisions so that Nielsen could monitor their viewing preferences. After working there for more than 12 years, Earl was placed on a developmental improvement plan, or DIP, for leaving a gift at an unoccupied household and for failing to keep a company map with her while recruiting. A DIP is an informal, non-disciplinary tool used to notify an employee that her performance fell below company standards. It is distinguished from a performance improvement plan, or PIP, which is an element of the disciplinary process used to warn an employee that failure to meet the company's standards may result in further disciplinary action, including termination.

After receiving the DIP, Earl was given a positive performance review. Soon afterward, Earl informed her supervisor and others at work that she had been diagnosed with peripheral neuropathy. Two months later, after writing the wrong address on a consent form, Earl was fired. She was 59 years old. During the months before and after her termination, Nielsen had hired five new recruits for her region, one of whom replaced Earl. Four of them were in their 20s and one was in his 30s. They were paid less than half of Earl's salary.

Earl filed suit, claiming age and disability discrimination in violation of the FEHA and wrongful termination. The district court granted summary judgment on her claims, and Earl appealed.

Pretext Evidence

The Ninth Circuit found there was no question but that Earl had established a prima facie case of age discrimination. It also agreed with the district court that Nielsen had articulated a legitimate, nondiscriminatory reason for her termination — her multiple violations of company policy. The only issue to be determined was whether Earl had presented sufficient evidence of pretext for the case to proceed to trial.

While Earl did not present direct evidence of pretext, she did present sufficient circumstantial evidence to show that Nielsen's explanation was internally inconsistent or otherwise not believable, concluded the court.

The court found that Earl's evidence showed Nielsen treated younger but otherwise similarly situated employees more favorably than it treated her. During the same time frame, Nielsen did not terminate, and may not even have disciplined, younger workers when they repeatedly violated similar policies. One 37-year-old, who had already received a DIP, was given another DIP after she assigned a home that did not have cable television and thus did not fall within Nielsen's demographics. Some months later, she failed to verify the address of a home she recruited but received only a PIP, if she was disciplined at all.

Another employee incorrectly collected demographics from two homes, forcing the company to have to remove the monitoring device from one. After the second violation, the employee was warned that he faced termination if there was another violation. Another violation was discovered just two weeks later, but the employee was not terminated and received only a PIP. The employee was 39 at the time of the first violation and 40 at the time of the last one.

A supervisor requested permission to terminate yet another employee, who had committed a number of violations within the first few months of being hired, including assigning a home with inaccurate demographics, repeatedly coming to work late, falsifying overtime records, and trashing his company car. She was told by the head of the company's human resources department that it would not be consistent with company procedure to terminate the employee prior to the issuance of a final warning PIP notifying

him that he would be terminated the next time he failed to meet expectations. He was not terminated at that time, but was issued a PIP. He eventually was terminated, at the age of 42.

In spite of this evidence, the district court had granted Nielsen's motion for summary judgment. It reasoned that the other recruiters were not similarly situated because they did not commit the exact same violation as Earl and that the recruiters who were over the age of 40 at the time of their violations were in the same protected class as Earl and could not be used as comparisons for purposes of pretext.

The appellate court disagreed. Employees need not be identically situated for purposes of pretext. They are similarly situated when they "have similar jobs and display similar conduct," the court instructed, quoting from *Vasquez v. County of Los Angeles* (9th Cir. 2003) 349 F.3d 634. Being similarly situated, it continued, "is not an unyielding, inflexible requirement that requires near one-to-one mapping between employees" because one can always find differences in performance or in the nature of rule violations.

In concluding that there was a triable issue of fact as to whether the other recruiters were similarly situated, the court noted that one of the employees with two prior DIPs had failed to verify an address just two months after Earl committed the same violation, but was not terminated. Further, Nielsen itself identified the violations by the other recruiters as similar to Earl's when it responded to a discovery request for information about other recruiters who violated "the same company policies and procedures." And, the relevant policies and procedures all serve the same purpose which is the proper collection and verification of household information to ensure accurate data. In addition, all of the policy violations were of "comparable seriousness," said the court, again citing *Vasquez*.

As to whether other employees over the age of 40 could be used for comparison purposes, the court noted that, in an age discrimination case, comparison with younger workers within a protected class is not improper. "Whereas sex and race discrimination rely on an individual's membership in a particular class, age discrimination is relative." "The proper inquiry is not whether the other recruiters are outside the protected class, but whether they are significantly younger than Earl," instructed the court. Here, Earl was 59 when she was terminated. The other recruiters, between the ages of 36 and 42, were "significantly" younger.

The court also found that Earl had presented evidence that Nielsen deviated from its established policy or practice when it terminated her after receipt of only one DIP and no PIPs, while it refused to terminate a relatively new employee who had committed multiple serious violations because he had not been issued a PIP.

The court reversed the district court's grant of summary judgment as to Earl's claims of age discrimination and wrongful termination in violation of public policy, finding that she had presented sufficient evidence to raise a triable issue of pretext, and remanded the case for further proceedings. However, because Earl failed to present any arguments regarding disability discrimination on appeal, the court upheld the lower court's dismissal of that claim. (*Earl v. Nielsen Media Research, Inc.* [2011] 658 F.3d 1108, 2011 LEXIS 19616.)

CPER Journal Online

Evidence of Pervasive Sexual Harassment Supports Jury Verdict in Favor of Plaintiff

The Second District Court of Appeal found sufficient evidence to support a jury's finding of hostile environment sexual harassment in violation of California's Fair Employment and Housing Act in *Fuentes v. AutoZone*. Contrary to the employer's contention, the court concluded that the plaintiff's testimony regarding the sexual harassment she experienced was not inherently improbable.

Sexual Harassment Evidence

Marcela Fuentes worked as a cashier for AutoZone. The acts complained of occurred during a period when the store manager, Juan Vaca, was on leave and the assistant manager, Melvin Garcia, was in charge. Fuentes alleged that Garcia and Gonzalo Carrillo, one of the parts sales managers, spread rumors that Fuentes had sexually transmitted herpes and was engaged in a sexual relationship with a coworker. They also suggested that she could make more money by becoming a stripper or being photographed naked. At one time, Garcia physically turned Fuentes around to show her buttocks to customers, while he was laughing and clapping. When two of the same customers returned to the store, Garcia told Fuentes to be ready to turn around again. He also told Fuentes that if he and she owned the store, all she would have to do "was just turn around and show them [her] butt" and they would be rich.

After Fuentes complained to Carrillo about Garcia's conduct, Carrillo reported it to the district manager. Fuentes described the incident to the district manager and asked to be transferred to another store. Her request was granted.

After her transfer, Fuentes met with another district manager and told him that she felt no one was looking into her complaints about Garcia and Carrillo. Fuentes was then placed on administrative leave while an investigation was conducted. Garcia and Carrillo were transferred and subsequently terminated.

Fuentes filed a lawsuit against AutoZone, Garcia, and Carrillo for sexual harassment in violation of the FEHA, intentional infliction of emotional distress, and slander. The trial court granted summary judgment to the defendants, and Fuentes appealed. The Court of Appeal, in an unpublished decision, found that there were triable issues of fact as to the sexual harassment cause of action, reversed the judgment of the trial court, and sent the case back for trial. The jury returned a verdict in favor of Fuentes. AutoZone appealed, arguing that there was insufficient evidence to support the jury's verdict.

Hostile Environment Sexual Harassment Test

When considering a claim of hostile environment sexual harassment in the workplace, the totality of the circumstances must be considered, instructed the appellate court. The harassment must be severe or pervasive enough to alter the conditions of the victim's employment to be actionable. It cannot be "occasional, isolated, sporadic, or trivial," the court specified, citing *Hughes v. Pair* (2009) 46 Cal.4th 1035, 2009 Cal. LEXIS 6019. "The test for hostile environment sexual harassment has both objective and subjective elements," noted the court.

"[A] plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail...if a reasonable person...*considering all the circumstances*, would not share the same perception," it explained, quoting from *Hughes*.

Inherent Improbability

The court was not persuaded by AutoZone's claims that portions of Fuentes testimony were inherently improbable. It found that the evidence did not support AutoZone's contention that all of the incidents at issue occurred within the space of a two-day period, rather than over more than two weeks, as testified to by Fuentes and others. The company also cited inconsistencies in testimony about when Fuentes first learned of the herpes rumors and regarding the turning incident.

"All of these issues are factual matters for resolution by the trier of fact," the court said. "Accordingly, the testimony of a witness offered in support of a judgment may not be rejected on appeal unless it is

physically impossible or inherently improbable and such inherent improbability plainly appears.” The relevant question to be considered in a claim of inherent improbability is whether it seems *possible* that what the witness claims happened actually happened, instructed the court.

Here, the court found that the evidence presented was not inherently improbable. Rather, “[I]t presents a common situation in which there are inconsistencies and contradictions in trial testimony,” which are to be resolved by the jury. In light of the unanimous verdicts on liability, it concluded that the jury believed Fuentes’ testimony and the corroborating testimony.

Pervasive and Severe

The court found the work environment created by Garcia and Carrillo to be objectively hostile and abusive. And, while acknowledging that all of the incidents complained of were limited to a three-week period, the court also concluded that the harassment directed at Fuentes was both pervasive and severe. It explained that the harassment by Garcia and Carrillo of Fuentes was ongoing during the time that Vaca was on leave. The incidents in which Garcia directed Fuentes to display her buttocks to customers to increase sales were physically humiliating. Those demands and the herpes rumor unreasonably interfered with her ability to work, it found. The court noted that the customers cheered and laughed at her. An employee from another store repeated the herpes rumor, and other groups of employees laughed about it.

The court emphasized that the harassment in this case was specifically aimed at Fuentes, which distinguished this case from *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 2006 Cal. LEXIS 719, 178 CPER 56. In *Lyle*, the Supreme Court affirmed summary judgment for the defendants on the grounds that the vulgar and coarse language complained of was not directed toward the plaintiff.

The court also found the facts of this case distinguishable from three cases relied on by AutoZone. In *Hughes*, the defendant expressed terms of endearment and admiration in one telephone conversation. Later the same day, he told the plaintiff in person that he would get her on her knees eventually, and said, “I’m going to fuck you one way or another.” The Supreme Court found that one phone conversation and one in-person encounter in a single day was not pervasive and that the sexual comments were not severe.

In *Haberman v. Cengage Learning, Inc.* (2009) 180 Cal.App.4th 365, 2009 Cal.App. LEXIS 2034, the plaintiff complained of flirtatious remarks made by her supervisor’s supervisor in emails, including whether she knew of anyone who wanted to have sex without having a relationship. He gave her compliments at various conferences. On one occasion, while parking, he called the plaintiff and told her that “he was coming up behind her and it felt pretty good.” The plaintiff also complained that her direct supervisor had told her that a few men would be disappointed if she brought a date to a company event. The *Haberman* court found that these acts fell far short of pervasive sexual harassment.

And, in *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 2007 Cal.App. LEXIS 1933, the third case relied on by AutoZone, the court found that three incidents of harassment by a county supervisor, who did not supervise the plaintiff or work in her same building, were insufficiently severe or pervasive to be actionable. The defendant called her an “aging nun” because she was not married, pulled her to his body and asked her if she had come to “lobby” him, and, on another occasion, asked for her home address while putting his arm around her and rubbing her breast with it.

The court found that the facts presented in these cases were in “sharp contrast” to the harassment suffered by Fuentes. It noted that in *Hughes* and *Mokler*, the plaintiff was not supervised by the harassers. In *Haberman*, the supervisors’ comments were made sporadically over a number of years and were nowhere near as vulgar as those made to Fuentes. In addition, the comments in that case were made privately, not in front of coworkers and customers, as in this case. And, in none of the three cases “did a manager attempt to exploit a female employee’s body in front of customers in order to increase sales as Garcia did with Fuentes,” said the court.

Finding that Garcia and Carrillo’s actions of sexual harassment were severe and pervasive, that Fuentes found their actions offensive, and that a reasonable person would have also, the court affirmed the jury’s verdict. (*Fuentes v. AutoZone, Inc.* [2011] 1200 Cal.App.4th 1221, 2011 Cal. App. LEXIS 1437.)

CPER Journal Online

‘Me-Too’ Evidence of Harassing Activity and Race Discrimination Improperly Excluded

In a sex discrimination case under California’s Fair Employment and Housing Act, the Fifth District Court of Appeal in *Pantoja v. Anton* held that the trial court erred when it excluded evidence of the employer’s harassing conduct towards female employees other than the plaintiff. The conduct occurred out of the plaintiff’s presence and at times when she was not employed.

Pantoja’s Claims

Lorraine Pantoja alleged that, while working for attorney Thomas J. Anton as a receptionist and secretary, Anton slapped and touched her buttocks. He also rubbed her thigh while offering her \$200, and asked her for a shoulder massage. He called her a “stupid bitch” repeatedly, and directed other profane and belittling expressions to her. When Anton noticed Pantoja sweating, he would ask her if she was going through menopause, which she found humiliating.

Pantoja witnessed similar behavior by Anton directed at other female employees. She heard him call other women “fucking bitch,” “stupid bitch,” and “little bitch.” She saw him give another employee an inappropriate hug.

During the course of her employment, Pantoja heard Anton refer to her and her coworkers as “my Mexicans.”

Anton fired Pantoja twice. The first time, he had kept her late to copy some documents. When she told him she had to leave because the babysitter could not stay any longer, he told her that she should not bother to come back if she left. He later asked her to return, which she did. On the second occasion, Pantoja had copied a document and left it on the counter as Anton instructed. When he could not find it the next morning, he called her at home and said, “Where are these fucking documents, you stupid, incompetent bitch? You have shit for brains. You have your fucking head in your ass. Where did you put those fucking documents? You’re fired. Don’t fucking bother coming back. You hear me? You’re fired, you stupid, incompetent, bitch.” Once again, Anton asked Pantoja to return to work, but this time she refused.

Pantoja filed a lawsuit against Anton, alleging violations of the FEHA, including race discrimination, sexual discrimination, and hostile work environment sex harassment. Prior to, and during, the course of the trial, the court ruled inadmissible any evidence of racial bias and any evidence of sex discrimination or harassment, unless Pantoja personally witnessed the acts or they adversely affected her work environment. The case proceeded to trial, and the jury found for the defense. Pantoja’s motion for a new trial was denied, and she appealed.

‘Me Too’ Evidence Admissible to Show Bias and Impeach

The Court of Appeal found that the trial court erred when it refused to allow Pantoja to introduce evidence that Anton had harassed other employees unless the conduct took place in her presence or affected her working environment. This evidence “could be relevant to prove Anton’s intent when he used profanity and touched employees,” said the court.

Further, Anton and witnesses he presented during the trial maintained that his profanity was always directed at situations, not people, that it happened in the presence of both men and women, and that he never would have tolerated sexual harassment by anyone in his office, let alone done it himself. Evidence that Anton harassed other women outside Pantoja’s presence could have shown the jury not only that he acted with discriminatory intent or bias based on gender, but it also would have enabled the jury to evaluate his credibility and that of his witnesses. “We conclude the evidence was admissible to show intent under Evidence Code section 1101, subdivision (b), to impeach Anton’s credibility as a witness, and to rebut factual claims made by defense witnesses,” said the court.

In coming to this conclusion, the court considered two sexual harassment cases relied on by the parties, *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 1998 Cal.App. LEXIS 511, 131 CPER 67, and

Johnson v. United Cerebral Palsy/Spastic Children's Foundation (2009) 173 Cal.App.4th 740, 2009 Cal.App. LEXIS 740.

The *Beyda* court held that Sec. 1101(a) bars evidence of sexual harassment of other employees unknown to the plaintiff if offered to prove a defendant's "propensity to harass." However, noted the court in this case, *Beyda* did not address the issue of when this type of evidence is admissible to prove intent or other matters listed in section 1101(b).

Johnson, on the other hand, *did* address the admissibility of me-too evidence under Sec. 1101(b). Johnson maintained that she was fired because she was pregnant, in violation of the FEHA. In opposition to the defendant's motion for summary judgment, she submitted declarations from five other employees who claimed to have been fired after telling her employer that they were pregnant. The Court of Appeal rejected the defendant's argument that the declarations were evidence of propensity made inadmissible under *Beyda*, pointing out that *Beyda* did not address admissibility under Sec. 1101(b). And, it said, many federal courts have held this kind of evidence admissible under rule 404(b) of the Federal Rules of Evidence "to show intent or motive, for the purpose of casting doubt on an employer's stated reason for an adverse employment action, and thereby creating a triable issue of material fact as to whether the stated reason was merely a pretext...." It concluded that evidence of pregnancy discrimination towards other employees "sets out factual scenarios related by former employees of defendant that are sufficiently similar to the one presented by plaintiff concerning her own discharge by defendant" to be relevant under Sec. 1101(b).

The appellate court here was persuaded by the *Johnson* court's reasoning, finding that it applied directly to Pantoja's claim that Anton's behavior toward her evidenced a gender bias that motivated her firing. It also applied to Pantoja's claim of hostile environment sexual harassment, added the court, noting that Pantoja was required to show that Anton had discriminatory intent or motivation based on gender.

While recognizing that the *kind* of intent or motivation required for hostile environment harassment may be different from that required for discriminatory hiring or firing, "[t]here is no reason why me-too evidence would be admissible under section 1101, subdivision (b), to prove the defendant's discriminatory mental state in one type of case but not the other," said the court.

The evidence was admissible even if Pantoja was not present and did not know of it, the court emphasized. The trial court allowed Anton to be questioned about his general policies and practices regarding sexual harassment. He maintained that his practice was not to engage in sexual harassment and not to tolerate it in others, at any time. "Even if he had advanced the theory that he had the policy and practice only while Pantoja was working for him, evidence that he did not have them at other times would have supported a rational inference that he did not have them *at all*," the court instructed.

The court was not persuaded by the defendants' argument that any error was harmless. The defendants contended that Pantoja had "no case" because there was "no proof of any bias or animus" on the part of Anton and so the exclusion of evidence did not make any difference. The court disagreed. "The record contains ample evidence that Anton often called his women employees 'bitch' in demeaning contexts and sometimes placed his hands on intimate parts of his women employees' bodies or clothing." If the trial court had not made erroneous rulings, testimony regarding additional inappropriate touching and comments would have been allowed. "There is a reasonable probability that this evidence of Anton's gender bias, which corroborated Pantoja's other evidence of gender bias, would have tipped the balance in a credibility contest like this case," the court concluded.

Race Discrimination Evidence Improperly Excluded

The appellate court also found that the trial court abused its discretion by granting the defendants' motion prior to trial that any evidence of Anton's reference to Mexicans be excluded. The trial court's rationale — that Pantoja did not have enough evidence to prove race discrimination — was an improper basis for its ruling, said the court. "Presented only with the argument that Pantoja did not have enough evidence to establish liability — not that the evidence Pantoja had was irrelevant or otherwise inadmissible — the court should have denied the motion," it said.

And, when additional evidence of discrimination was offered, the trial court refused to allow it because Pantoja was not working at the firm during the relevant time period. This ruling was also an abuse of discretion for the same reasons discussed by the court when considering the trial court's exclusion of

sexual harassment me-too evidence out of Pantoja's presence.

Jury Instructions

The court did not agree with Pantoja that the trial court's jury instruction based on *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 2006 Cal. LEXIS 4719, 178 CPER 56, was erroneous. The instruction read: "A hostile work environment/sexual harassment claim is not established where a supervisor or coworker simply uses crude or inappropriate language in front of employees without directing sexual innuendo or gender-related language toward a plaintiff or toward women in general." However, it did find that the instruction was potentially misleading in this case absent other additional special instructions. "Without some form of clarification, the instruction could have caused the jury to draw the inference that harassing conduct or comments motivated by a gender-based discriminatory intent do not amount to an actionable hostile environment unless there is 'sexual innuendos' or 'gender-related language,'" cautioned the court. "This inference would be incorrect because abusive conduct that is not facially sex-specific can be grounds for a hostile environment sexual harassment claim *if it is inflicted because of gender*, i.e., if men and women are treated differently and the conduct is motivated by gender bias."

The court reversed the judgment. (*Pantoja v. Anton* [2011] 198 Cal.App.4th 87, 2011 Cal. App. LEXIS 1036, petition for review denied.)

CPER Journal Online

Sporadic Incidents of Sexual Conduct Do Not Make a Hostile Work Environment

A single incident of harassment directed at the plaintiff was not sufficient to violate the California Fair Employment and Housing Act's prohibition of sexual harassment in the workplace, according to the Fourth District Court of Appeal in *Brennan v. Townsend & O'Leary Enterprises, Inc.* While the plaintiff observed and learned about other incidents of sexual conduct, they did not constitute severe or pervasive sexual harassment, said the court.

Sexually Offensive Conduct

In support of her claim of unlawful sexual harassment, Stephanie Brennan pointed to several incidents that occurred at her place of work over a four-year period. She alleged that at an office meeting, the owner of the company, Steve O'Leary, asked another employee to don a bridal veil with a penis attached. During an office Christmas party that Brennan attended later that year or the next year, a management employee dressed as Santa Claus had several of Brennan's coworkers sit on his lap and asked them personal questions. At yet another Christmas party, O'Leary wore a Santa hat with the word "bitch" written across the brow. The following August, Scott Montgomery, the executive creative director, sent an email to another employee that was inadvertently forwarded to Brennan. In that email, Montgomery, noting that three employees in Brennan's unit had left, wrote, "Three down, one big-titted, mindless one to go," referring to Brennan.

Brennan complained to her supervisor about the email, and Montgomery was given a letter of reprimand.

After she received the email, Brennan asked past and present employees about their experiences to find out whether there were other examples of sexual harassment. She was told that Montgomery had referred in an email to a client as "a demanding, counter-productive, mindless, shitty-ass bitch," and had also called the same client a "cunt" and had made inappropriate comments to other employees.

Brennan spoke several times to O'Leary about sexual conduct that she had observed and heard about. He asked her to stay at the company and help fix the work environment. The company called in an outside investigator to look into sexual harassment in the workplace, but Brennan refused to speak with him.

Brennan resigned from the company approximately five months after receiving the August email. She brought a lawsuit against the company and the owners. On the only cause of action that went to the jury — sexual harassment — the jury found in her favor. Defendants filed a motion for judgment notwithstanding the verdict, claiming that the evidence presented was legally insufficient to support the judgment. The trial court granted the motion. Brennan appealed, and the defendants cross-appealed.

Court of Appeal Upholds Trial Court's Ruling

The hostile work environment form of sexual harassment violates the FEHA only where it is severe or pervasive, instructed the appellate court, citing *Hughes v. Pair* (2009) 46 Cal.4th 1035, 2009 Cal. LEXIS 6019. No recovery of damages is available for harassment that is "occasional, isolated, sporadic, or trivial," it explained, quoting from *Hughes*. Where the harassment alleged is based on only a few isolated incidents, the employee must show that the conduct was "severe in the extreme" in order to prevail.

Further, the court continued, sexual conduct that is directed at persons other than the plaintiff is considered less severe than that directed at the plaintiff, citing *Lyle v. Warner Brothers Television Prod.* (2006) 38 Cal.4th 264, 2006 Cal. LEXIS 4719, 178 CPER 56. In order to prevail on a hostile work environment claim based on conduct directed towards others, the complaining employee must show that the conduct permeated her direct work environment. "To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it," said the Supreme Court in *Lyle*.

The existence of a hostile work environment must be evaluated considering the totality of the circumstances, explained the court, considering the following factors: the nature of the conduct;

frequency; total number of days over which it occurred; and context in which it took place. “A plaintiff must show a concerted pattern of harassment of a repeated, routine, or generalized nature,” said the court, quoting *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 2007 Cal.App.LEXIS 1933.

Conduct Observed by Brennan

Evaluating the facts presented by Brennan in light of the lessons of *Hughes*, *Lyle*, and *Mokler*, the court found that she was not subjected to severe sexual harassment. She was never “assaulted, subjected to unwelcome physical contact, threatened, propositioned, or subjected to explicit language directed at her or at anyone else in her presence,” said the court. Nor was she subjected to verbal abuse or harassment.

The court also concluded that Brennan did not experience pervasive sexual harassment. It noted that the August email was the only incident directed at her. And, while that email was “rude, insulting, and unprofessional,” it was an isolated event and was not meant to be made public or to be seen by Brennan.

The three incidents that Brennan reported having observed also did not constitute a concerted pattern of harassment. The penis on the veil incident took place more than four years prior to the August email, the court noted. The other two incidents took place at offsite Christmas parties, not in Brennan’s work environment. Referring to the third incident, the court found that a Santa hat with “bitch” written on it did not, without more, constitute an act of sexual harassment.

The four incidents occurred over a four-year period, with gaps of between six months and one year in between. “[S]uch evidence simply does not show a concerted pattern of harassment of a repeated, routine, or generalized nature,” concluded the court.

The court also found that evidence about conversations between O’Leary and Brennan during which O’Leary asked Brennan about her personal life, including whether she was having sex, did not support a finding that these conversations were acts of sexual harassment. There was no evidence presented to show that Brennan found these discussions offensive or unwelcome.

Other Conduct

The court also was not impressed by sexually harassing conduct that Brennan learned about from other employees, noting that she did not witness the conduct and that it did not occur in her work environment. Brennan argued that the Supreme Court in *Lyle* qualified its rule with the word “generally” and that, because she learned of these other incidents while still employed, they can prove that her work environment was hostile.

The court noted that Brennan did not have any knowledge of these incidents before she conducted her own investigation to discover other examples of sexual harassment. Some of the incidents she learned about occurred a year earlier, and some at an undisclosed time. “[H]ow under those circumstances can those incidents be probative in showing that sexual harassment conduct ‘permeated’ *plaintiff’s* immediate workplace environment and was ‘pervasive and destructive’ within the meaning of sexual harassment jurisprudence?” asked the court.

Retaliatory Conduct

Brennan contended that her claim of sexual harassment was supported by retaliatory acts that she experienced after the August email and prior to her resignation. Brennan claimed that the investigation of her sexual harassment complaint was flawed because the investigator talked to the wrong people, and asked inappropriate questions about what she wore and whether she had been seen with Montgomery outside the workplace. She also objected that she was not provided a copy of the investigator’s report.

Brennan also alleged that after she got an attorney involved, certain people at work stopped talking to her, stopped attending her meetings, and told her not to attend meetings with certain clients.

The court found no evidence to show that these acts were based on Brennan’s gender and, accordingly, did not assist in establishing pervasive sexual harassment. (*Brennan v. Townsend & O’Leary Enterprises, Inc.* [2011] 199 Cal.App.4th 1386, 2011 Cal.App. LEXIS 1433.)

CPER Journal Online

Individual Employees Not Liable for Discrimination Under California's Military and Veterans Code

In a case of first impression, the Second District Court of Appeal determined that individual employees cannot be held liable for discriminating against members of the armed forces in violation of California's Military and Veterans Code Sec. 394. For its holding in *Haligowski v. Superior Court of Los Angeles County*, the court relied on decisions interpreting similar language in California's Fair Employment and Housing Act.

Lieutenant Mario Pantuso was called to active service in the Navy while working at Safeway Services. When he returned from his six-month deployment and asked for his job back, his supervisor, Mike Haligowski, and the regional manager, Greg Chomenko, told him that he was terminated.

Pantuso sued Safeway, Haligowski, and Chomenko, alleging discrimination and retaliation in violation of Secs. 394(a) and (d). Pantuso claimed that the defendants gave him negative performance evaluations after he informed them that he would be deployed, terminated him, and refused to reemploy him because of his military service, and that they denied him an earned bonus. Haligowski and Chomenko demurred to Pantuso's complaint, arguing that supervisors could not be held personally liable under the statute. The trial court overruled the demurrer, and Haligowski and Chomenko petitioned the Court of Appeal for a writ of mandate ordering the trial court to vacate its ruling and enter a new order sustaining the demurrer.

Does 'Person' Mean Individual Supervisor?

The Court of Appeal focused on the meaning of the word "person" as it appears in the statute. Section 394(a) reads: "No *person* shall discriminate against any officer, warrant officer or enlisted member of the military or naval forces of the state or of the United States because of that membership. No member of the military forces shall be prejudiced or injured *by any person, employer, or officer or agent of any corporation, company, or firm* with respect to that member's employment position or status or be denied or disqualified for employment by virtue of membership or service in the military force...." (Emphasis added.) Subdivision (d) provides that "No *employer or officer or agent of any corporation, company, or firm, or other person*," shall terminate any person from employment because of their membership or service in the military.

The court found nothing in the legislature's statement of intent in passing the statute that indicated whether it intended to make supervisors individually liable. Nor did it find the answer in the language of the statute.

'Person' in the FEHA

Turning to extrinsic evidence, the court found no help in the legislative history and no California case on point. It did find persuasive the reasoning and result of a federal district court in an unpublished decision, however. In *Kirbyson v. Tesoro Refining and Marketing Co.* (N.S.Cal. Mar. 2, 2010) No. 09-3990SC, 2010 WL 761054, the court dismissed the plaintiff's Sec. 394 discrimination claims against the individual defendants. Citing a California Court of Appeal case interpreting similar language in the FEHA, the *Kirbyson* court concluded that a "California court would not interpret the statute so as to reach 'persons' who are being sued for claims that 'arise out of the performance of necessary personnel management duties.'"

The court in this case explained that, because both Sec. 394 and the FEHA are California employment discrimination statutes, "a review of cases under the FEHA sheds light on how California courts and the Legislature view the individual liability of supervisors for discriminatory conduct in the performance of regular management duties." While the FEHA defines "employer" as "any *person* regularly employing five or more persons, or any *person* acting as an agent of an employer..." two California Supreme Court cases and one appellate court case have held that individual supervisors and agents cannot be held liable for discrimination or retaliation under the act, noted the court, citing *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 1996 Cal.App.LEXIS 4999, 121 CPER 81; *Reno v. Baird* (1998) 18 Cal.4th 640, 1998 Cal. LEXIS 4311, 131 CPER 62; and *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th

1158, 2008 Cal. LEXIS 2504, 189 CPER 89.

The *Janken* court concluded that the use of the word “agent” in the act was intended to ensure that employers would be held liable for the acts of their supervisory employees, not to make every supervisory employee an “employer.” It also noted that the FEHA treats discrimination differently from harassment, for which supervisors may be held individually liable. Discrimination claims “arise out of the performance of necessary management duties,” whereas harassment is “conduct not necessary for performance of a supervisor’s job.” And, it reasoned, imposing personal liability on supervisors would not add much to a victim’s prospects for monetary recovery but could devastate an individual supervisor financially. Such a situation could present a supervisor with a conflict of interest with her employer every time she had to make a personnel decision.

The Supreme Court in *Reno* approved *Janken*, holding that “individuals who do not themselves qualify as employers may not be sued under the FEHA for alleged discriminatory acts.” In *Jones*, the Supreme Court extended the same reasoning to conclude that individuals are not personally liable for retaliation under the FEHA.

Application to Sec. 394

The Court of Appeal reasoned that the logic used by the courts in the FEHA cases should also apply to Sec. 394. Both are anti-discrimination statutes, and the language in Sec. 394 is parallel to that of the FEHA. Both forbid a “person” from discriminating or retaliating. It would be “illogical” and “incongruous” to hold that supervisory employees are liable for discrimination and retaliation under Sec. 394 but not under the FEHA, given the similarity between the language and the goals behind each, said the court.

The court also found compelling the reasoning of *Janken*, *Reno*, and *Jones* regarding the inherent nature of a supervisor’s duties. “[H]olding individual supervisors personally liable for discriminatory acts against members of the military forces based solely on...personnel decisions could discourage effective management while adding minimal compensation to victims,” it concluded.

Furthermore, said the court, “the Legislature knows how to specify its intent to hold a manager individually liable,” as indicated by its choice of language in the FEHA making an employee “personally liable” for harassment. “Had the Legislature intended to hold individual managers and supervisors liable under section 394, it would have done so more clearly and expressly,” it reasoned.

The court, dismissing Pantuso’s arguments to the contrary, held that “the use of the word ‘person’ in Sec. 394 does not attach personal liability to supervisors for acts that turn out later to be discriminatory against members of the military and naval forces where those acts arose out of the performance of normal management duties.” (*Haligowski v. Superior Court of Los Angeles County* [2011] 200 Cal.App.4th 983, 2011 Cal.App. LEXIS 1418.)

CPER Journal Online

Supreme Court Requires Strong Evidence of an Implied Contractual Right to Vested Retirement Health Benefits

California law permits a vested right to retirement health benefits to be implied from a county ordinance or resolution, the Supreme Court has concluded, although it cautioned that a vested contractual right should not be easily inferred. The case under consideration, *Retired Employees Association of Orange County v. County of Orange*, is before the United States Court of Appeals for the Ninth Circuit, but the federal court asked for advice on California law. The California court did not decide whether Orange County retirees have the vested right that REAOC claimed.

Pooling Dispute

In 1966, Orange County began offering medical insurance to its retired employees. In 1985, it grouped active and retired employees into a single pool for the purpose of determining health benefits premiums. Inclusion in the same pool as active employees reduced the premiums for retired employees, although it raised them for active employees. The county paid the majority of the active employee premium costs, but contributed little to the retired employees' premiums.

In 2007, the county and the unions representing active employees agreed to split the retired and active employees into separate pools. The county did not negotiate with the retired employees before passing the resolution making the change.

On behalf of 4,600 retirees, REAOC sued in federal court to prohibit the county from splitting the pool. Among other claims, it asserted that the county's exclusion of retirees from the active employee pool was an unconstitutional impairment of contract. While acknowledging that there was no express promise in any collective bargaining agreement or board resolution to continue a single pool, the association argued that the implied right to remain in the unified pool was manifested by long-standing practice and representations in county employee handbooks. The county, however, pointed to annual resolutions of the board of supervisors that set health plan premium rates for a year at a time.

The federal district court ruled against the retirees on the ground that, as a matter of California law, the county could be liable only for an express obligation in a board resolution. REAOC appealed to the Ninth Circuit. The federal appeals court asked the California Supreme Court for a decision whether, under California law, a county and its employees could "form an implied contract that confers vested rights to health benefits on retired county employees."

Contractual Terms of Employment

The Supreme Court recited basic California law that permits a contract to be implied where the existence and terms of the agreement are "manifested by conduct." The court reminded the parties that an additional implied term can be read into a written contract as long as it does not conflict with express terms of the contract. It reiterated its conclusion in *Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 1969 Cal. LEXIS 329, that a public agency "may be bound by an implied contract if there is no statutory prohibition against such arrangements." In *Youngman*, employees contended that they had an implied contractual right to salary step increases each year. The court rejected the district's argument that it had no authority to enter into an implied contract.

Orange County contended that *Youngman* did not apply, relying on *Markman v. County of Los Angeles* (1973) 35 Cal.App.3d 132, 1973 Cal.App. LEXIS 696. In that case, a deputy sheriff had worked overtime on occasion for several years, but had been unable to use compensatory time off in the year it was earned, as required by Los Angeles County ordinance. The ordinance allowed an employee to receive cash compensation only if approved in advance, and the deputy sheriff had not obtained prior approval. He sued but was awarded no compensation for the overtime work because the court held he was entitled only to the compensation as was "expressly" provided by the ordinance.

Orange County argued that the principle announced in *Markman* disposed of the association's claims, which depend on implied contractual terms. But the Supreme Court criticized the county's interpretation of

Markman. The court explained that *Markman* held only that an employee who did not obtain compensation in one of the ways authorized by the ordinance was not entitled to recover compensation. Cases since *Markman* each involved a conflict between a public employee's claim and the ordinance or statute that governed the subject of the claim, the court observed. The court characterized the cases as illustrations of the principle that implied contract terms will not be found when they would conflict with express terms of an ordinance or contract.

The court clarified its often-quoted pronouncement that "public employment is not held by contract." That statement, said the court, "has limited force where, as here, the parties are legally authorized to enter... into bilateral contracts to govern the employment relationship." Because the county had negotiated contracts under the Meyers-Milias-Brown Act that addressed a negotiable subject, retirement health benefits, the court held that the language of *Markman* did not apply to this case.

No Prohibition on Implied Rights

The county argued that Article XI of the California Constitution barred the county from promising compensation except by ordinance. The court noted, however, that the language requires compensation of board members to be set "by ordinance," but the clause relating to employees — "shall provide for the...compensation...of employees" — does not prescribe the method of setting employee compensation.

The court agreed with the county that Government Code Sec. 25300 does require the county to set employee compensation by resolution or ordinance. Since REAOC claimed that its members' entitlement to health premiums calculated on the basis of a unified pool was deferred compensation, the court ruled that "a court must look to Board resolutions, including those resolutions approving or ratifying MOU's...to determine the parties' contractual rights and obligations." But the requirement that matters of compensation must be established by resolution does not prevent recognition of implied terms if they are clearly intended, the court instructed.

Presumption Against Inferring Contracts

The court explained that a county board passes resolutions for various reasons, such as establishing policy. Courts must be mindful that the primary function of a legislative body is to declare policies which may later be revised, the court cautioned. To avoid limiting the powers of a legislative body, courts have required a person asserting that a law or ordinance created contractual rights to overcome a presumption that the law merely was intended to establish a policy that may be changed.

The court reviewed California cases that illustrate the possibility of proving an implied contract, but only if the intent to create contractual rights is clear. To prove an implied contract term, a person need not point to explicit statutory language, the court said, relying on *California Teachers Assn. v. Cory* (1984) 155 Cal.App.3d 494, 1984 Cal.App. LEXIS 2002. The *California Teachers* court explained a contract could be implied from a statute as long as there was clearly an "element of exchange" of something valuable between the state and a private person. It then enforced an implied contract relating to the administration of a retirement fund. But, in *Claypool v. Wilson* (1992) 4 Cal.App.4th 646, 1992 Cal.App. LEXIS 314, 93 CPER 9, the court found no implied promise concerning the allocation of investment earnings in a pension fund. As the REAOC court summarized, "Although the intent to contract must be clear, our case law does not inexorably require that the intent be express."

The court found several of the county's contentions inapposite. The county argued that no implied rights can be found if the county did not use the means of making a contract that is established by law. Here, the court said, REAOC alleges that a contractual term is implied in a resolution, which is an authorized means of contracting. The county's claim that the implied right was not presented to the board as the MMBA requires for binding collective bargaining agreements is misdirected, the court noted, because REAOC's claim is based on a contract approved by the board.

The court acknowledged the legitimate concerns of unfunded retiree health benefits obligations and the rising cost of providing the benefits. It reminded the parties that the question before it was "one of law, not of policy." It assured the county that "[t]he requirement of a 'clear showing' that legislation was intended to create the asserted contractual obligation should ensure that neither the governing body nor the public will be blindsided by unexpected obligations."

Implied Vested Health Benefits Not Barred

The county argued that it is improper to infer vested contractual rights, but the court criticized this assertion for lack of any supporting legal authority. Saying, “Vesting remains a matter of the parties’ intent,” the court reviewed cases where a court did not find implied vested rights and another where a court did infer vested rights.

A court found implied vested rights to longevity pay, vacation, and sabbaticals because they were an inducement to remain employed in *California League of City Employee Assns v. Palos Verdes Library Dist.* (1978) 87 Cal.App.3d 135, 1978 Cal.App. LEXIS 2165, 40 CPER 25. The Supreme Court agreed with criticism that the *Palos Verdes* court had failed to focus sufficiently on the parties’ intent to create vested rights, but approved the underlying theory of the case — “that public employee benefits, in appropriate circumstances, could become vested by implication.” The court noted that, in later cases, courts acknowledged that vested rights could be conferred if the legislation and circumstances surrounding their enactment demonstrated an intent to create enforceable contract rights even though those courts did not find evidence of the intent to confer contractual rights.

Orange County also argued that a section of the County Employees Retirement Law of 1937 barred the county from granting vested retirement health benefits. Government Code Secs. 31691 and 31692 prohibit a county from giving vested rights to employer *contributions* to life or disability insurance premiums or “toward the payment of all or part of the consideration for any hospital service or medical service corporation.” REAOC countered that Sec. 31691 does not apply to health insurance benefits, and that Sec. 53201 allows a county to provide health and welfare benefits to employees and retirees “subject to conditions as may be established by it,” including payment of insurance premiums for medical, hospital, and surgical benefits. The court, however, found it need not decide whether Sec. 31691 encompassed health care insurance since REAOC did not claim a vested right in contributions, but only in a methodology used to calculate the premiums of active and retired employees. While pooling active and retiree premiums had the effect of subsidizing retiree premiums, REAOC was not claiming a vested right to a contribution, only that premiums for the two groups be equal.

The court concluded that, “under California law, a vested right to health benefits for retired county employees can be implied under certain circumstances from a county ordinance or resolution.” (*Retired Employees Association of Orange County v. County of Orange* [11-21-11] Supreme Ct. S184059, ___ Cal.4th ___, 2011 Cal. LEXIS 12109, 2011 DJDAR 16765.)

CPER Journal Online

Retirement Law Defines Whether Settlement Proceeds Qualify as Compensation in Pension Calculation

Characterization of settlement proceeds as back pay is necessary before the California Public Employees Retirement System will use the amount to calculate a pension benefit, but that may not make it “final compensation” under the Public Employees Retirement Law (PERL). If the amount does not reflect the employee’s “payrate” and “special compensation,” the back pay amount will not be used to figure final compensation, the Court of Appeal explained in *Molina v. Board of Administration, California Public Employees Retirement System*.

Wrongful Termination Settlement

Phillip Molina was terminated from his position as the director of finance for the City of Oxnard. He sued for wrongful termination and settled his claim for \$875,000. The settlement agreement did not characterize any portion of this amount as back pay but provided that the city would provide a letter explaining what portion of the total was compensation. In the settlement contract, Molina promised to keep the letter confidential except as needed for tax preparation purposes. The city agreed to allow Molina to be reinstated for one day for the purpose of purchasing additional service credit from the Public Employees Retirement System. The contract recited that it was the entire agreement of the parties, and that it superseded prior and contemporaneous representations.

After his termination, Molina worked for a short while at another agency and then retired. He asked CalPERS to include \$200,000 of the settlement amount as his final annual salary or to treat \$875,000 as his salary for the last five years of employment with Oxnard. CalPERS declined to inflate his final compensation under either alternative. Although Molina appealed this decision, the CalPERS board denied his administrative appeal.

Molina petitioned the court to set aside the board’s decision and provide him a pension calculated on the basis of a \$200,000 annual salary. The trial court denied the petition, and Molina appealed.

Characterization of Settlement Amount

Molina contended that the settlement contract authorized him to characterize what portion of the \$875,000 was back salary and what was tort damages. The court found the agreement clearly provided that Oxnard, not Molina, would characterize the settlement amount. Since the contract was an integrated writing, which stated it was the entire agreement of the parties, any oral understandings that Molina and the city had reached before or at the time of signing the agreement could not be used to change the terms of the written contract.

In addition, since the agreement allowed Molina to disclose the letter only for tax purposes, the court held that Oxnard also did not have the authority to dictate how the settlement payment should be treated for retirement purposes. The court pointed out that CalPERS had advised both parties that a portion of the settlement amount could be used to calculate Molina’s pension only if he were reinstated for a full year with a legitimate salary based on a salary schedule. Molina, however, was reinstated for only one day.

PERL Defines Compensation

One factor in a pension calculation is “final compensation,” a term that is defined as the “highest average annual compensation earnable by a member” during a consecutive three-year period. Government Code Sec. 20636 defines “compensation earnable” as the member’s “payrate” plus “special compensation.” Both payrate and special compensation are limited to amounts paid to similarly situated employees. The payrate is the monthly cash compensation that is paid in accordance with “publicly available pay schedules.” Special compensation is an additional payment received for special skills or work conditions that is payable “pursuant to a labor policy or agreement or as otherwise required by state or federal law” to similarly situated employees.

The court advised that “a participant’s specific pension benefit depends on ‘final compensation,’ which will not increase without a rise in ‘payrate’ or ‘special compensation.’” It cited a similar case to show that a pay increase may not be included in a pension calculation if it does not meet the legal requirements. In *Prentice v. Board of Administration* (2007) 157 Cal.App.4th 983, 2007 Cal.App. LEXIS 2001, a city manager was given a raise just before retirement, but the increased pay rate was not disclosed in a published salary schedule. CalPERS refused to use the raise to calculate his pension because it was not part of his payrate or special compensation.

Similarly, Molina’s published annual payrate was \$102,000, not \$200,000. Since he never worked in a position with a \$200,000 payrate and did not show that he was entitled to special compensation available to similarly situated employees, there was no legal basis for his assertion that \$200,000 of the settlement amount should factor into his pension benefit.

The court emphasized that the amount Molina claimed as back pay on his state and federal income tax returns was not “compensation earnable” for retirement purposes unless it met the narrow definitions in the PERL. (*Molina v. Board of Administration, California Public Employees Retirement System* [2011] 200 Cal.App.4th 53, 2011 Cal.App. LEXIS 1328.)

CPER Journal Online

Meetings of Labor/Management Benefits Committee Are Exempt From Brown Act

The Los Angeles Community College District and the unions representing its employees entered into a "Master Agreement" to establish a Joint Labor/Management Benefits Committee. The purpose was to ensure common benefits throughout the district, since the six unions previously had bargained varying coverage for their bargaining units.

The committee was authorized to review the district's health benefits plans, make changes to plans to contain costs while maintaining benefits of the employees, and make recommendations to the board of trustees of the district. The committee comprised one voting representative from the district, one from each union, one non-voting member from the district, and a chair. Any action by the committee required the district representative and all but one union representative to vote in favor of the action at a meeting that had a quorum of the district member and five union representatives. Proposed changes in benefits had to be approved by the board of trustees. The board adopted a rule that created the committee in accordance with the Master Agreement.

Richard McKee, on behalf of Californians Aware, sent a letter demanding that the district acknowledge that the JLMBC was a legislative committee subject to the Brown Act, which requires that public bodies hold meetings open to the public. The chair of the committee responded that the committee was not a Brown Act committee.

Californians Aware and others petitioned the court to order the committee to comply with the Brown Act. The trial court denied the petition on the grounds that the Educational Employment Relations Act provides labor negotiations are exempt from the Brown Act. The petitioners appealed.

The Brown Act requires local agencies to hold meetings open to the public. It applies to committees created by formal action of a legislative body. The petitioners contended that the JLMBC was a legislative body because the district board created it by entering into the Master Agreement and adopting the rule establishing the committee. They contended that the committee was not a public school employer under EERA and was therefore not exempt from the Brown Act.

In 2009, the state attorney general issued an opinion that the JLMBC was not subject to the Brown Act because Section 3549.1 of EERA exempts "[a]ny meeting and negotiating discussion between a public school employer and a recognized or certified employee organization." Since health benefits are within the scope of bargaining, and the JLMBC was a product of collective bargaining, the A.G. found the committee played a continuing role in the bargaining process. The A.G. advised that the committee was not a legislative body subject to the open meetings law.

The court agreed that "the JLMBC was created as part of, and for the purpose of furthering, the collective bargaining process under the EERA and, as such, is not subject to the provisions of the Brown Act." It turned aside the contention that the committee was not a public school employer. EERA provides that a public school employer "or such representatives as it may designate...shall meet and negotiate," the court pointed out. The district members on the committee are clearly representatives, the court declared.

Belatedly, the petitioners contended that EERA itself requires public notice, but the court ruled the claim was forfeited because it had not been raised in the petition. The court affirmed the trial court's judgment denying the petition. (*Californians Aware v. Joint Labor/Management Benefits Committee* [2011] 200 Cal.App.4th 972, 2011 Cal.App. LEXIS 1412.)

CPER Journal Online

Lack of Funding, Not Complaints, Led to U.C. Whistleblower's Layoff

A staff researcher angered the professor in charge of her unit, but her whistleblower complaint was not the motivation behind her layoff, arbitrator Paul Staudohar found in a case involving the School of Veterinary Medicine at the Davis campus of the University of California. The grievant was one of 12 employees scheduled for layoff during the economic downturn that affected her unit, the Veterinary Genetic Laboratory.

The grievant had been working for 22 years in the laboratory, which conducted paternity testing for cattle and horse breeders and breeder registries. The VGL was funded solely by revenue from its services. It also had an arm that performed research on genetic diseases of several animal species, but that section brought in no funding.

In 1997, a renowned professor became director of the VGL. Within a few years, he shifted the grievant from her duties on the service side of the laboratory to research assignments. In 2002, he promoted her to staff research associate IV supervisor and put her in charge of the canine research unit. She conveyed her discomfort with the assignment because she did not feel she had the qualifications for the job.

The grievant became even more uncomfortable when the director hired a new Ph.D. who had worked as a dog geneticist at the Berkeley campus. The new employee was surprised to find he was working under the grievant. Initially, the director refused to switch their roles but finally gave in at the grievant's insistence in 2006. The grievant was reclassified as a staff research associate IV.

In 2007, the grievant noticed the director's attitude toward her had changed. She also found questionable the way he handled funds and behaved abusively toward employees. The director had begun to pressure the new canine research supervisor to become more productive and start publishing.

In October 2008, the grievant took her concerns to the associate dean of the veterinary school. Two weeks later, the director called the grievant into his office and accused her of being disloyal and stabbing him in the back. After this meeting, the director seemed more curt with the grievant. They began to exchange emails rather than speak face-to-face. He moved a canine research project to his own laboratory.

Although the associate dean continued to meet with her, the grievant felt nothing was being done about her complaints. She filed a formal whistleblower complaint in February 2009, alleging corruption, fraud, economic waste, and other malfeasance. That same day, the director and the VGL's management officer met with the grievant to discuss her job duties once the canine research supervisor's contract ended in April 2009. They informed her that she would continue her research but her group would be combined with another group under a different supervisor. She requested to move back into the service unit and offered to take a demotion, but the director refused.

A week later, the director called her into a meeting and angrily told her that her complaints were foolish and would hurt her. Subsequently, the grievant felt that other faculty members began to treat her poorly. According to the grievant, her new supervisor told her that she would like to lay her off and that the grievant was foolish for having filed complaints against the director.

In April 2009, the grievant's whistleblower complaint was denied, but was forwarded to the vice provost because it presented possible violations of the faculty code of conduct.

Due to the recession, and to a reduction in business, the director decided to make budget cuts. The grievant's new supervisor was on the committee that made the decision to lay off employees. In May, the grievant and 12 other VGL employees received notice of layoff. At the same time, the VGL hired a new postdoctoral scholar to do canine research.

The grievant claimed that her layoff was in retaliation for her whistleblower complaint and her complaints to the associate dean. She also pointed out that she would not have been laid off if the director had

allowed her to demote to a staff research associate III position because she had more seniority than the three other SRA IIIs. In addition, she asserted that the VGL found funding for two of the employees who received layoff notices and for the new postdoctoral canine researcher.

Arbitrator Staudohar found that the director and others in the VGL unit knew that the grievant had complained to the associate dean, but thought it “doubtful” that the chancellor’s office would have notified the director of the whistleblower complaint. He found no convincing evidence the director knew about the whistleblower complaint before the layoff decision was made.

The arbitrator believed the grievant’s assertions that the director had reacted angrily after finding out about her complaints to the associate dean, but found “no clear indication that he had acted on the basis of these emotions” when making the layoff decision. Therefore, Arbitrator Staudohar concluded that the grievant’s layoff was not in retaliation for her complaints.

In addition, he found that the grievant would have been laid off whether or not her whistleblower conduct contributed to the layoff decision. The VGL’s revenue was down because breeding of race horses declined during the recession and fewer foals needed to be registered. The grievant’s canine research group brought in no revenue. The grievant could not bump any other SRA IVs because there were none, and university practice did not allow her to bump SRA IIIs. While two employees who originally had been served with layoff notices remained employed in the unit, the arbitrator found that one was retained because she had a dual appointment with another unit that had grant funding, and the other was returned after she won a grievance hearing.

The evidence showed the university’s audit office had reviewed the financial analysis leading to the layoffs and found it appropriate. It concluded the new postdoctoral researcher was hired for only one year with money legally borrowed from another program under the VGL director’s supervision. Therefore, Arbitrator Staudohar found no improper university action and denied the grievance. (*Grievant and University of California Davis* [10-1-10] 17 pp. *Representatives*: Peter M. McEntee (Beeson Tayer & Bodine) for the grievant; Danesha N. Nichols for the university. *Hearing Officer/Arbitrator*: Paul D. Staudohar.)

CPER Journal Online

Resources

New Disability Discrimination Pocket Guide Edition for Public and Private Sectors

Disabled California workers generally turn to two statutes to remedy workplace disability discrimination: The federal Americans with Disabilities Act (ADA) and the California Fair Employment and Housing Act (FEHA). This guide covers both, including the ADA Amendments Act of 2008 (ADAAA) and EEOC regulations which became effective May 24, 2011.

This new second edition includes

- Similarities and differences between the FEHA and the ADA...including new ADAAA regulations that lower the standard for a showing of disability under the ADA; that eliminate the court-made requirement that an impairment substantially limit the individual's ability to engage in tasks that are of "central importance" to the individual's life, not just to his/her work; that lower the standard for showing when an individual is regarded as having a disability under the ADA; and that provide the definition of "disability" is to be broadly construed in favor of coverage.
- References to the text of the law and the agencies' regulations that implement the statutory requirements;
- A discussion of other legal protections afforded disabled workers, such as the federal Rehabilitation Act of 1973, the federal Family and Medical Leave Act and corresponding California Family Rights Act, and workers compensation laws;
- Major court decisions that interpret disability laws;
- A chart that compares the key provisions of the laws.

The guide, written by M. Carol Stevens and others at the law firm of Burke Williams Sorensen, is a valuable reference and training tool, and helpful to anyone who needs to understand disability discrimination laws that apply in both the public and private sectors in California.

The 117-page guide is \$20 (plus shipping). To order or see the Table of Contents, visit <http://cper.berkeley.edu>. For questions, email http://cperservices@berkeley.edu or call 510.643.7093.

"Meet the Arbitrator," an Opportunity for Advocates and Arbitrators

In both Northern and Southern California, the National Academy of Arbitrators is providing an opportunity for labor and management advocates throughout California to sit down with arbitrators outside the confines of a hearing room and talk about how they decide grievances. NAA's two California chapters created the forum for arbitrators, employee relations staff, union representatives, and attorneys from both sides of the table.

Choosing an arbitrator can be a major challenge. Frequently, parties are not familiar with some of the arbitrators on lists provided by the California State Mediation and Conciliation Service, Federal Mediation and Conciliation Service, or American Arbitration Association. Arbitrator Andria Knapp, coordinator of the Northern California Region's conference, explained that the purpose of the program is for practitioners and arbitrators to meet and talk informally with arbitrators — both long-established as well as newer members of the profession. Small, interactive roundtable discussions allow participants to learn how individual arbitrators view and decide common issues, to ask questions, to hear arbitrators discuss their differing opinions, and to give arbitrators feedback from the parties' perspective. To maximize exposure, arbitrators rotate among discussion groups after plenary sessions.

The NAA Northern California Region's next "Meet the Arbitrator" program is February 10 in Oakland, cosponsored by CSMCS, FMCS, and AAA. MCLE credit is provided. For information, email meet-the-arbitrator@earthlink.net. The Southern California Region's next program, cosponsored by the Los Angeles chapter of the Labor Employment Relations Association (LERA), is scheduled for fall 2012, reports Regional Chair Bob Steinberg.

The National Academy of Arbitrators, established in 1947, is a professional association of labor arbitrators, with about 650 members in the United States and Canada. Academy membership, based on strict admission standards, is evidence that the arbitrator is well established with broad acceptability. About 60 California arbitrators have been admitted to the Academy. Sara Adler of Los Angeles will become the next national president at the Academy's annual meeting in Minneapolis in June 2012.

The Academy's purpose is to improve understanding of labor arbitration through national and regional conferences, advocacy training, educational programs and publications. The Academy fosters the highest standards among arbitrators by seeking adherence to the *Code of Professional Responsibility for Arbitrators*. For information, including national meetings, directory of members, and text of the Code, visit <http://www.naarb.org>.

The NAA publishes *The Common Law of the Workplace: The Views of Arbitrators*, St Antoine, ed., 2^d edition (BNA Books, 2005). The *Proceedings of the Annual Meeting, National Academy of Arbitrators*, 1948 to present (BNA Books), provide a treasure trove of great thinking on arbitration issues and pragmatic practice advice from leading advocates and arbitrators (accessible online on NAA's website).

CPER was awarded a grant by the Academy's Research and Education Foundation to underwrite printing costs of the *Pocket Guide to Just Cause*, written by Academy members Bonnie Bogue and Katherine Thomson and published in 2010.

DVD by NAA Portrays Arbitration of Termination Case

The National Academy of Arbitrators' new educational DVD, "The Case of the Missing Money: Revisiting the Elements of Just Cause," portrays an arbitration in a termination case, including presentations by advocates and decisions by arbitrators. The DVD is designed for use by labor and management organizations, law schools, employee relations staff, and other academic and training programs.

The DVD captures an instructive and entertaining session from the Academy's annual meeting in San Diego in May 2011. The subject of the arbitration is the dismissal of a 20-year old soda delivery driver who finds \$400 on his route, keeps the money for himself, but then turns it over when his supervisor asks about the missing money at the end of the day. The DVD includes direct and cross-examination of a witness, and closing arguments, by skilled counsel. Decisions are then rendered by a panel of experienced arbitrators from the US and Canada, and by a system board of adjustment from the airline industry. Those in the audience attending the session also had an opportunity to decide the dispute.

Seventy-eight minutes in length, the DVD is available as a public service for \$35 (shipping and handling included) from the National Academy of Arbitrators Operations Center, One North Main Street, Suite 412, Cortland, NY 13045 [Tel: (607) 756-8363]. Accompanying the DVD is a brief essay outlining the issue of just cause in arbitration proceedings. The essay also includes postscripts about the session itself and a statistical analysis of the decisions of those in the audience. The DVD has a menu permitting viewers to focus on different facets of the program, such as witness examination techniques, while also allowing for discussion breaks.

The attorneys presenting the case, each with decades in the field, are Ira (Buddy) Gottlieb (Bush Gottlieb) for the union, and Lindbergh Porter (Littler Mendelson) for the employer. The arbitration panel includes Academy members Jules Bloch, Edna Francis, Joan Gordon, Kathleen Miller, and Lou Zigman. The airline system board is composed of management representatives Gerry Anderson (Air Tran/Southwest), Stephanie Babish (American Eagle), and Mark Moscicki (American), and union representatives Brett Durkin (APFA-American), Terry Taylor (AFA-Alaska), and Maria Torre (AFA-United). The witness is played Academy arbitrator Margaret Brogan. The moderator is Academy arbitrator Barry Winograd.

CPER Journal Online

Public Sector Arbitration Log

ATTENTION ATTORNEYS AND UNION REPS

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

- Arbitrability — Procedural
- Arbitrability — Substantive
- Benefits parity

Los Angeles Dept. of Water and Power and DWP Management Employees Assn. (4-11; 42 pp.)
Representatives: Cecil Marr, senior assistant city attorney, for the employer; Adam Stern (Myers Law Group) for the union. *Arbitrator:* Christopher D. Burdick..

Issues: Was the grievance timely? Was the grievance specific enough to comply with the arbitration clause? Did the employer violate the MOU by not providing benefits to the MEA unit that were at least equal to those granted to the other bargaining units?

Union's position: (1) The grievance is arbitrable. Each failure to pay proper benefits constitutes a continuing violation, so a timely grievance could be filed after any pay period. The grievance stated sufficient facts to satisfy MOU requirements.

(2) The department violated the MOU when it failed to provide to managerial employees 10 specific benefits that were at least equal to those provided to other bargaining units.

(3) Enforcing the MOU parity provision through arbitration does not usurp the city council's authority because the arbitrator is merely engaging in the ministerial task of implementing contract provisions already agreed on, and would not be writing the MOU anew for an unwilling party.

Employer's position: (1) Not a single contract violation proved was timely filed.

(2) Three of the claims were not mentioned during the grievance process and are not arbitrable.

(3) The MOU states that the level of benefits should be "at least equal" to those in other bargaining units; the evidence shows that the "level of benefits," including benefits unique to MEA, is greater than for any other bargaining unit.

(4) The contract requires the parties to address "level of benefits" issues through negotiations, not grievance arbitration. If the level of benefits should be found not equal, the sole remedy is to remand to the parties to bargain the issue.

Arbitrator's holding: The grievance is arbitrable. The grievance is denied on the merits.

Arbitrator's reasons: (1) The grievance was timely. The ongoing refusal to deal with the union's claims constituted a "continuing violation" allowing a grievance to be filed within 15 days of each pay period. The filing period would provide a limit on any backpay remedy.

(2) The grievance was specific enough to provide notice of the issues, and the employer had a chance during the grievance process to ask the union to identify the benefits that are allegedly not "equal."

(3) The MOU states "that appropriate differentials in salaries [will be] maintained between the Managers and their subordinates, and that Managers receive a level of benefits at least equal with those granted to other bargaining units." It does not define "benefits" despite 20 years of "incessant bickering" and several

modifications of the parity language.

(4) The MOU requires the parties annually to “meet and confer” to compare the total economic packages, and to determine if modification is required to assure the level of the managerial “benefits” are at least equal to those of subordinates. Past practice shows that bargaining sometimes resulted in a benefit improvement sought by MEA, but sometimes did not.

(5) The union showed certain valuable benefits received by another unit that are not granted to MEA. The employer showed that the composite “value” (economic or otherwise) of all “benefits” makes MEA’s overall benefit package more than comparable to those offered to subordinates’ units.

(6) Based on contract interpretation principles for resolving contract ambiguity, the phrase “level of benefits” means all benefits received, compared to benefits granted other bargaining units, measured on the same basis.

(7) Since MEA’s overall “benefit level” (albeit hard to quantify to the last dollar-and-cent) is comparable, if not superior, to other units, MEA failed to prove the parity clause was violated.

(8) Without a contract violation, there is no need to address the employer’s argument that the sole remedy to redress a benefit inequality would be to remand to the parties to bargain.

(Binding Grievance Arbitration)

- Discipline
- Sexual Harassment

County of Sacramento and Sacramento County Alliance of Law Enforcement (6-1-11; 10 pp.)

Representatives: Timothy D. Weinland (Office of County Counsel) for the employer; Daniel Thompson (Goyette and Associates) for the union. *Arbitrator:* Matthew Goldberg.

Issue: Did the employer have just cause to suspend the grievant for seven days?

Employer’s position: (1) Good cause exists for suspending the grievant for making an inappropriate, sex-based remark to a coworker, who filed a sexual harassment complaint.

(2) Through training, the grievant had notice that such remarks were inappropriate and were no longer tolerated.

(3) The grievance had received a four-day suspension within the prior 12 months for conduct unbecoming a county employee, so the seven-day suspension for violation of the county’s sexual harassment policy was for good cause.

(4) The union’s citation of State Personnel Board decisions is inapposite because the county is not bound by that precedent.

Union’s position: (1) The grievant has taken responsibility and admitted his conduct was inappropriate; the issue is whether the seven-day suspension is justified.

(2) State Personnel Board decisions on progressive discipline provide guidance and hold that discipline should be imposed to allow the employee to learn from mistakes and improve performance.

(3) The evidence does not support the charge of discourteous treatment as the grievant was not hostile, but rather made a “locker room joke” about a coworker, causing other employees to laugh; the grievant repeated the remark to the coworker so he would not be left out of the joke.

(4) Mitigating factors include the prior climate where such jokes were tolerated without repercussions, the grievant’s lack of intent to violate the harassment policy and his assurance it will not happen again, the dissimilarity between this instance and the basis for prior discipline, and the longevity of his satisfactory employment.

Arbitrator’s holding: The grievance is granted in part and denied in part; disciplinary action is sustained

but reduced from the suspension to a letter of warning.

Arbitrator's reasons: (1) Discipline is justified because the coworker was offended by the remark, prompting a harassment complaint, even though the grievant intended it in jest.

(2) The grievant's prior discipline was for misconduct occurring 20 months earlier and totally unrelated to sexual harassment, so the grievant's present misconduct did not show a pattern of being immune to correction or unwillingness to conform to expectations.

(3) Mitigating factors include lengthy service showing he is capable of learning from mistakes and performing satisfactorily. This incident was a one-time remark without malice or intent to provoke the coworker; his misguided humor was of the type previously tolerated as "mere shop talk"; although sex-based, his remark could not be considered harassment or even remotely creating a hostile work environment. In addition, the coworker had responded to the grievant's remark "in kind" with a sexually derogatory statement of his own, but was not disciplined.

(4) The grievant exhibited suitable remorse, and admitted his mistake to his supervisor even before the investigation began.

(5) The evidence is clear and convincing that the suspension was inordinately severe for the offense; it must be reduced to a letter of warning and the grievant made whole.

(Binding Grievance Arbitration)

- Procedural Arbitrability
- Layoffs
- Work Out of Class

City of Oakland and Service Employees International Union, Loc. 1021 (6-2-11; 7 pp.)

Representatives: Jennifer Chin, deputy city attorney, for the employer; Anne Yen (Weinberg Roger & Rosenfeld) for the union. *Arbitrator:* C. Allen Pool (CSMCS Case No. ARB-10-0152).

Issue: Was the grievance arbitrable? Were painters properly laid off?

Union's position: (1) The grievance is procedurally arbitrable as the union moved the grievance to the next step within the time limits in the grievance procedure.

(2) The city violated the MOU and personnel rules when it laid off five employees in the painter classification, but retained employees in the traffic painter and electrical painter classifications, and then had employees in the latter two classifications work out of class, performing duties of the painter classification.

(3) If the city wanted to use painting workers interchangeably, it was required to meet and confer over consolidating painter classifications, but it failed to give notice and the opportunity to meet and confer before it laid off only painters and shifted their duties to the classifications of traffic painters and electrical painters, who were retained.

Employer's position: (1) The grievance is not arbitrable because the union moved it to the third step and then to the fourth step (arbitration) prematurely, before the city had responded.

(2) The city complied with the MOU when it laid off only employees in the painter classification in seniority order, due to a severe budget deficit that eliminated funding for the maintenance painting done by the painters classification.

(3) The city did not work employees out of class when it had workers in all three classifications do graffiti abatement before the layoff, and then continued that work with only traffic and electrical painters after the layoff of employees in the painter classification. It was within its management rights to discontinue maintenance painting.

Arbitrator's holding: The grievance is arbitrable. The grievance is denied.

Arbitrator's reasons: (1) The city failed to respond to the grievance at step 2 and 3 within the time allowed; the grievance procedure provides that if the city does not respond within the time limit, the grievance will be moved to the next step. The union properly moved the grievance forward at steps three and four after the city failed to respond on time. Therefore, the grievance is procedurally arbitrable.

(2) In response to a budget cut, the city properly laid off employees by seniority in the painter classification, without violating the MOU layoff provisions or personnel rules.

(3) The decision to limit painting functions after the layoff to graffiti removal, traffic painting, and electrical painting, and to cease maintenance painting of buildings previously performed by the painter classification, was within the city's managerial discretion to exercise control over its organization and operations.

(4) Traffic painters and electrical painters assigned to do graffiti removal were not working out of class. The job descriptions for all three classifications state: "Duties may include, but are not limited to, the following:" allowing the city discretion to assign graffiti removal to any of the classifications. No evidence shows any intent to modify those classifications, so no duty to meet and confer or comply with personnel rules governing classifications arose.

(Binding Grievance Arbitration)

- Discharge
- Dishonesty
- AWOL
- Medical Leave

City of Oakland and Oakland Police Officers Assn. (7-12-11; 14 pp.) *Representatives:* Tracy A. Chriss, deputy city attorney, for the employer; Justin E. Buffington (Rains Lucia Stern) for the union. *Arbitrator:* Joseph F. Gentile (CSMCS Case ARB-09-0399).

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

Employer's position: (1) The city had just cause to terminate the grievant for absence without leave for the 15 days he failed to return to work after the doctor cleared him to return to duty without restrictions.

(2) The city had just cause to terminate the grievant for dishonest and misleading statements when he falsely claimed, in the investigation into his absence, that he did not return to work because the medical unit clerk had told him she was still looking for a "light duty assignment" after the doctor had cleared him to return without restrictions.

Union's position: (1) The city did not have just cause to terminate the grievant.

(2) The grievant was absent because the doctor restricted him to light (desk) duty because of an injured elbow. He did not return to work because the medical unit clerk told him she was still looking for a light-duty position, even after the doctor cleared him to return to regular duty. He did return after his follow-up appointment that confirmed he could return without restriction.

Arbitrator's holding: The grievance is denied.

Arbitrator's reasons: (1) The grievant's claim that the medical clerk told him she was still looking for a light-duty assignment, after the doctor had cleared him to return to full duty, is not credible. The medical clerk's statement in the I.A. investigation is substantiated by emails she sent at the time, indicating he was cleared to return to work and that she was no longer searching for a light-duty position.

(2) The grievant was AWOL for 15 days after the doctor cleared him to return to full duty; he had no basis for believing his absence was approved between that date and the date of his follow-up appointment.

(3) The grievant was dishonest when he falsely claimed the medical clerk had told him he need not return to work because she was still seeking a light-duty assignment.

(4) No mitigating circumstances exist for reducing the level of discipline imposed for the two serious rule violations.

(Binding Grievance Arbitration)

- Discharge
- Dishonesty
- Falsifying documents

County of Sacramento and Stationary Engineers Loc. 39 (8-25-11; 12 pp.) *Representatives:* Timothy Weinland, deputy county counsel, for the employer; Leslie Freeman (Weinberg Roger & Rosenfeld) for the union. *Arbitrator:* Katherine J. Thomson.

Issue: Did the employer have good cause to discharge the grievant?

Employer's position: (1) The county had good cause to terminate the grievant for falsifying an FMLA leave certification that he submitted to authorize his leave to care for his wife when she was receiving treatment for a serious medical condition.

(2) The grievant changed the doctor's notation, which authorized "8 hours and/or 1 days per month," by marking out the "8" and changing the "1" to "21" days per month.

(3) The county has a consistent policy of terminating all employees found to be dishonest.

(4) The contract requires the arbitrator to sustain the discharge unless the level of discipline imposed was an "abuse of discretion."

Union's position: (1) The grievant acknowledged that he changed the form because he believed the doctor had made a mistake in approving only one day a month, since he was not sure how much time he might need to take off to care for his wife after her monthly treatments, and because he knew she had surgery scheduled within two months of when the FMLA form was submitted.

(2) The county has not established the grievant intended to be dishonest; rather, he was confused by the form, honestly thought the doctor had made a mistake, and wanted to avoid the hassle of having the doctor prepare a form that accurately indicated the leave he would need. In the past, the doctor had not filled in the number of days and the grievant had been allowed to take intermittent leave as needed.

(3) The grievant had no union representation because he elected not to request a rep when he was told the most that could result from the meeting, which he had himself requested to clarify the form, would be a short suspension.

(4) Termination was an abuse of discretion. Other cases of dishonesty that resulted in termination are not comparable. The grievant did not benefit as he took no leave based on the FMLA form, before going out on leave for his own back injury.

Arbitrator's holding: The grievance is sustained in part and denied in part.

Arbitrator's reasons: (1) There is no dispute that the grievant's wife had a serious medical condition for which he was entitled under the FMLA to take intermittent time off.

(2) He may have been confused by the form; the evidence is not convincing that he intended to defraud the county; he worked two weeks after turning in the form without taking any FMLA leave, until his own injury.

(3) Nevertheless, he intended to deceive the county by altering the form, rather than going through the hassle of having the doctor change it, because he wanted the county to think he would need more than one day a month.

(4) For that deception, the county had good cause to discipline the grievant. However, the county abused its discretion by imposing the "standard" penalty of discharge for dishonesty.

(5) The county abused its discretion by failing to consider the circumstances that distinguished this case from prior discharges for dishonesty, including his 20 years of service, his good performance record, the

fact he had gained no pay or leave to which he was not entitled and had taken nothing of value by altering the form, and had not been dishonest when discussing the form with management. His misconduct is distinguishable from the serious misfeasance of other employees previously discharged for dishonesty.

(6) The county had good cause to impose substantial discipline in the form of a 60-day suspension, but not discharge.

(Binding Grievance Arbitration)

CPER Journal Online

Public Employment Relations Board 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. They may be found in the PERB Activity Report. Cases are arranged by statute – the Dills Act, EERA, HEERA, MMBA, TEERA, the Trial Court Act, and the Court Interpreter Act – and subdivided by type of case. In-depth reports on significant board rulings and ALJ decisions appear in news sections above. The full text of cases is available at <http://www.perb.ca.gov>.

DILLS ACT CASES

EERA CASES

HEERA CASES

MMBA CASES

DILLS ACT CASES

Unfair Practice Rulings

Exceptions to proposed decision withdrawn and complaint dismissed following parties' settlement agreement: DPA/DCR.

(California Correctional Peace Officers Assn. v. State of California [Dept. of Personnel Administration/Dept. of Corrections and Rehabilitation], No. 2197-S, 8-22-11, 3 pp. By Member Huguenin, with Chair Martinez and Member McKeag.)

Holding: In light of the parties' settlement, the request to withdraw the exceptions to the ALJ's proposed decision and to dismiss the complaint was granted.

Case summary: The association filed an unfair practice charge alleging that DPA/DCR violated the Dills Act by failing on four occasions to execute a written document memorializing an agreement the parties had reached. An administrative law judge issued a proposed agreement, and DPA/DCR filed exceptions.

While the matter was pending before the board, the parties notified PERB that they had reached a settlement in this case, and requested that the matter be dismissed. The board found the settlement to be in the best interests of the parties and consistent with PERB law. Accordingly, the board agreed to the withdrawal of DPA/DCR's exceptions and considered the underlying charge withdrawn. The board also directed that the complaint be dismissed and the proposed decision of the ALJ vacated.

Unilaterally enacted furlough plan ratified by legislature does not violate act: State of California (DPA).

(Union of American Physicians and Dentists v. State of California [Dept. of Personnel Administration], No. 2210-S, 10-13-11, 6 pp. By Member Dowdin Calvillo, with Chair Martinez and Member McKeag.)

Holding: The Dills Act does not limit the legislature's authority to enact unilateral changes to terms and conditions of employment regardless of funding source.

Case summary: The charging party alleged that DPA violated the Dills Act when it unilaterally implemented a plan to furlough state employees three days a month pursuant to an executive order issued by the governor. While the charge was pending before a board agent, an Alameda County Superior Court judge granted a writ of mandate brought by the union and other employee organizations. He concluded that the furloughs were invalid as applied to employees performing services funded by special funds, including federal funds, rather than by the general fund. The state appealed that ruling.

Additionally, while the charge was pending before the board agent, the California Supreme Court in *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal. 4th 989, 201 CPER 47, held that, while the emergency exception in the Dills Act found in Sec. 3516.5 did not authorize the governor to implement the furloughs, the legislature had the authority to modify terms and conditions of employment without collectively bargaining. By adopting the budget acts of 2008 and 2009, the legislature effectively ratified the governor's furlough orders, the court held.

Relying on this ruling, the board in *State of California (DPA)* (2010) Dec. No. 2152-S, 201 CPER 71, reached the same result, holding that the legislature's action in authorizing the furlough plan and revising the budget acts did not violate the act.

Based on these rulings, the board agent dismissed the instant charge. The union appealed the dismissal of its charge to the board, and the state filed an opposition to the appeal.

While the appeal was pending before the board, the First District Court of Appeal in *Union of American Physicians and Dentists v. Brown* (2011) 195 Cal.App.4th 691, 202 CPER online, held that the governor could lawfully furlough state employees paid from federal funds. The appellate court relied on the Supreme Court's ruling in *PECG v. Schwarzenegger*, which held that the legislature's action operated to validate the furloughs regardless of funding source. The Supreme Court declined to review *UAPD v. Brown*.

The board found that the court's decision in *UAPD v. Brown* was dispositive of the issue before PERB. As determined by the courts in *PECG v. Schwarzenegger* and *UAPD v. Brown*, the board stated, the Dills Act does not limit the legislature's authority to enact unilateral changes to terms and conditions of employment, and no exception to this rule exists for federally funded employees.

The board upheld the dismissal without leave to amend.

EERA CASES

Unfair Practice Rulings

CSEA's request to withdraw unfair practice charge granted: Red Bluff UHSD.

(California School Employees Assn. and its Chap. 354 v. Red Bluff Union High School Dist., No. 2193, 8-5-11, 2 pp. By Member McKeag, with Chair Martinez and Member Dowdin Calvillo.)

Holding: The association's request to withdraw the complaint and underlying unfair practice charge was granted.

Case summary: The charging party alleged that the district violated EERA when it recommended that the board of trustees not ratify a tentative agreement previously reached by the parties. CSEA thereafter notified the board that the parties had settled their dispute, and asked that it be permitted to withdraw the complaint and unfair practice charge. Finding withdrawal to be in the best interest of the parties and consistent with the purposes of the act, the board granted CSEA's request.

Insufficient facts alleged to demonstrate DFR breach: AFT Part-Time Faculty United, Loc. 6286.

(Peavy v. AFT Part-Time Faculty United, Loc. 6286, No. 2194, 8-12-11, 15 pp. By Member Dowdin Calvillo, with Chair Martinez and Member McKeag.)

Holding: The union's decision not to represent the charging party or take his grievance to arbitration was not devoid of honest judgment, and did not deprive him of his right to pursue his claim on his own behalf.

Case summary: The charging party alleged that the union breached its duty of fair representation when it failed to represent him in his grievance against the Victor Valley Community College District.

Contrary to the board agent, PERB found that the charge was timely filed. It noted that the union offered

the charging party some form of ongoing assistance for a four-month period ending two months before the charge was filed; during that time, he was not aware that further assistance from the union was unlikely.

The board found that the charging party failed to allege facts that demonstrate the union's conduct breached its duty of fair representation. The charging party actively pursued his claim on his own behalf without union assistance; any negligence on the part of the union did not foreclose any remedy or interfere with his right to pursue his claim.

Moreover, the board noted, the union played a role in processing the grievance. Absent evidence of arbitrary, discriminatory, or bad faith conduct, the board said, a union's decision to provide representation in a manner contrary to the wishes of the bargaining unit member does not violate the duty of fair representation. The union's failure to present Peavy's counteroffer to the district did not show a violation of the duty.

The fact that the charging party incurred travel expenses as a result of representing himself is not an issue before the board, PERB said. The issue is whether the union's inaction extinguished the charging party's right to pursue his claim. The charging party failed to establish that "essential element."

The union's decision not to take the charging party's grievance to arbitration was based on a rational, good faith determination that it would be better to strengthen the contract language at issue in the grievance during negotiations rather than risk an unfavorable arbitration award. The question is not whether the union's decision was correct, but whether it was the product of honest judgment, PERB instructed. It found no evidence that the decision not to arbitrate the grievance was arbitrary or lacking in good faith.

Finally, the board dismissed the charging party's assertion that the union's refusal to represent him in his grievance was disparate treatment as the union handled the grievances of three other part-time faculty members. The board found no allegations demonstrating that the other grievances arose under similar circumstances or any facts concerning the nature of the other employees' grievances. The mere fact that all three grievances may have involved the same issue of class assignments is insufficient to establish discrimination, the board noted, because grievances raising the same issue may have different bases. In addition, since the charging party expressly chose to file a grievance and represent himself, he was not similarly situated to the other employees.

Appeal of dismissal withdrawn after parties reach settlement: Mendocino County Office of Education.

(Mendocino County Federation of School Employees, American Federation of Teachers, Local 4345 v. Mendocino County Office of Education, No. 2200, 9-8-11, 2 pp. By Chair Martinez, with Members McKeag and Huguenin.)

Holding: AFT's request to withdraw its appeal of the dismissal of its unfair practice charge was granted.

Case summary: The charging party alleged that the employer failed to meet and negotiate in good faith. A board agent dismissed the charge, and AFT filed an appeal.

Thereafter, AFT notified the board that the parties had reached an amicable resolution of the matters that formed the basis for the unfair practice charge, and that it sought to withdraw its appeal of the dismissal and the underlying charge.

The board noted that PERB Reg. 32625 provides that requests for withdrawal of a charge before a complaint has issued "shall be granted." The board also found that settlement of the dispute was in the best interests of the parties, effectuates the purposes of the act, and is consistent with the board's mission to promote harmonious labor relations. Accordingly, the board granted AFT's request to withdraw its appeal and the underlying charge.

Side letter not automatically terminated by execution of subsequent MOU: Palomar CCD.

(Council of Classified Employees/AFT, Loc. 4522 v. Palomar Community College Dist., No. 2213, 10-27-11, 11 pp. By Member McKeag, with Members Dowdin Calvillo and Huguenin.)

Holding: The district did not make a unilateral change in policy when it processed a letter of reprimand under the terms of a side letter that predated the MOU.

Case summary: In 2008, the district's police chief issued an official letter of reprimand to police officer Perez. The district advised the union, Perez's representative, that an appeal would be heard by the vice president of student services under the terms of a side letter executed by the parties in 2005. The disciplinary procedures set out in the side letter applied to reprimands, which were excluded from the procedures set out in the terms of the memorandum of understanding.

In this case, the union alleged that the district's reliance on the procedures articulated in the side letter was a unilateral change. It reasoned that the side letter was no longer in effect as of February 2006, when the parties modified their MOU.

An administrative law judge dismissed the unilateral change charge, finding that the 2005 side letter was in effect when the letter of reprimand issued. Therefore, the district did not make any change in policy when it relied on the side letter in processing the letter of reprimand.

On appeal, the board reviewed two of its prior decisions addressing the duration of side letter agreements. In *Lodi USD* (2001) No. 1452, 150 CPER 89, the ALJ found that a written side letter which included a salary schedule for certain food service employees had expired when the parties negotiated a new collective bargaining agreement. The board found that the side letter remained in effect after a new collective bargaining agreement was reached by the parties, even though the side letter did not, by its own terms, continue.

In *City of Riverside* (2009) No. 2027-M, 196 CPER 90, the board found that language included in a subsequently negotiated memorandum of understanding governed whether a grievance settlement expired when a new MOU was reached.

In this case, the board read the *Riverside* decision to mean that, absent a provision in an MOU or agreement between the parties, the side letter did not automatically expire upon the ratification of a subsequently negotiated MOU.

In an effort to harmonize the *Lodi* and *Riverside* decisions, the board said that a side letter is an agreement that typically modifies, clarifies, or interprets an existing provision in an MOU or addresses an issue of interest to the parties that is not otherwise covered by the MOU. "At its most basic," the board said, "a side letter is a contract between the parties" and its duration "is dictated by the provisions of the side letter itself (either express or implied) or by the subsequent conduct of the parties." Therefore, PERB said, absent a provision in the MOU, an agreement, or "other evidence demonstrating the parties intended it to expire, a side letter does not automatically expire upon the ratification of a subsequently negotiated MOU."

In this case, the board noted that the 2005 side letter did not contain an express provision concerning its duration, and was negotiated to fill a gap in the MOU regarding lesser discipline for the district's police officers. The board concluded that the parties likely intended the procedures set out in the 2005 side letter to remain in effect at least as long as the discipline policies of the contract excluded warnings and reprimands. The board also observed that the 2006 MOU lacked a merger clause, an integration clause, a supersession clause, and an "entire agreement" clause, a zipper clause, or any other provision that would terminate, modify, or extinguish the 2005 side letter. Therefore, the board concluded, the 2005 side letter was still in effect when the district issued the letter of reprimand to Perez, and the district did not make a change in policy when it processed Perez's letter of reprimand under the terms of the 2005 side letter.

Representation Rulings

Dean of instruction, director of international studies are management employees, not appropriately included in petitioned-for bargaining unit: Santa Barbara CCD.

(Santa Barbara Community College Dist. and Teamsters Local Union No. 186, No. 2212, 10-26-11,

7 pp. By Member McKeag, with Members Dowdin Calvillo and Huguenin.)

Holding: The dean of instruction and the senior director of international studies are managerial employees and should not be included in the petitioned-for unit.

Case summary: The Teamsters filed a petition seeking recognition as the exclusive representative of a unit of the district's certificated deans and certificated directors. A board agent found that the proposed unit was an appropriate bargaining unit. The B.A. found that positions to be included in the unit were the associate dean of career technical education; the associate dean of physical education/health education/dance and athletic director; the senior director of international students and services/study abroad; the director of Kinko's early learning center; the dean of instruction; and the dean of continuing education; but excluded were the positions of deans of education programs and the director of extended opportunities, programs, and services.

The board agreed with the B.A.'s findings with two exceptions. It concluded that the dean of instruction and the senior director of international studies should not be in the petitioned-for unit.

PERB found that the dean of instruction is properly designated a management employee. Duties of the incumbent involve independent planning and organization of the programs in the continuing education department and formulating district policies as well as administering programs. The essential duties of this position, said the board, include the responsibility to develop and enforce policies and procedures for faculty, students, and the community. The board found that the dean of instruction position is similar to that of the deans of educational programs, designated as management positions. The board found that the dean of instruction plays a significantly larger role in formulating policies for the continuing education program than did the academic deans deemed non-management employees in *Grossmont-Cuyamaca CCD* (2008) PERB No. 1958, 191 CPER 88.

The board also found that the senior director of international students is properly designated as management. With regard to the study abroad program, the senior director operates with a high degree of independence, formulates initiatives, and solves problems related to the program. The incumbent is responsible for initiating and developing contracts to support the program and makes recommendations regarding student tuition. She travels internationally on behalf of the district, inspects new facilities, and serves as "the face" of the district in the international community. Accordingly, the senior director position should be excluded from the petitioned-for unit.

Duty of Fair Representation Rulings

Basis for seeking disqualification of board agent addressed by PERB: UTLA

(*Adams v. United Teachers of Los Angeles*, No. 2205-E, 9-27-11, 12 pp. + 15 pp. B.A. dec. By Member Huguenin, with Members McKeag and Dowdin Calvillo.)

Holding: The charging party failed to demonstrate that the board agent held a fixed anticipatory prejudice against him that established a basis for disqualification.

Case summary: The charging party alleged that the union breached its duty of fair representation by failing to file grievances and enforce rights under a settlement agreement. A board agent dismissed the charge, finding that the charging party failed to state a prima facie case. The board agent also denied the charging party's request that he disqualify himself.

On appeal, the board adopted the B.A.'s dismissal of the charge, but reviewed separately the charging party's allegation of bias and the basis for his request that the B.A. disqualify himself.

The board explained that, pursuant to PERB Reg. 32620, a board agent has a duty to assist the charging party to state his or her case in the proper form, to answer procedural questions, and to facilitate communication and exchange of information between the parties. However, the board cautioned, despite these duties, the ultimate responsibility to state a clear and concise statement of the facts that form a prima facie case remains with the charging party.

Here, the board agent satisfied this duty. He communicated on several occasions with the charging party,

allowed him to amend his charge three times, and issued warning letters outlining the deficiencies of the charge.

The board next turned to the standards for disqualification of a board agent found in PERB Reg. 32155. Any party may request that a board agent disqualify himself or herself “whenever it appears that it is probable that a fair and impartial hearing or investigation cannot be held by the Board agent to whom the matter is assigned.” Citing PERB precedent, the board reiterated that a “fixed anticipatory prejudgment” against a party must be shown to establish “prejudice.” Such prejudice is established through statements or conduct of the board agent indicating a clear predisposition against a party, PERB explained. Adverse rulings by a board agent in a previous case, or erroneous legal or factual rulings do not, in themselves, indicate prejudice.

Applying these standards in this case, the board agent’s statements in a warning letter did not demonstrate bias, the board said, but rather a candid and appropriate appraisal of the charging party’s allegations. They did not show a fixed anticipatory prejudgment against him. The fact that a different board agent dismissed the charging party’s prior unfair practice charge does not show bias of the board agent in this case.

Nor did the board agent ignore the charging party’s amendments to his current unfair practice charge, miscalculate the statute of limitations, or erroneously find his amendment to the charge tardy. The board agent’s statement that the charging party could file his own grievances against his employer, the Los Angeles Unified School District, did not demonstrate bias.

No allegations of DFR breach presented in unfair practice charge: California School Employees Assn. and its Chap. 724.

(Davis v. California School Employees Assn. and its Chap. 724, No. 2208, 10-6-11, 4 pp. + 14 pp. B.A. dec. By Member Dowdin Calvillo, with Chair Martinez and Member McKeag.)

Holding: The charging party failed to demonstrate that the association breached its duty of fair presentation by failing to adequately assist her in processing various complaints concerning her employment with the San Diego USD.

Case summary: The charging party alleged that CSEA failed to process her complaints in the manner she desired, changed representatives during a mediation session, and met with the district during mediation outside of her presence. The board agent found many of the allegations were outside the limitations period. The board agent rejected the contention that the charging party’s discovery of new information about the prior events brought the prior events within the limitations period.

The board agent found that the selection of a union representative is an internal union activity not subject to PERB review and found insufficient evidence that the union’s decision to change representatives was arbitrary, discriminatory, or exercised in bad faith. The board agent also noted that the charging party failed to allege facts concerning the result of the mediation or the subject matter of the union’s discussion outside the charging party’s presence.

The allegation that a union representative made a disparaging comment about the charging party to another union representative does not support a DFR charge, the B.A. said, because the union continued to pursue her grievance.

On appeal, the board summarily affirmed the board agent’s dismissal of the charge. The board also found that the appeal from the dismissal failed to satisfy the requirements of PERB Reg. 32635(a) by stating the specific issues of procedure, fact, law, or rationale to which the appeal is taken. Rather, the board said, the charging party merely restated the facts alleged in the charge and the arguments made before the board agent. The board also found no good cause to consider new evidence and factual allegations presented for the first time on appeal. PERB found no reason why these allegations could not have been included in the original or amended charge.

HEERA CASES

Unfair Practice Rulings

Dismissal of issues pending on appeal ‘honors’ the parties’ settlement agreement: CSU.

(California State University Employees Union v. Trustees of the California State University [San Marcos], No. 2195-H, 8-12-11, 10 pp. By Member Dowdin Calvillo, with Member McKeag; Member Huguenin dissenting.)

Holding: Because the underlying unfair practice charge was withdrawn under the terms of the parties’ settlement agreement, the board ordered that the charge and complaint be withdrawn, the complaint be dismissed, and the proposed ALJ decision be vacated despite the parties’ failure to request withdrawal of the appeal.

Case summary: The union filed an unfair practice charge alleging a unilateral transfer of bargaining unit work and retaliation against an employee, Cesar Aguilar, for engaging in protected activity. The union amended the charge and alleged that the university also retaliated against Rafael Lopez. PERB’s general counsel issued a complaint on the allegation concerning Aguilar, but dismissed the allegations concerning the transfer of work and the retaliation against Lopez. The union appealed the partial dismissal.

While the appeal was pending, the parties entered into a settlement agreement whereby the union agreed to withdraw this and another unfair practice charge. Neither party requested that the appeal from the partial dismissal then pending before the board be withdrawn.

In *Trustees of the California State University (San Marcos)* PERB Dec. No. 2070-H, 198 CPER 93, the board affirmed the dismissal of the transfer of work claim but directed the general counsel to issue a complaint on the retaliation allegation concerning Lopez.

The university filed a motion to dismiss this complaint with the administrative law judge, arguing that the charge was settled in its entirety under the terms of the parties’ settlement agreement. The ALJ denied the motion, finding that PERB lacked jurisdiction to enforce the parties’ agreement. Following a hearing, the ALJ issued a proposed decision finding that the university had retaliated against Lopez for engaging in protected conduct.

CSU filed exceptions to the ALJ’s proposed decision. It again asserted that the board should dismiss the complaint as the matter was fully settled by the terms of the parties’ settlement agreement.

On appeal, the board noted that, under PERB Reg. 32320(a), it has the discretion to allow the withdrawal of a charge and complaint and to vacate a proposed decision. And, citing *Office of the Santa Clara County Superintendent of Schools* (1982) PERB Dec. No. 233a, it has done so when it would effectuate the purposes of the statute.

In this case, given the parties’ clear agreement that this case be withdrawn, the board found that it effectuates the purpose of HEERA to permit withdrawal of the unfair practice charge and dismissal of the complaint. The board also vacated the ALJ’s proposed decision that the university had retaliated against Lopez.

The board acknowledged that HEERA Sec. 3563.2(b) precludes the board from enforcing agreements between the parties, and from issuing a complaint alleging the violation of any agreement that would not also constitute an unfair practice. However, relying on precedent interpreting similar language included in EERA, the board announced that the prohibition set out in Sec. 3563.2(b) “must be read in the overall context of PERB’s authority to issue an unfair practice complaint.” The language in that section does not limit PERB’s authority to honor the terms of the parties’ settlement agreement. Further, the board said, this interpretation of Sec. 3563.2(b) validates PERB’s settlement process, is consistent with the board’s mission to promote harmonious labor relations, and is within PERB’s discretionary authority to allow the withdrawal of charges when doing so would effectuate the purposes of the act.

In a dissenting opinion, Member Huguenin argued that the majority’s interpretation of the statute is one-sided. PERB will not enforce a respondent’s promise of performance unless its failure to perform is itself an unfair practice. However, PERB will give the respondent the benefit of its bargain by dismissing the charge under the settlement’s terms.

Huguenin argued that PERB should continue to refuse to enforce settlement agreements for either side

or, alternatively, should declare that the legislature intended to restrict enforcement of collective bargaining agreements, leaving unfair practice settlement agreements fully enforceable by the board.

Judicial Review

Arbitrator's award not repugnant to the act: CSU.

(*Scholz v. Trustees of the California State University [Long Beach]*, No. 2201-H, 9-13-11, 11 pp. By Member Dowdin Calvillo, with Member McKeag; Member Huguenin concurring.)

Holding: The charging party's request for repugnancy review of an arbitrator's award was untimely filed but, if considered, did not demonstrate that the arbitrator's decision was clearly repugnant to the purposes of HEERA.

Case summary: The charging party filed an unfair practice charge alleging that CSU retaliated against her for previously filing an unfair practice charge with PERB and for filing several grievances concerning her teaching assignments and her performance evaluation. Thereafter, she filed a grievance making similar claims.

CSU argued that the unfair practice charge should be deferred to arbitration. It cited provisions of the contract that prohibit reprisals for filing grievances and for participation in CFA activities. PERB's regional director deferred the charge to arbitration and placed it in abeyance until the arbitration process was completed. The board agent informed the charging party that, following arbitration, the charge would be dismissed unless she sought repugnancy review under the criteria set forth in *Dry Creek Jt. ESD* (1980) PERB No. Ad-81a, 47 CPER 82.

An arbitrator issued a decision in the deferred grievance in May 2009; the charging party filed an amended charge nine months later. Because the regional director twice informed the charging party of her right to seek repugnancy review, the board concluded that the request for PERB's review of the arbitrator's award was untimely filed. The board majority disagreed with concurring Member Huguenin in that the board could decide the case under PERB Reg. 3266(d), which allows the board to direct "at any time" that the record in a repugnancy case be submitted to the board for a final decision.

Even if a timely request for repugnancy review had been filed, the board continued, the charging party failed to demonstrate that the arbitrator's award was clearly repugnant to the purposes and policies of HEERA. The charging party made no showing that the arbitrator's award was palpably wrong or not susceptible to an interpretation consistent with HEERA.

PERB deferred to the arbitrator's award because the evidence presented to the arbitrator in the grievance was factually parallel to the facts that would have been considered in the unfair practice charge.

The board rejected the charging party's contention that because the parties failed to include retaliation in the stipulated issue before the arbitrator, post-arbitral deferral is inappropriate. The board held that a party cannot avoid deferral simply by failing to pursue available contractual procedures.

Moreover, the board noted, the arbitrator's conclusion that CSU had not acted in bad faith or without careful consideration "necessarily means that CSU's actions were not the product of unlawful discrimination." Therefore, the board reasoned, the arbitrator's conclusions "encompass the same factual issues" that would have been presented in support of the retaliation claim.

Member Huguenin filed a concurring opinion. He wrote that allegations of discrimination or retaliation for accessing or participating in PERB's remedial processes should be adjudicated by PERB itself to safeguard the board's processes from abuse. PERB should not delegate that responsibility to an arbitrator, he wrote.

Unit modification ruling that did not present novel issue not appropriate for judicial review: Regents of U.C.

(*Regents of the University of California v. Coalition of University Employees*, Order No. JR-26-H,

10-26-11; 3 pp. dec. By Member McKeag, with Members Dowdin Calvillo and Huguenin.)

Holding: Because the union did not present a unique issue of special importance, the board denied its request for judicial review.

Case summary: CUE requested judicial review of the board's decision in *Regents of the University of California* (2011) PERB Dec. No. 2185-H, 203 CPER online [\[link\]](#). In that case, the board upheld the decision of an ALJ where both U.C. and CUE had filed petitions for unit modification relating to 14 employees of the CUE unit who had been assigned new job duties. The board held that the newly acquired duties of the incumbents required the exercise of independent judgment and professional skills; they no longer shared a community of interest with employees in the clerical bargaining unit represented by CUE. The unit was modified to exclude the 14 positions from the CUE unit.

Under HEERA Sec. 3564, the board's unit determinations are not subject to judicial review unless PERB agrees that the case is one of "special importance" and joins in the request in the review. PERB has found a case has "special importance" if the case presents a novel issue that "primarily involves the construction of a unique statutory provision," and the issue is likely to recur often. PERB found that the issue in this case — reclassification of positions whose duties have changed over time — is a routine occurrence in labor relations that involves a PERB regulation rather than a statutory provision. Therefore, the case did not have the special importance necessary for granting judicial review.

MMBA CASES

Unfair Practice Rulings

Allegations against union state no prima facie case of retaliation: Inlandboatmen's Union of the Pacific.

(*O'Keefe v. Inlandboatmen's Union of the Pacific*, No. 2199-M, 8-29-11, 2 pp. + 10 pp. B.A. dec. By Chair Martinez, with Members McKeag and Dowdin Calvillo.)

Holding: The charging party failed to allege sufficient facts to establish that a reprimand issued to him by the union constituted an adverse action affecting his employment and the basis for a prima facie case of retaliation.

Case summary: The charging party alleged that the union issued him a letter of reprimand and refused to process a grievance in retaliation for filing earlier unfair practice charges with PERB, and for filing a grievance against his employer, the Golden Gate Bridge Highway and Transportation District.

First, the board said, the letter of reprimand is not an adverse action because it did not have an adverse impact on the charging party's employment. Nor did it threaten specific future discipline. There is no indication that the district was aware of the reprimand or took any action against the charging party because of the union's reprimand. PERB will not intervene in internal union activities unless those activities impact employer-employee relations. The charging party failed to allege sufficient facts linking his protected activities to the union's refusal to process his grievance. The charge is subject to dismissal for this reason as well.

His amended charge did not allege facts demonstrating that the union forwarded emails to the district that caused the district manager to verbally abuse the charging party and resulted in the termination of another employee.

No showing of adverse action in response to charging party's reports to mayor, board of supervisors: City and County of San Francisco.

(*Crandell v. City and County of San Francisco*, No. 2206-M, 10-5-11, 2 pp. + 12 pp. B.A. dec. By Chair Martinez, with Members McKeag and Dowdin Calvillo.)

Holding: The charging party failed to demonstrate that the city violated the act by stalking him and

photographing him using cell-phone cameras during work time in retaliation for filing reports with city officials.

Case summary: The charging party was employed by the Workers' Compensation Department as a benefits technician. He alleged that his supervisor and an H.R. administrator began stalking him in July 2008 using cell-phone cameras, and that another manager directed administrators to maintain close surveillance of him. He asserted that he was monitored during staff meetings and that those who conducted the surveillance were rewarded with retention and promotion.

In August and September, the charging party complained to the mayor and the board of supervisors concerning staffing assignments and forced overtime, and about the use of city funds for a staff party. The alleged stalking continued, and the charging party filed a grievance. He was terminated.

The board agent found that the charging party's report concerning working conditions addressed collective concerns of department employees and was protected activity. The charging party's letter to the mayor and the board of supervisors regarding the staff party was not protected activity, the B.A. concluded, because the charging party failed to allege any facts to demonstrate that his concerns about using city funds for department activities were a collective employment-related concern.

Only two instances of stalking were within the limitations period. The board agent found it was not objectively reasonable to believe that a supervisor's use of a cell-phone camera in the workplace, even if on more than two occasions, would have an adverse impact on an individual's employment. The charging party failed to show that he was treated differently from other employees or that the cell-phone camera was used in evaluating his work performance.

The board agent concluded that the charging party failed to demonstrate any nexus between his protected activity and the alleged adverse action.

On appeal, the board summarily affirmed the B.A.'s dismissal of the charge.

No showing of wrongful termination for filing complaints with city officials: City and County of San Francisco.

(*Crandell v. City and County of San Francisco*, No. 2207-M, 10-5-11, 3 pp. + 13 pp. B.A. dec. By Chair Martinez, with Members McKeag and Dowdin Calvillo.)

Holding: The charging party failed to demonstrate that the city terminated his employment in retaliation for filing reports with city officials.

Case summary: Based on many of the same facts as alleged in PERB Dec. No. 2206-M, above, the charging party claimed that he was subjected to a hostile work environment and terminated in retaliation for providing city officials with reports concerning staffing assignments and forced overtime and about the use of city funds for a staff party.

The board agent found that some of the charging party's reports concerning working conditions of department employees were protected activities that were known by the manager who decided to terminate him. The board agent also found that termination of the charging party was an adverse action. Other alleged retaliating actions were not filed within the six-month limitations period. However, the board agent concluded that the facts as alleged did not demonstrate a nexus between the charging party's protected activity and his termination.

On appeal, the board summarily affirmed the board agent's dismissal of the charge. The board also found that the appeal from the dismissal failed to satisfy the requirements of PERB Reg. 32635(a) by stating the specific issues of procedure, fact, law, or rationale to which the appeal is taken. Rather, the board said, the charging party merely restated the facts alleged in the charge and the arguments made before the board agent.

Retaliation charge fails to state prima facie case: Golden Gate Bridge, Highway and

Transportation Dist.

(*O’Keefe v. Golden Gate Bridge, Highway and Transportation Dist.*, No. 2209-M, 10-12-11, 3 pp. + 10 pp. B.A. dec. By Chair Martinez, with Members McKeag and Dowdin Calvillo.)

Holding: The charging party failed to demonstrate that the district took adverse action against him for engaging in protected activity.

Case summary: The charging party alleged that the district retaliated against him for filing prior unfair practice charges and for testifying on behalf of a coworker at a PERB hearing. He alleged that the district prohibited him from filing a grievance concerning the filling of a deckhand position, and that he was threatened with discipline by the district general manager for distributing bulletins about another employee, was denied the use of vacation leave, and was not permitted to exchange workdays.

The board agent determined that the charging party engaged in protected activity and the district had knowledge of this conduct. However, the board agent found that the charging party did not demonstrate he was subject to adverse action when he was denied the right to file a grievance because the subject matter of the grievance did not impact his position. Nor did he allege facts that showed a nexus between his protected activity and the district’s denial of the grievance.

The board agent also found no evidence of any adverse action as a result of the meeting with the general manager. There was no evidence that the meeting had an impact on his employment or that the meeting was motivated by the charging party’s protected activities.

The charging party failed to establish a nexus between his protected activities and the district’s decision to deny his vacation request. The district claimed he had no accrued vacation days. The board agent noted no evidence of disparate treatment; a departure from established procedures; inconsistent justifications for its action; exaggerated, vague, or ambiguous reasons for denying the vacation request; or employer animosity toward union activists.

The board agent found the charge failed to demonstrate that the district refused the charging party’s request to exchange workdays because he had exercised protected rights. The district claimed the exchange would have increased its payroll costs. The fact that this was the only time a shift change had not been permitted did not, by itself, establish a violation, the board agent concluded. Further, there was no evidence how this denial adversely impacted the charging party’s employment.

On appeal, the board summarily upheld the dismissal of the charge. Additionally, it noted that the appeal failed to satisfy the requirements of PERB Reg. 32635(a) by placing the board and the respondent on notice of the issues raised on appeal. Mere reiteration of the facts alleged in the charge or the arguments presented to the board agent are insufficient to warrant an appeal.

Poor performance, not protected activity, motivated driver’s termination: City of Santa Monica.

(*McKnight v. City of Santa Monica*, No. 2211-M, 10-24-11, 18 pp. By Member Dowdin Calvillo, with Chair Martinez and Member McKeag.)

Holding: The charging party failed to demonstrate that he was released from his probationary position because he engaged in protected activity. His poor performance formed the basis for termination.

Case summary: The charging party, a bus driver, alleged that the city terminated him in retaliation for filing several grievances. An administrative law judge issued a proposed decision finding that the charging party had engaged in protected activity. The ALJ found a nexus between the charging party’s protected activity and his termination based on the city’s failure to conduct a thorough investigation of the two safety complaints and its failure to give the charging party any reason for his termination. The ALJ found that the charging party’s performance did not violate the city’s regulations and warranted only minor corrective action. She concluded that the city failed to establish that the charging party would have been terminated absent his protected activity and that the incidents were used as a pretext to mask the city’s true motivation for termination, i.e., his protected activity.

On appeal, the board found that the charging party had engaged in protected activity when four grievances

were filed on his behalf by the United Transportation Union, his exclusive representative. The board also concluded that management officials who recommended termination had knowledge of the grievance filings.

However, the board failed to find a nexus between the charging party's protected activity and the adverse action, his termination. It found that the city's failure to interview the charging party or other drivers who had complained about his performance did not support an inference of unlawful motive because videotapes of the incident were available and reviewed by management.

The city's failure to give the charging party a reason for dismissal did not show an unlawful motive, the board said, because the charging party was a probationary "at will" employee and there was no evidence that the city's practice was to give probationary employees a reason for releasing them from probation. The city's practice was to inform the employee only that he or she had failed to meet expectations. Accordingly, PERB found that the charging party had failed to establish a prima facie case of retaliation.

The board also noted that the city established it would have rejected the charging party during his probationary period despite his protected activity. The board found ample evidence in the record that the charging party was repeatedly advised of his performance deficiencies before the union engaged in protected activity on his behalf, and that witnesses testified the incidents giving rise to his termination were sufficiently egregious to warrant releasing him from probation.

PERB cautioned that the issue before it was not whether the city had just cause to terminate the charging party, but rather whether the employer's true motivation was the employee's exercise of protected activity. In weighing the evidence, the board found, the charging party's supervisors were dissatisfied with his performance throughout his employment with the city and came to an independent decision to reject him from probation based on work-related factors.

Representation Rulings

Lead workers share community of interest with employees in petitioned-for unit: City of Palmdale.

(City of Palmdale and Teamsters Loc. 911, No. 2203-M, 9-23-11, 17 pp. + 40 pp. B.A. dec. By Chair Martinez, with Members McKeag and Dowdin Calvillo.)

Holding: The maintenance division lead workers share a community of interest with the crews they oversee and are appropriately included in the petitioned-for unit.

Case summary: The Teamsters sought recognition of certain public works employees in the city's maintenance and public works divisions. Following six days of formal hearing, a board agent found it was not appropriate to include employees in two traffic division classifications, traffic signal technician I and II, because they interact little and do not share common job duties, skills, wages, or supervision with maintenance division employees.

The board agent also concluded it was not appropriate to include the acting supervisor of the maintenance division's facility maintenance section in the bargaining unit because his job duties were almost entirely supervisory, and his supervision and work hours differed greatly from those of other employees in the petitioned-for unit.

The board agent also found it was not appropriate to include in the unit the senior maintenance specialist with oversight of the city's water conservation program under the maintenance division's landscape maintenance section because he rarely performed maintenance duties and used different skills. The city did not file exceptions to inclusion in the unit of a senior maintenance specialist in the facility maintenance section.

On appeal to the board, the city argued that six maintenance division lead positions should be excluded from the unit under a community of interest analysis because the supervisory nature of their job duties creates a distinction between them and other maintenance division employees.

The board found that the lead custodian, who spends one-third of his time performing traditional custodial duties and the remainder performing his oversight functions, shares a community of interest with the other

employees in the petitioned-for unit. Likewise, two landscape maintenance lead workers and a landscape inspector spend at least 10 percent of that time performing the same kind of actual maintenance work as performed by the crews they oversee. The board found that the board agent's factual findings concerning the amount of actual maintenance work performed by street maintenance lead workers expressed in the form of a range, not as an exact number, was supported by the record as a whole.

The board acknowledged that the lead workers' primary duty is supervision, not actual maintenance work. However, the MMBA includes all public employees except elected officials and gubernatorial appointees within its scope and does not preclude the formation of bargaining units comprising both supervisory and non-supervisory personnel. Therefore, the board reasoned, there is no legal grounds to exclude the lead workers from the proposed unit based solely on the supervisory nature of their leadership roles. The question is whether the distinctive nature of their lead supervision job duties is a sufficient basis for concluding that they do not share a community of interests with the petitioned-for unit, PERB explained.

Considering the totality of the circumstances, the board noted that the leads spend at least 10 percent of their time regularly performing the same kind of work as their crews; they work in an integrated fashion with their crews; inspect the work of and provide on-the-job training to crew members; wear the same uniforms as the crew; and share a common goal of ensuring that city facilities are well maintained. The lead workers and the other employees in the proposed unit have daily contact with one another, share similar training, qualifications, and skills, and share common supervision. Leads and their crews have the same wage and benefit structure.

Despite the distinctive nature of their lead supervision responsibilities, the board concluded, the leads share substantial mutual interests with other employees in the petitioned-for unit concerning their wages, hours, and other terms and conditions of employment.

PERB lacks jurisdiction to process severance petition where local rule does not unduly burden petitioner: City of Inglewood.

(City of Inglewood, Inglewood Police Civilians Assn., and SEIU, Loc. 721, Order No. Ad-390-M, 9-28-11, 2 pp. + 9 pp. regional attorney dec. By Chair Martinez, with Members McKeag and Huguenin.)

Holding: Because the city's local rules provide a process to achieve severance from an existing bargaining unit that does not place an undue burden on the petitioner seeking severance, the board lacks jurisdiction to entertain the association's severance petition.

Case summary: The Inglewood Police Civilians Association filed a severance petition with PERB seeking to sever 13 classifications from the city's general employees bargaining unit represented by SEIU. The regional attorney dismissed the petition, noting that PERB only has authority to conduct representation proceedings in cases where a public agency has not adopted local rules under which severance can be achieved.

The R.A. reviewed two prior decisions of the board that address PERB's jurisdiction in representation cases. In *County of Orange* (2010) No. 2138-M, 201 CPER 87, the board held that it has the authority to assert jurisdiction and apply its own representation rules only when the agency's local rules contain no provision that can accomplish what the petitioner is seeking without placing an undue burden on the petitioner.

In *County of Siskiyou* (2010) No. 2113-M, 200 CPER 88, in contrast, the board asserted jurisdiction over a petition seeking to amend certification. The board rejected the county's contention that amendment of certification could be obtained under its decertification process. Because the amendment of certification and decertification are very different procedures, the board in *Siskiyou* reasoned that it would be unduly burdensome to require a union to engage in a relatively onerous decertification process simply to obtain official recognition of a change in the organization's form.

In the present case, the board adopted the R.A.'s decision to dismiss the petition. The decision first noted that the severance process is very similar in purpose to the recognition process. According to PERB regulations, both allow an employee organization to become the recognized representative of an appropriate bargaining unit. Both involve similar requirements with many of the same steps, including the requirement to file a petition, provide proof of support, and create an appropriate bargaining unit. The only

distinction is that PERB's petition for certification process is used to create a new unit consisting of unrepresented employees; PERB's severance process is used to create a bargaining unit consisting of employees who are already members of an existing unit.

While the city's representation rule does not make this distinction, the local rules require that a petition be filed, that the petitioner demonstrate employee support, and that the proposed unit be appropriate. Because of the similarities in the purpose and the process, the board found the case to be dissimilar to *Siskiyou*.

Moreover, the board noted, severance has been achieved using the city's local rules. It rejected the association's argument that because this occurred only on one occasion, the board should assert its jurisdiction. The board's ruling in *County of Orange* was not dependent on severance being achieved under the employer's local rules on multiple occasions. The central issue was whether severance could be achieved under the local rules without placing an undue burden on the petitioner.

Severance can be and has been affected under the city's local rules, and application of those rules does not place an undue burden on the association's ability to pursue severance.

Duty of Fair Representation Rulings

No standing to make DFR claim where charging party is outside the bargaining unit: Alameda County Management Employees Assn.

(*Harper v. Alameda County Management Employees Assn.*, No. 2198-M, 8-29-11, 8 pp. By Chair Martinez, with Members McKeag and Dowdin Calvillo.)

Holding: The unfair practice charge was timely filed, but the association did not breach its duty of fair representation because the charging party was not a member of the bargaining unit.

Case summary: The charging party alleged that the association breached its duty of fair representation by failing to notify her that her employer, the Alameda County Medical Center, would not agree to include her in the bargaining unit and by the manner in which it handled her disciplinary proceedings. She also alleged that the medical center unilaterally created and filled her position without providing the association with an opportunity to meet and confer.

The charging party was promoted to the position of human resources compliance auditor. On her behalf, the association requested that the position be included in the bargaining unit. The medical center denied the association's petition, finding that the charging party had access to confidential labor relations information.

The board concluded that the statute of limitations began to run when the charging party was made aware of the association's efforts on her behalf and the medical center's refusal to recognize her as a member of the bargaining unit. Until then, she was not told that the medical center objected to her inclusion in the unit. Nor was she apprised of the status of her request to be added to the unit. Therefore, the board concluded, the charge was timely filed within six months of learning that further assistance from the association was unlikely.

Because the charging party was not a member of the bargaining unit, the association's duty of fair representation did not extend to her and she did not have standing to bring a duty of fair representation charge, the board said. Although an association representative represented her at her *Skelly* hearing, she did not become a member of the bargaining unit as a result of the association's "de facto" representation during the disciplinary proceedings. The charging party's belief about her status is irrelevant, PERB announced.

The charging party also alleged that the association's failure to notify her that the medical center would not agree to include her in the bargaining unit caused the medical center to deny her third-step appeal request. Whether or not she was notified, the medical center was under no obligation to grant her appeal request, the board noted.

Even if the charging party were a member of the bargaining unit, the board added, the association

representative's conduct during the *Skelly* hearing, a non-contractual disciplinary process, did not give rise to a duty of fair representation.

The board turned aside the allegation that the medical center implemented an unlawful unilateral change when it created and filled her position without meeting and conferring with the association. Individual employees have no standing to allege unilateral change violations.

Absent specific factual allegations, charge failed to state prima facie DFR breach: SEIU, Loc. 1021.

(*Crandell v. Service Employees International Union, Loc. 1021*, No. 2202-M, 9-15-11, 3 pp. + 10 pp. B.A. dec. By Chair Martinez, with Members McKeag and Dowdin Calvillo.)

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

Case summary: The charging party filed an unfair practice charge alleging that SEIU breached its duty of fair representation by failing to pursue a grievance alleging that coworkers and management employees of the City and County of San Francisco were conducting surveillance of him and stalking him using cell-phone cameras.

A board agent found the charge was untimely and that the charging party had included no specific allegations to show that SEIU's failure to file or arbitrate a grievance was arbitrary, discriminatory, or in bad faith.

On appeal, the board affirmed the board agent's dismissal.

Insufficient facts alleged in support of claimed DFR breach: SEIU Loc. 1021.

(*Horan v. Service Employees International Union, Loc. 1021*, No. 2204-M, 9-23-11, 11 pp. By Chair Martinez, with Members McKeag and Dowdin Calvillo.)

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

Case summary: The charging party alleged that the union breached its duty of fair representation by failing to represent him in arbitration. Relying on information found in a civil complaint provided by the union, the board agent concluded that the cited arbitration was the culmination of earlier grievances that SEIU failed to process outside the six-month statute of limitations period and, therefore, determined that the charge was untimely.

On appeal, the board referred only to the allegations in the amended charge, which omitted reference to the earlier grievances; it found that the arbitration was not necessarily an outgrowth of the earlier grievances and concluded that the charge was filed within the six-month statute of limitations period.

However, the board found that the charge did not allege any facts that would show in what manner SEIU's action or inaction was without a rational basis or devoid of honest judgment. Therefore, the charging party failed to show how SEIU's failure to represent him at the arbitration constituted a breach of the duty of fair representation.

In facts alleged for the first time on appeal, the charging party claimed that the arbitration arose out of a "predecessor *Skelly* hearing." There was no allegation that SEIU's representational obligation arose out of the collective bargaining agreement or that the union possessed exclusive control of the post-*Skelly* arbitration and the remedies available through that process. The board found "no factual showing that there was anything more at stake than an individual right unconnected with negotiating or administering a collective bargaining agreement." Nor was there an allegation that the charging party was not allowed to represent himself or that SEIU prevented him from doing so.

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PERB Activity Report

ALJ PROPOSED DECISIONS

Sacramento Regional Office — Final Decisions

SEIU Local 521 v. County of Kings, Case No. SA-CE-739-M. ALJ Shawn P. Cloughesy. (Issued 9/24/11; final 10-7-11, HO-U-1018-M.) A violation was found where the county changed its local rule to provide an earlier decertification window for a rival union, violating the county's duty of strict neutrality.

Oakland Regional Office — Final Decisions

No final decisions.

Los Angeles Regional Office — Final Decisions

No final decisions.

Sacramento Regional Office — Decisions Not Final

Davis City Employees Assn. v. City of Davis, Case SA-CE-672-M. Chief ALJ Shawn P. Cloughesy. (Issued 10-31-11, exceptions due 11-28-11.) The city was alleged to have implemented its last, best, and final offer prior to completing factfinding procedures as set out in the city's local rules. A violation was found. The city and the association agreed to hearing dates, but disagreed as to the formality of the hearing and the number of days of the hearing. Due to the disagreement, the city cancelled factfinding and implemented its LBFO instead of choosing the less-harsh alternatives of having the factfinder determine the formality of the hearing or just dictating the informality of the hearing.

Oakland Regional Office — Decisions Not Final

None.

Los Angeles Regional Office — Decisions Not Final

Pasadena Management Assn. v. City of Pasadena, Case number LA-CE-574-M. ALJ Eric J. Cu. (Issued 10-27-11, exceptions due 11-21-11.) The city allegedly enacted an unlawful unilateral change by implementing a standby procedure for responding to after-hours electrical emergencies. A violation was found. The city enacted a change without a notice of an opportunity to request bargaining. Under the MMBA scope of representation test: the change to the extra-duty assignment process had a significant and adverse effect on the unit; such changes have traditionally been subject to bargaining and therefore are not a managerial prerogative; and balancing the parties interests weighed in favor of bargaining. The appropriate remedy was a rescission of the policy and a return to the status quo.

Report of the Office of the General Counsel

Injunctive Relief Cases

Nineteen requests for injunctive relief were filed during the period October 1, 2010 through October 31,

2011. One request was granted, three were withdrawn, and 15 were denied.

Requests granted

SEIU Local 521 v. County of Kings (IR Request No. 604, Case Nos. SA-CE-739-M and SA-CE-740-M). On August 31, 2011, SEIU filed a request for injunctive relief alleging that the county unlawfully assisted a competing union and interfered with SEIU's rights as the incumbent exclusive representative by revoking a three-year "contract bar" rule in the middle of a multi-year contract and changing the remaining "window period" from January 2012 to July 2011 to allow for an accelerated decertification election then scheduled to begin on September 6, 2011. On September 2, 2011, the board granted the IR request, but the matter was placed in abeyance pending a response from the State Mediation and Conciliation Service to the board's request that SMCS stay the election pending completion of expedited PERB administrative proceedings. The matter was settled when the parties agreed to be bound by a proposed decision issued by a PERB ALJ on September 28, 2011.

Requests withdrawn

International Association of Fire Fighters, Local 1319 v. City of Palo Alto (IR Request No. 601, Case No. SF-CE-869-M). On August 1, 2011, IAFF filed a request for injunctive relief alleging that the city violated the MMBA (Gov. Code Sec. 3507) by failing to consult in good faith before adopting a resolution to place a local measure on the November 2011 ballot that would repeal a charter provision which has provided for interest arbitration since 1978. The IR request was withdrawn without prejudice, and the charge was placed in abeyance pending a vote of the city council on a settlement proposal negotiated at an informal conference on August 4, 2011.

Union of Professional and Technical Employees v. Regents of the University of California (UC) (IR Request No. 600, Case No. SF-CE-987-H). On June 8, 2011, UPTe filed a request for injunctive relief alleging that U.C. violated HEERA by unilaterally terminating paid union leave for two UPTe officers in the middle of an organizing drive and ordering them to return to new full-time positions at U.C. San Diego, ostensibly because the union was delinquent in reimbursing U.C. for the leave in accordance with the parties' MOU. The matter was settled after an informal conference on June 14, 2011, and the request was withdrawn.

SEIU Local 521 v. City of Tulare (IR Request No. 598, Case No. SA-CE-718-M). On March 16, 2011, SEIU filed a request for injunctive relief alleging that the city violated its local rules and PERB regulations when it provided the union with only a partial listing of unit members' home addresses on the eve of a scheduled decertification election. The request was withdrawn by SEIU on March 21, 2011.

Requests denied

SEIU Local 1021 v. County of Mendocino (IR Request No. 608, Case No. SF-CE-834-M). On October 28, 2011, SEIU filed a request for injunctive relief alleging that the county failed to bargain in good faith by reneging on a tentative agreement reached with the assistance of an SMCS mediator and signed by both parties on October 11, 2011, by prematurely declaring impasse, and by failing to respond to certain requests for information that were necessary and relevant to the negotiations. The board denied the request on November 4, 2011.

SEIU-UHW West v. El Camino Hospital (IR Request No. 607, Case No. SF-CE-891-M). On October 20, 2011, SEIU filed a request for injunctive relief seeking to prohibit the hospital from proceeding with a decertification election in violation of local rules containing proof of support requirements and procedures for unit modifications. The board denied the request on October 27, 2011, but the administrative proceedings were expedited, and SMCS was asked to stay the election scheduled for November 3, 2011, pending completion of the expedited PERB administrative process. SMCS agreed to stay the election; a complaint promptly issued, and an informal conference was scheduled for November 1, 2011. When the case did not settle, an expedited hearing was set for November 14, 2011.

McFarland Teachers Assn. v. McFarland Unified School Dist. (IR Request No. 606, Case No. LA-CE-5604-E). On September 8, 2011, the union filed a request for injunctive relief seeking to prevent the district from compelling testimony by the association president at a termination hearing about confidential communications he had with a teacher who was discharged. The board denied the request on September 14, 2011.

International Association of Fire Fighters, Local 1319 v. City of Palo Alto (IR Request No. 605, Case No. SF-CE-869-M). On September 8, 2011, after the city council rejected the settlement proposal negotiated as to IR Request No. 601, IAFF renewed its request for injunctive relief seeking to prohibit the city from proceeding with an election on November 8, 2011, on a ballot measure that would repeal a charter provision which has provided for interest arbitration since 1978. The board denied the IR request on September 15, 2011, but the matter was expedited. A hearing was held before a PERB ALJ on September 26 and 29, 2011, briefing was completed on October 10, 2011, and the matter is pending a proposed decision.

City of San Jose v. IBEW Local 332 & International Union of Operating Engineers, Local Union #3 (IR Request No. 603, Case Nos. SF-CO-260-M and SF-CO-261-M). On August 19, 2011, the city filed a request for injunctive relief, alleging that the unions had directed or encouraged unit members to walk off the job or refuse to cross a picket line erected in front of a city wastewater treatment plant to protest the presence of a contractor who was believed to be operating in violation of local prevailing wage standards. The board denied the request on August 25, 2011, and PERB assisted the parties in negotiating limits on picketing that obviated the need for further court or administrative proceedings. The underlying charges were withdrawn on October 23, 2011.

San Mateo Firefighters, IAFF Local 2400 v. Menlo Park Fire Protection Dist. (IR Request No. 602, Case No. SF-CE-874-M). On August 12, 2011, IAFF filed a request for injunctive relief alleging, inter alia, that the district violated the MMBA by engaging in bad faith "piecemeal" bargaining, and making unlawful unilateral changes in terms and conditions of employment. The board denied the request on August 24, 2011.

United Teachers Los Angeles v. Los Angeles Unified School Dist. (IR Request No. 599, Case Nos. LA-CE-5546-E and LA-CE-5561-E). On May 20, 2011, UTLA filed a request for injunctive relief alleging, inter alia, that LAUSD violated EERA by unilaterally implementing new performance evaluation procedures and directly dealing with unit members regarding the new process. The board denied the request on May 26, 2011, but the administrative proceedings were expedited. The matter was heard in early August 2011, briefing was completed on October 28, 2011, and a proposed decision by a PERB ALJ is pending.

Transport Workers Union, Local 200 v. City & County of San Francisco (IR Request No. 597, Case No. SF-CE-809-M). On February 14, 2011, the union filed a request for injunctive relief seeking to prohibit the county from conducting a decertification election in an existing bargaining unit in violation of its local rules. The board denied the request on February 22, 2011.

SEIU Local 521 v. City of Tulare (IR Request No. 596, Case No. SA-CE-708-M). On February 2, 2011, Local 39 filed a request for injunctive relief seeking to prohibit the county from conducting a decertification election in an existing bargaining unit in violation of its local rules. The board denied the request on February 8, 2011.

International Union of Operating Engineers, Stationary Engineers Local 39 v. County of Yolo (IR Request No. 595, Case No. SA-CE-704-M). On January 20, 2011, Local 39 filed a request for injunctive relief seeking to set aside the county's approval of a unit modification in violation of its local rules. The board denied the request on January 26, 2011.

Santa Clara County Correctional Peace Officers Assn. v. County of Santa Clara (IR Request No. 594, Case No. SF-CE-804-M). On January 12, 2011, SCCCPOA filed a request for injunctive relief against the county, seeking to prohibit, in part, the implementation of a new policy regarding background checks of correctional officers. The board denied the request on January 18, 2011.

National Union of Healthcare Workers v. Salinas Valley Memorial Hospital Dist. (IR Request No. 593, Case No. SF-CE-797-M). On December 27, 2010, NUHW filed a request for injunctive relief seeking to prohibit the county from implementing anticipated layoffs. The board denied the request on December 31, 2010.

Siskiyou County Employees Assn. v. County of Siskiyou (IR Request No. 592, Case No. SA-CE-16-C). On December 1, 2010, CEA filed a request for injunctive relief seeking to enjoin the county and SMCS from conducting a decertification election. The board denied the request on December 7, 2010.

Kern County Probation Officers Assn. v. County of Kern (IR Request No. 591, LA-CE-649-M). On November 30, 2010, the union filed a request for injunctive relief seeking to prohibit the county from

prematurely and unlawfully declaring impasse and implementing its LBFO. The board denied the request on December 6, 2010.

International Union of Operating Engineers, Stationary Engineers Local 39 v. County of Yolo (IR Request No. 590, SA-CE-676-M). On October 1, 2010, Local 39 filed a request for injunctive relief seeking to prohibit the county from conducting a decertification election. The board denied the request on October 11, 2010.

Litigation Activity

Fourteen litigation cases were opened between October 1, 2010, and October 31, 2011.

California Correctional Peace Officers Assn. v. PERB, Alameda County Superior Court, Case No. RG11594509. In September 2011, CCPOA filed a petition for writ of mandamus alleging the board erred in PERB Dec. No. 2196-S by affirming a board agent's dismissal of CCPOA's charge.

County of Riverside v. PERB; SEIU Local 721, California Supreme Court, Case No. S195567. In August 2011, the county filed a petition for review of a decision by which the Court of Appeal, Fourth Appellate District, Division Two, Case No. E051351, summarily denied its petition for a writ of extraordinary relief as to PERB Dec. No. 2119-M. The Supreme Court denied the county's petition on September 14, 2011.

City of Redding v. PERB; SEIU Local 1021, California Court of Appeal, Third Appellate District, Case No. C068825. In July 2011, the city filed a petition for writ of extraordinary relief alleging that the board erred in PERB Dec. No. 2190-M.

Police Officers Association of Victor Valley CCD v. PERB, San Bernardino County Superior Court, Case No. CIVVS1102192. In April 2011, the president of the POA filed a petition for writ of mandamus *in propria persona*, alleging that the board erred in PERB Order No. Ad-388 by affirming a board agent's dismissal of a severance petition. The court dismissed the petition on September 21, 2011.

Salas v. PERB; City of Alhambra, California Court of Appeal, Second Appellate District, Case No. B231481. In March 2011, Salas filed a petition for writ of extraordinary relief alleging that the board erred in PERB Dec. No. 2161-S.

CDF Firefighters v. PERB; State of California (CAL FIRE), California Court of Appeal, Third Appellate District, Case No. C067592. In March 2011, CDF Firefighters filed a petition for writ of extraordinary relief alleging that the board erred in PERB Dec. No. 2162-S.

County of Riverside v. PERB; SEIU, California Court of Appeal, Fourth Appellate District, Case No. E053161. In March 2011, the county filed a petition for writ of extraordinary relief alleging that the board erred in PERB Dec. No. 2163-M.

Moore v. PERB; Housing Authority for the City of Los Angeles & AFSCME, Council 36, Los Angeles County Superior Court Case No. BS131048. In March 2011, Moore filed a petition for writ of mandamus alleging that the board erred in PERB Dec. Nos. 2165-M and 2166-M when it adopted a board agent's dismissal of the petitioner's charges against HACLA and AFSCME.

Fallbrook Elementary Teachers Assn. v. PERB; Fallbrook Elementary School Dist., California Court of Appeal, Fourth Appellate District, Case No. D059434. In March 2011, the union filed a petition for writ of extraordinary relief alleging that the board erred in PERB Dec. No. 2171-E.

CCPOA v. PERB; State of California (CDCR), California Court of Appeal, Third Appellate District, Case No. C067235. In February 2011, CCPOA filed a petition for writ of extraordinary relief alleging that the board erred in PERB Dec. No. 2154-S. The matter was settled, and the petition was dismissed in May 2011.

Woods v. PERB; State of California (CDCR), California Court of Appeal, Third Appellate District, Case No. C067447. In February 2011, Woods filed a petition for writ of extraordinary relief alleging that the board erred in PERB Dec. No. 2136-S.

CSEA, Chapter 401 v. PERB; Castaic Union School Dist., California Court of Appeal, Second Appellate

District, Case No. B230002. In January 2011, CSEA filed a petition for writ of extraordinary relief, alleging that the board erred in PERB Dec. Nos. Ad-384 and JR-25.

Association of Building, Mechanical and Electrical Inspectors v. PERB; City of San Jose, California Court of Appeal, Sixth Appellate District, Case No. H036362. In December 2010, ABMEI filed a petition for writ of extraordinary relief alleging that the board erred in PERB Dec. No. 2141-M.

California Correctional Peace Officers Assn. v. PERB; State of California (DPA), California Court of Appeal, Third Appellate District, Case No. C066396. In October 2010, CCPOA filed a petition for writ of extraordinary relief alleging that the board erred in PERB Dec. No. 2130-S.

Personnel Changes

In May 2011, Anita Martinez, who served as regional director of the San Francisco Regional Office since 1982, was appointed as member and chair of PERB. At the same time, A. Eugene Huguenin was appointed as a member of PERB, and M. Suzanne Murphy was appointed as PERB's general counsel.

In July 2011, Daniel Trump was hired as a regional attorney in the San Francisco Regional Office, filling a position vacated by Eric Cu, who became an administrative law judge in the Los Angeles Regional Office that month.

In October 2011, Bernhard Rohrbacher was hired as a supervising regional attorney in the Los Angeles Regional Office, filling a position that became vacant after Sean McKee left the Los Angeles Regional Office in March 2011.

CPER Journal Online

Fair Employment and Housing Commission Decisions

California Code of Regulations Title 2, Sec. 7435, authorizes the Fair Employment and Housing Commission, an administrative agency charged with enforcing California's Fair Employment and Housing Act, to designate as precedential, any decision, or part of any decision, that contains a significant legal or policy determination of general application that is likely to recur. Once the commission has done so, the agency may rely on it as precedent and the parties may cite to it in their arguments to the commission and the courts. One of the commission's decisions designated as precedential is summarized below. Full text of decisions may be viewed online at <http://www.fehc.ca.gov/act/decision.asp>.

Airline's Failure to Accommodate and Discharge of Employee Because of Disability Violated Act

(*DFEH v. Air Canada*, No. 11-07-P, 7-14-11; 2 pp. + 38 pp. ALJ dec.)

Holding: The employer violated the FEHA's prohibition against discrimination on the basis of disability when it refused to engage in the interactive process to determine whether a disabled employee could perform the essential duties of her position with reasonable accommodation, refused to provide her with reasonable accommodation, terminated her because of her disability, and failed to take all reasonable steps to prevent discrimination.

Case summary: Caroline Messih Zemaitis worked as an Air Canada customer service agent at the LAX air terminal. After several work- and non-work-related injuries to her back, knee, and neck, Zemaitis transferred to Air Canada's cargo facility as a customer service agent-cargo, taking a pay cut and a demotion in order to work at a desk job. She did the full range of duties, accommodating her neck pain by moving files to a lower shelf.

On two occasions, Zemaitis' supervisor, Cindy Cichy, assigned her warehouse duties to cover for absent warehousemen. Zemaitis objected that the warehouseman duties were not part of her job description. Cichy disagreed and ordered her to do the work, which included heavy lifting. Zemaitis injured her back while working in the warehouse. She filed a worker's compensation claim and, after a short leave, returned to her normal position with restrictions on lifting more than 10 pounds, prolonged sitting, standing, or walking. She had no problem performing the regular job duties of her position.

Zemaitis became pregnant. The weight of the pregnancy injured her back and she went out on disability leave. After giving birth and a period of recuperation, Zemaitis was released to work with restrictions: no lifting over 15 pounds, no repetitive pushing or pulling, no squatting or kneeling, no repetitive finger and wrist movements, no repetitive overhead shoulder range of motion, and no very heavy work.

Zemaitis notified Air Canada of the return to work release by email and fax. Receiving no response, she went to work but was told by Cichy that she could not come back because of the restrictions. Approximately one month later, Zemaitis received a letter from Air Canada notifying her that she would not be able to return to her position. It offered her two choices: either take an unpaid medical leave of absence for up to two years or quit. Zemaitis rejected both options and ultimately was terminated.

Following the issuance of an accusation by the Department of Fair Employment and Housing, Administrative Law Judge Ann M. Noel found that Air Canada violated several provisions of the FEHA's ban on disability discrimination. Air Canada argued that Zemaitis was not entitled to the protections of the act because she was not a "qualified" individual within the meaning of the act. It maintained that she could not perform the essential functions of her position, referring to the warehouseman duties, even with accommodation. The ALJ was not persuaded. She found that the warehouseman duties were not essential job duties of the customer service agent-cargo position, irrespective of the job description, concluding from the evidence that, in practice, LAX cargo agents were not required to perform warehouseman duties.

The ALJ found that Air Canada failed to engage in a timely, good faith interactive process to determine whether Zemaitis could perform the essential duties of her position with reasonable accommodation as

required by the act. Air Canada claimed that Zemaitis failed to request a reasonable accommodation, thus relieving it of this obligation. The ALJ disagreed, holding that once Zemaitis had made her disability and limitations known to the company, it had an affirmative duty to communicate with her regarding possible accommodations. Air Canada also argued that its offer of a two-year unpaid medical leave was a reasonable accommodation. The ALJ dismissed this argument. Internal emails revealed that Air Canada believed it was not under any duty to engage in the interactive process and, after Zemaitis was released to work, Air Canada failed to attempt to discuss any accommodation with her, including the unpaid medical leave option.

The ALJ also found that Air Canada violated the act by failing to provide Zemaitis with reasonable accommodation. Air Canada argued that Zemaitis insisted that she did not need any accommodation but that it, nonetheless, offered her two years of unpaid medical leave. The ALJ explained that, because she had performed the duties of her position previously with similar restrictions, Zemaitis believed that she did not need any specific accommodations. And, said the ALJ, the two-year unpaid leave offer was not an acceptable option. Zemaitis would lose pay and would not be guaranteed reinstatement, according to the terms of the collective bargaining agreement. If she could not return to work within the specified period, she would lose her seniority and could be terminated. Further, the only accommodation Zemaitis needed was to not be assigned warehouseman duties, which would not have caused the company undue hardship.

Air Canada's termination of Zemaitis after it barred her from returning to work because of her physical disabilities was discrimination on the basis of disability in violation of the FEHA, the ALJ concluded.

The ALJ also found that Air Canada had failed to take all reasonable steps to prevent discrimination from occurring, as required by the FEHA. "[T]he evidence established that Air Canada had no information about California law regarding disability, including employees' rights and its responsibilities. The company's program for disabled workers applied only to temporary, industrially-based disabilities. What programs the company did have regarding reasonable accommodation or safety policies were not followed by its management employees," she said.

The ALJ awarded Zaimitis back pay and lost benefits, including lost travel benefits, and ordered Air Canada to reinstate her to her position if currently available or, if not, to a substantially similar position. She also awarded Zaimitis front pay from the date of the hearing to the date of reinstatement as well as \$125,000 in emotional distress damages.

Finding that Air Canada's actions showed a pattern of oppressive and malicious conduct established by clear and convincing evidence, the ALJ ordered an administrative fine in the amount of \$25,000 to be paid by Air Canada to the state's general fund.

The ALJ also ordered Air Canada to cease and desist from failing to engage in the interactive process to reasonably accommodate employees with disabilities, and to post a notice in each California business location acknowledging its unlawful conduct towards Zemaitis and notifying all employees of their rights under the act.

The commission, by a vote of 3 to 1, adopted the ALJ's decision as final. The commission also designated the decision as precedential.