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Letter From the Editor



Dear CPER Readers,

Caught up in the daily struggle of how to provide public services with decreasing funding, it is easy to forget how we got here or think about where we're going. The featured articles in this issue invite us to step back and view the changing political context in which public work is done. In "Privatization and the 'Reform' of Public Education," Michael Egan (California Teachers Association) questions whether the current trend in market-based management is serving the purposes of public education. In chapters from his book, *From Mission to Microchip: a History of the*

California Labor Movement, Fred Glass (California Federation of Teachers) reminds us that public sector labor advances took place against the backdrop of a belief that government could solve social problems. Our third excerpt from his book traces the struggle of female and minority public workers to gain comparable pay for comparable work and their success — just as Proposition 13 passed and a squeeze on public funding began.

Bruce Barsook (Liebert, Cassidy, Whitmore) reviews the law regulating when an employer may implement unilateral changes in terms and conditions of employment, which agencies are increasingly considering necessary after the Great Recession. Fresno County illustrates a common scenario, where imposition of compensation cuts leads to a strike and a PERB complaint.

As stories in Recent Developments show, reworking past promises is the next step for some public employers facing ballooning budget deficits. The City of Stockton has the distinction of becoming the first entity to enter the mediation process mandated by AB 506 before a municipality may file for bankruptcy. The idea is for the city and its labor unions and creditors to renegotiate pacts before the city runs out of money. And Governor Brown's pension reform legislation may renege on an aspect of retirement promises to some current employees — their contribution rates.

The governor and several others are trying to reverse the slide in public funding, but they can't agree on who should benefit or who should pay more taxes. As the stories in our Public Schools section illustrate, the uncertainty and contingencies in funding wreak havoc on the education sector's operations and labor relations.

Don't miss the developments in case law under the Public Safety Officers Procedural Bill of Rights Act and the California Public Records Act scattered throughout this issue. A terminated officer's ability to use the PSOPBRA to see personnel files ends on the effective date of termination. And, an employee's right to challenge disclosure of personnel files under the CPRA in court has been confirmed.

CPER is continuing to upgrade your online experience. Our PERB summaries now contain direct links to the complete decisions on PERB's website. And the introduction of a printer-friendly pdf capability allows you to highlight text and print articles easily.

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Katherine J. Thomson, Editor, CPER

CPER Journal Online

Privatization and the “Reform” of Public Education



By [Mike Egan](#), assistant executive director, [California Teachers Association](#)

When Milton Friedman’s book *Capitalism and Freedom* was published 50 years ago,^[1] it included a call for the reform of public education through free-market approaches and the use of vouchers. Over the last 20 years, through advocacy, legislation, and regulation, the privatization of public education has grown nationally. In that time, public education leaders have experimented with a wide range of privatization vehicles including charter schools, education management organizations, and overtly market-oriented policies.

Friedman’s theories opened the school door to a host of free-market themes: competition, consumer choice, market segmentation, efficiency, productivity, achievement measures, enhanced managerial authority, a contingent workforce, and incentives and sanctions related to performance. These topics continue to resonate, both in the national debate and within California, but they have begun to destabilize public education. How we implement such ideas has implications not only for the day-to-day operations of public schools, but more importantly for the functioning of our social, political, and economic institutions, and the maintenance of our democracy.

Stanford education professor Patricia Burch writes about the downside of privatization:

Beyond the shifting of resources and authority (public to private), market-based education policies can have destabilizing effects of decision making structures in education. This includes the basic premise that the complex nature of education necessitates collective decision making and collective input into policy design. Market based education governance is a different model of governance — based on consumerism and competition. When [privatization] is on the rise, decision-making processes anchored in principles of collaboration, collective input and deliberation, struggle to maintain a foothold in schools. As neoliberal policies create more space for market principles, they can make less space for democratic processes in education policy and policies informed by public interest.^[2]

These profound challenges need to be carefully considered, warns Michael Apple, professor of education at the University of Wisconsin:

We spend billions of dollars on schooling. Evidence of success is needed, as is accountability in where the money goes and whether it is well spent. Of course, issues such as what the goals of schooling should be, what the knowledge that we teach should be, who decides, what counts as evidence, accountability to whom, and similar kinds of things are not easy to ask or to answer. But they can get forgotten in the midst of our search for efficiency, measurability, and business-like procedures.^[3]

Purpose of Public Education

We expect our public education system to perform multiple roles. It must develop students’ knowledge and skills from an early age and set the stage for continued personal learning, and it must lay the foundation for innovation for the benefit of our society. Nineteenth-century education reformer Horace Mann viewed public education as “the great equalizer of the conditions of men, the balance-wheel of the social machinery” providing all the opportunity for social mobility and to achieve the “American dream.” In its broadest and perhaps most important sense, the public education system informs, prepares, and enables citizens to participate in a representative democracy.

The degree to which public education has succeeded in filling these roles has been the topic of scholarly and popular controversy since the beginnings of the ‘common school’ in the mid-19th century until today. Many voices have advocated changes in the purpose, curriculum, pedagogy and the social relations of our public education system.

Educational theorists Samuel Bowles and Herbert Gintis argue that the purpose of schooling in a capitalist society is based on three propositions: human development, inequality, and the process of social change that serves the needs of our developing political economy. How these propositions are shaped is subject to the tensions created in the political and economic order of our society. For example, as our economy has passed through agricultural and industrial phases and into a growing service- and knowledge-based economy, the demands placed on the public education system have adjusted accordingly. The two educators contend that:

(1) while cognitive skills are important in the economy, the most important contribution of schooling to an individual's economic success lay elsewhere....Schools prepare people for dual work roles, by socializing people to function well (and without complaint) in the hierarchical structure of the modern corporation or public office....

(2) parental class and other aspects of economic status are passed on to children in part by means of unequal educational opportunity, but that the economic advantages of the well-to-do go considerably beyond the superior education they receive,

(3) the origins of primary schooling and the development of the high school suggested that the evolution of the modern school system is accounted for not by the gradual perfection of a democratic or pedagogical ideal but by a series of class and other conflicts arising through the transformation of the social organization of work and its rewards...the interests of the owners of the leading business tended to predominate but were rarely contested.[4]

The champions and advocates of privatization of public education should be scrutinized from the perspective of Bowles and Gintis. Despite the rhetoric of seeking to close the achievement gap, solve the civil rights issues of our time, or develop a "child-centric" focus in our education efforts, the energy and financial support of the effort to privatize public education has more to do with preparing California students, parents, and employees for their respective roles in a 21st century global economy of growing inequality. Privatization concentrates the exercise of economic decisionmaking, puts political power in fewer private hands, and nurtures the public-private partnerships that accelerate the transfer of public monies into private hands. The privatization of public education serves a larger political economic agenda that rewards the few and neglects the many.

Charter Schools

The charter school movement has succeeded in introducing private sector norms and culture into the design, operation, and management of publicly funded schools. California's Charter School Act of 1992 was only the second in the nation. Its promise: reform based primarily on teacher and parent control of the education process that could lead to systemic change of public education for all.

Legislative intent

47601. It is the intent of the Legislature, in enacting this part, to provide opportunities for teachers, parents, pupils, and community members to establish and maintain schools that operate independently from the existing school district structure, as a method to accomplish all of the following:

- (a) Improve pupil learning.
- (b) Increase learning opportunities for all pupils, with special emphasis on expanded learning experiences for pupils who are identified as academically low achieving.
- (c) Encourage the use of different and innovative teaching methods.
- (d) Create new professional opportunities for teachers, including the opportunity to be responsible for the learning program at the school site.
- (e) Provide parents and pupils with expanded choices in the types of educational opportunities that are available within the public school system.
- (f) Hold the schools established under this part accountable for meeting measurable pupil outcomes, and provide the schools with a method to change from rule-based to

performance-based accountability systems.

(g) Provide vigorous competition within the public school system to stimulate continual improvements in all public schools.[5]

Early national proponents of charters, including education innovators Albert Shanker, Ray Budde, and Ted Kolderie, believed in their potential to transform public education by engaging teachers and parents in the active operation of local schools. California's charter movement includes many sincere advocates who maintain that original belief. Shanker, however, soon became disillusioned, believing that "the charter school movement was largely hijacked by conservatives who made many charter schools vulnerable to the same groups that made voucher schools so dangerous: for-profit corporations, racial separatists, the religious right, and anti-union activists." [6]

In California, the intent of the Charter School Act quickly gave way to a focus on the commodification of the education product. Its consumption was promoted as "parental choice." It was sold through the growth of Charter Management Organizations [7] as corporate operators of public schools, which increased management authority, hostility to employee organization (with some exceptions), and the adoption of private sector labor market policies (reduced average compensation, employment at will, extended hours of operation, and high rates of employee turnover).

Rather than creating a learning lab where lessons applicable for systemwide improvement could be generated and shared, the charter movement has evolved in a way that fractures the traditional education system. It has become an alternative "choice" for parents, but contributes little in broad systemic change and improvement. Instead of serving to "stimulate continual improvements in all public schools," charters have undermined traditional school districts by siphoning off students — and the resources associated with them. Research suggests the charter effort has provided neither broad-based lessons nor examples that can be used to improve district performance, nor has it increased students' academic performance beyond what they could achieve in their "home" districts. [8] Studies also suggest that many charters under-enroll certain types of students (English-language learners and those with learning and other disabilities) [9] and undergo a process of resegregation. [10] Despite this evidence, legislation at the national (Elementary and Secondary Education Act/No Child Left Behind, Race to the Top, School Improvement Grants) and state (Parent Empowerment Act of 2010 [11]) levels continues to embrace charters as the favored solution to struggling students and schools.

The Crisis in Funding Public Education

Since the end of the post-war economic boom in the 1970s and the passage of Proposition 13 in 1978, public education funding has been harmed by the fluctuations in the economies and politics of our state. The passage of Proposition 98 in 1988 and the establishment of a constitutional guarantee of a share of total state funding did not arrest the slide. [12] California has fallen from being among the highest in per-pupil funding to among the lowest.

As a result of Prop. 13, the threshold for passing a state budget and measures to increase revenues changed from a simple majority to a two-thirds vote of the legislature. It shifted a relatively stable property tax funding base for public education to reliance on a more volatile personal income tax, which has had consequences unanticipated by most Californians. Prior to Prop. 13, local property taxes provided 60 percent of school funding, state revenues provided 34 percent, and federal sources provided 6 percent. [13] In 2009-10, those figures were nearly reversed, with state revenues providing 60 percent of funding, local property taxes giving 23 percent, and the balance coming from the state lottery and other federal and local sources. Gaining two-thirds majorities for budgets required subsequent tax provisions nominally promoting "growth" and favoring corporations and the affluent. These policies did not deliver broad-based economic prosperity and further eroded funding for education.

When the housing bubble burst and financial and equity markets collapsed in 2008, the ensuing recession wiped out billions, if not trillions, of dollars of wealth and income. It shattered the ability of the federal, state, and local governments to maintain infrastructure, provide a social safety net, and maintain traditional public services, including public education. Funding for public education declined precipitously, falling from over \$56 billion in 2007-08 to an estimated \$48.3 billion in 2011-12. In order to cope with the revenue slide, traditional school districts reduced staff, increased class size, shortened the school day, and cut program, while at the same time being admonished by critics to improve student performance, "leave no child behind," and "race to the top." Charters, too, were affected and were obliged to hold down

compensation costs and seek supplementary funding from foundations, philanthropies, benefactors, and other private sources.

As a “free market” economic crisis underlies the current problem of providing such essential public services as education in California, it is ironic that “privatizers” seek to solve that same crisis through free-market solutions.

New Markets, New Profits

Despite the sharp declines in funding at all levels of governments, the private sector looked to the public education sector as a new market to exploit. Aided by legislation and regulations (such as No Child Left Behind, Race to the Top, School Improvement Grants) and the politicians that favored them (Bush, Schwarzenegger, and Obama), the private sector entered that market with a vengeance:

Education is rapidly becoming a \$1 trillion industry, representing 10% of America’s GNP and second in size only to the health care industry. Federal and state expenditures on education exceed \$730 billion. Education companies, with over \$80 billion in annual revenues, already constitute a large sector in the education arena. The education industry plays an increasingly important role in supporting public education by meeting the demand for products and services that both complement and supplement basic education services.[14]

Historically, traditional private participants in the public education sector have included food and transportation services, textbook and test publishers, specialized instruction, and private tutors. Now, No Child Left Behind’s policy mandates for testing, data collection, remedial services, school improvement, and management services have created new market segments to be mined for profits. Financial data from 2006 shows private vendors participating in the following new and growing public education market areas: test development and preparation, data management and collection, remedial services, and online curricula. Over a dozen of these companies *each* have earned from \$14-\$100 million and realize gross profits of 40-60 percent annually.[15]

Online content and education services, including “virtual” charter schools, are another growth segment for private investment. Banker Michael Moe, formerly with Lehman Brothers and Merrill Lynch, and who helped take K-12, Inc. (a large online charter operator) public, says, “This education issue, there’s just not a bigger problem or bigger opportunity in my estimation.” He now has his own firm that helps businesses tap into the public education market.[16] Beginning in 2002, K-12, Inc., operating as California Virtual Academy, began online charter schools in nine California counties,[17] and may accept students residing in those and contiguous counties. Another online charter operator, California Pacific Charter Schools, is authorized by local districts in five counties and accepts students from up to 26 counties in the state.

Despite the growth of online charters in California and nationally, many have reservations about their role in public education. In *The Nation*, journalist and liberal activist Lee Fang recently cautioned:

To be sure, some online programs have potential and are necessary in areas where traditional resources aren’t available. For instance, online AP classes serve rural communities without access to qualified teachers, and there are promising efforts to create programs that adapt to the needs of students with special learning requirements. But by and large, there is no evidence that these technological innovations merit the public resources flowing their way. Indeed, many such programs appear to be failing the students they serve.

A recent study of virtual schools in Pennsylvania conducted by the Center for Research on Education Outcomes at Stanford University revealed that students in online schools performed significantly worse than their traditional counterparts. Another study, from the University of Colorado in December 2010, found that only 30 percent of virtual schools run by for-profit organizations met the minimum progress standards outlined by No Child Left Behind, compared with 54.9 percent of brick-and-mortar schools. For White Hat Management, the politically connected Ohio for-profit operating both traditional and virtual charter schools, the success rate under NCLB was a mere 2 percent, while for schools run by K12, Inc., it was 25 percent. A major review by the Education Department found that policy reforms embracing online courses “lack scientific evidence” of their effectiveness.

“Why are our legislators rushing to jump off the cliff of cyber charter schools when the best

available evidence produced by independent analysts show that such schools will be unsuccessful?” asked Ed Fuller, an education researcher at Pennsylvania State University, on his blog.^[18]

In December of 2011, the *New York Times* raised similar concerns about the education and business practices of K12 Inc., and other online charter operators:

A look at [K12 Inc.'s] operations, based on interviews and a review of school finances and performance records, raises serious questions about whether K12 schools — and full-time online schools in general — benefit children or taxpayers, particularly as state education budgets are being slashed.

Instead, a portrait emerges of a company that tries to squeeze profits from public school dollars by raising enrollment, increasing teacher workload and lowering standards.

Current and former staff members of K12 Inc. schools say problems begin with intense recruitment efforts that fail to filter out students who are not suited for the program....Online schools typically are characterized by high rates of withdrawal.

Teachers have had to take on more and more students, relaxing rigor and achievement along the way, according to interviews. While teachers do not have the burden of a full day of classes, they field questions from families, monitor students' progress and review and grade schoolwork. Complaints about low pay and high class loads — with some high school teachers managing more than 250 students — have prompted a unionization battle at Agora, which has offices in Wayne, Pa.

A look at a forthcoming study by researchers at Western Michigan University and the National [Education Policy Center] shows that only a third of K12's schools achieved adequate yearly progress, the measurement mandated by federal Behind legislation.

....Teachers have also questioned why some students who did no class work were allowed to remain on school rosters, potentially allowing the company to continue receiving public money for them. State auditors found that the K12-run Colorado Virtual Academy counted about 120 students for state reimbursement whose enrollment could not be verified or who did not meet Colorado residency requirements. Some had never logged in.

“What we're talking about here is the financialization of public education,” said Alex Molnar, a research professor at the University of Colorado Boulder School of Education who is affiliated with the education policy center. “These folks are fundamentally trying to do to public education what the banks did with home mortgages.”^[19]

Wall Street, as well, has been actively engaged in the public education sector to aid its bottom line. In 2000, Congress established the New Markets Tax Credit Program to encourage investment into business and real estate projects in low-income communities. Individual or corporate investors receive a tax credit totaling 39 percent of the original investment amount. In June 2010, JPMorgan Chase said it was willing to invest \$325 million (\$50 million in grants, \$175 million in debt financing, and \$100 million in new markets tax-credit equity) to support the development of charter school facilities. But, as reported in *EducationWeek*:

...Alex Molnar, a professor of education policy at Arizona State University in Phoenix and a skeptic of the value of charter schools, said he wonders whether JPMorgan Chase's plan to finance charter schools is a way for the bank to make money from public education rather than provide charity to it.

For the \$100 million that the bank is providing in “new markets tax-credit equity,” he said, it's his understanding JPMorgan will receive a tax credit through a federal government program established at the end of the Clinton administration.

The New Markets Tax Credit Program permits taxpayers to receive credits against federal income taxes for qualified investments in designated community-development entities, according to a description of the program on the U.S. Department of the Treasury's website. The credit for the investor equals 39 percent of the cost of the investment and is claimed over

seven years, the site says.

“Essentially, it amounts to a loan,” Mr. Molnar said. “They are making money from the government because they are able to offset these funds with this tax credit.”^[20]

Hedge funds profit from public funds flowing to charters too.

Harlem Children’s Zone, for instance, is one of the most financially well-endowed education reform efforts in the country. Following *Waiting for Superman*,...Harlem Children’s Zone received millions — including \$20 million from Goldman Sachs in mid-September. New York City is also contributing \$60 million toward a \$100 million new school.

But there are also those who will make money off of Harlem Children’s Zone.

The organization had net assets of \$194 million listed on its 2008 nonprofit tax report. Almost \$15 million was in savings and temporary investments, and another \$128 million was invested at a hedge fund. Given that most hedge funds operate on what is known as a 2-20 fee structure (a 2 percent management fee and a 20 percent take of any profits), some lucky hedge fund will make millions of dollars off of Harlem Children’s Zone in any given year.^[21]

Contesting the Future of Public Education in California

For good or ill, residents of California can say that they have a hand in the future. The history and trends generated by our state have had an impact around the world, whether in the industrialization of agriculture, the intensification of global trade, or the creation of knowledge and new technologies underlying the explosion of integrated circuits and their applications. Public investments in physical and social infrastructure — from water projects and transportation systems to primary and secondary education, the community college system, the California State University, and the University of California — have made our state a desirable destination for corporations and individuals. And, this, in turn, has impacted the state and its economy and politics in a positive and profound way.

These developments were firmly rooted in a mass public education system that was a model for the world and supported a vibrant political popular culture. To return to this scenario, the privatizers’ vision of market-based education reform, and the economic and political landscape they intend it to support, must be turned, and another narrative of public education created. As Gintis and Bowles observed, “The interests of the owners of the leading businesses tended to predominate but were rarely contested.” We must again rise to that contest.

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^[1] Milton Friedman, *Capitalism and Freedom*, University of Chicago Press, Chicago, Illinois, 1962.

^[2] Patricia Burch, *Hidden Markets The New Education Privatization*, Routledge, New York and London, 2009, p 14.

^[3] Michael W. Apple in Patricia Burch, *Hidden Markets The New Education Privatization*, Routledge, New York and London, 2009, p. xi.

^[4] Samuel Bowles and Herbert Gintis, *Schooling in Capitalist America*, Haymarket Books, Chicago, Illinois, 2011, pp. ix-x.

^[5] Education Code Secs. 47600 et seq.

- [6] Richard D. Kahlenberg, *Tough Liberal Albert Shanker and the Battles Over Schools, Unions, Race and Democracy*, Columbia University Press, New York, 2007.
- [7] Such as Aspire, High Tech High, KIPP, and Green Dot, the latter of which became unionized very early on. Green Dot's founder embraced empowering its employees through collective bargaining, providing a just cause standard for discipline and discharge, a salary schedule competitive with neighboring districts and involving teachers in curriculum development at each of its campuses. As Green Dot grew, so did the authority of local principals in managing local Green Dot schools.
- [8] Multiple Choice: Charter Performance in 16 States, Center for Research on Education Outcomes (CREDO), Stanford University, Stanford, CA, 2009.
- [9] G. Miron, J. L. Urschel, W. J. Mathis, & E. Tornquist, E. *Schools without Diversity: Education Management Organizations, Charter Schools and the Demographic Stratification of the American School System*. Boulder and Tempe: Education and the Public Interest Center & Education Policy Research Unit, 2010. Retrieved from <http://epicpolicy.org/publication/schools-without-diversity>.
- [10] Erica Frankenberg, Genevieve Siegel-Hawley, and Jia Wang, *Choice without Equity: Charter School Segregation and the Need for Civil Rights Standards*, The Civil Rights Project UCLA, Los Angeles, CA, January 2010.
- [11] Known as the parent "trigger" law.
- [12] Jonathan Kaplan, "School Finance Facts," California Budget Project, Sacramento, CA, November 2011.
- [13] Tom Timar, "How California Funds K-12 Education," Institute for Research on Education Policy and Practice, Stanford University, Stanford, CA, September 2006.
- [14] Education Industry Association, (n.d.a.), *Overview of the education industry association*, in Burch, op. cit., p. 21.
- [15] *Hidden Markets* Burch, op cit, p. 24.
- [16] Lee Fang, "How Online Learning Companies Bought America's Schools," *The Nation*, November 16, 2011.
- [17] Tuolumne, Kern, Kings, Los Angeles, San Diego, San Joaquin, San Mateo, Sonoma, and Sutter.
- [18] Lee Fang, op. cit.
- [19] Stephanie Saul, "Profits and Questions at Online Charter Schools" *New York Times*, December 12, 2011.
- [20] Mary Ann Zehr, "Banking Giant Offers Financing for Charter Schools" *EducationWeek*, June 9, 2010.
- [21] Barbara Miner, "The Ultimate Superpower," <http://www.NOTwaitingforsuperman.org>, October 2010.

CPER Journal Online

The Rights and Limitations on a Public Employer's Ability to Unilaterally Implement Terms and Conditions of Employment



By Bruce A. Barsook, Liebert Cassidy Whitmore

Normally, changes in terms and conditions of employment (e.g., wages, benefits, hours, leaves) are the result of negotiated agreements between the public employer and the recognized employee organization. Occasionally, however, employers determine that they need to change those working conditions without agreement. While the wisdom of such a move and its impact on labor-management relations should be considered whenever unilateral action is contemplated, there are conditions under which unilateral actions are legally permissible, and that is the focus of this article.

General Rule: Unilateral Actions Prohibited

It is a fundamental tenet of labor law that an employer must refrain from taking any unilateral action which would change a mandatory subject of bargaining until it has given the recognized employee organization notice and an adequate opportunity to bargain.^[1] If bargaining is requested, the duty to bargain lasts until the parties have either reached an agreement or reached impasse and have exhausted any mandatory impasse resolution procedures. Absent some legally recognized defense, failure to comply with these obligations constitutes a “per se” violation of the duty to negotiate in good faith.^[2]

Exceptions to the General Rule

There are three legally recognized defenses to employer-initiated unilateral action — waiver, necessity, and expiration of the collective bargaining agreement — and one partial exception, implementation of a non-negotiable decision. Since the essence of collective bargaining is bilateralism, courts and labor boards apply these exceptions reluctantly.^[3] The Public Employment Relations Board has held that the employer not only bears the burden of proving the affirmative defense of waiver, but that any doubts must be resolved against the party asserting waiver.^[4]

Waiver. An exclusive representative may waive its right to negotiate a proposed change in the terms and conditions of employment either by agreeing to waive its right to bargain during the term of agreement (contract waiver) or by failing to request negotiations despite notice and a reasonable opportunity to negotiate before the implementation of the proposed change.

For a contract waiver to justify a unilateral action, the contract must contain specific language that clearly and unmistakably waives the right to bargain over a change in a particular matter. Such a waiver is most often found when the specific subject is covered by the express terms of an existing agreement.

For example, PERB held that a provision in a collective bargaining agreement permitting “one duty free lunch period of no less than 30 minutes each day,” constituted a clear waiver of the union’s right to bargain over a reduction of the teachers’ lunch period from 50 to 30 minutes.^[5]

On the other hand, general provisions, such as “zipper” clauses, which extinguish the employer’s (or both parties’) duty to bargain during the term of the agreement, ordinarily will not be held to constitute the requisite clear and unmistakable waiver. Such provisions serve only to “shield” the employer from union requests to negotiate during the term of the contract; they do not provide the employer with the “sword” to unilaterally adopt changes in employment terms.^[6]

Management rights clauses, which reserve to management the “exclusive” right to take action with respect to a list of specified employment conditions, are generally not considered to constitute a sufficiently clear and unmistakable waiver allowing unilateral employer action. Thus, it has been held that even though a “county rights” clause in a memorandum of understanding reserved for the county “the exclusive right to...assign its employees,” the county could not unilaterally change shift assignments

because the language did not constitute a “clear and unmistakable relinquishment” of the union’s right to bargain.[7]

A public employer also may act unilaterally if it offers written notice and a reasonable opportunity to meet before the intended action, and the employee organization fails to request bargaining.[8] Simply protesting an employer’s contemplated unilateral action is not the same as a demand to bargain.[9] An employee organization however, need not request bargaining when such a request would be futile or if a firm decision already has been made by the employer before giving notice to the union.[10] Under such circumstances, a unilateral change would be unlawful.

PERB has also suggested that under some circumstances, a union’s failure to negotiate in good faith, following the employer’s notice and opportunity to negotiate, may constitute a waiver of the union’s right to negotiate, and hence, authorize an employer’s unilateral action.[11]

Necessity. While compelling business or operational necessity may sometimes justify unilateral action, courts and labor boards usually have looked with disfavor at these employer claims. In order to justify unilateral action, the necessity must be the unavoidable consequence of a sudden change in circumstances beyond the employer’s control, there must be no alternative course of action available, and the time to act must preclude the opportunity for bargaining.[12]

Alleged financial emergencies traditionally have fared poorly as a ground for unilateral action. For example, speculative concern over the impact of Proposition 13 was determined by both the courts and PERB to be an inadequate reason to engage in unilateral action.[13] Similarly, Governor Schwarzenegger’s unilateral declaration of a fiscal emergency in early 2008 was found to be an insufficient justification for unilateral action.[14] Claims based on the constitutional requirement that public agencies submit a balanced budget and constitutional debt limitation provision also have been rejected.[15] Indeed, the California Supreme Court suggested in the *Sonoma County* case that contractual monetary commitments could be deferred only if the fiscal emergency was so disastrous that the agency would be forced to cease operations if the crisis were not resolved.[16]

Operational necessity has been accepted in situations in which the public employer was compelled by statute to take action. Thus, in *Mt. Diablo USD*, PERB determined that mandatory provisions of the Education Code regarding teacher layoffs permitted the district to send out notices and implement some aspects of the layoff where the code provided for immutable dates for action.[17]

Expiration of prior contract. Generally, upon expiration of a collective bargaining agreement, the duty to bargain requires the employer to maintain the status quo without taking unilateral action as to wages, hours, or other working conditions until the parties negotiate an agreement or exhaust the impasse procedures.[18]

On the other hand, contractual terms that are solely a product of the contract itself (e.g., provisions that relate to the employee organization’s statutory rights) form an exception to this general rule. Since the existence of these terms presupposes the existence of a contract, once the agreement has expired, an employer may alter these conditions without bargaining with the union.[19] Examples include union security, management rights clauses, zipper clauses, and no strike clauses.[20]

PERB also has adopted the reasoning of the U.S. Supreme Court in *Litton Financial Division*[21] and has held that arbitration clauses do not continue in effect after expiration of a collective bargaining agreement except if: (1) the dispute involves facts and occurrences that arose before expiration; (2) the dispute involves post-expiration conduct that infringes on rights accrued or vested under the agreement; or (3) under normal principles of contract interpretation, the agreement to arbitrate survives the expiration of the agreement. While PERB may apply this holding to other acts under its jurisdiction, the state legislature amended the Dills Act (applicable to state employees) so that arbitral clauses and other provisions of a memorandum of understanding survive the expiration of the agreement.[22]

If a provision in a collective bargaining agreement relates to a non-mandatory subject of bargaining (permissive subject), PERB has held that the employer may make changes to the provision following expiration of the contract. Thus in *Eureka City School District* and *El Centro Elementary School Dist.*, PERB found that following expiration of the contracts, school districts’ unilateral changes to a smoking policy (*Eureka*) and retiree health insurance (*El Centro*) were not unfair labor practices.[23]

Implementation of a non-negotiable decision. A public employer is not obligated to negotiate over subjects that are outside the scope of bargaining. Hence, it may make unilateral changes to practices that are outside the scope of representation.[24] However, before unilaterally implementing any decision on a subject outside the scope of representation, the agency must negotiate over the effects of that decision insofar as they affect matters within the scope of bargaining. PERB has held that under certain circumstances, an employer may implement a non-negotiable decision before completion of the bargaining process. Such action is permissible where:

- the implementation date is not an arbitrary one, but is based on either an immutable deadline...or an important managerial interest, such that a delay in implementation beyond the date chosen would effectively undermine the employer's right to make the nonnegotiable decision;
- notice of the decision and implementation date is given sufficiently in advance to allow for meaningful negotiations prior to implementation; and,
- the employer negotiates in good faith prior to implementation and continues to negotiate in good faith after implementation as to those subjects not necessarily resolved by virtue of the implementation.[25]

In *Mt. Diablo*, PERB held that the Education Code provisions regarding the notices that must be sent to certificated teachers in the event of layoffs constituted an immutable deadline which authorized the district to implement aspects of the layoffs prior to completion of the negotiations process. In *Compton CCD*, PERB found that the need to implement layoffs prior to the adoption of the district's budget represented a significant managerial interest (the need to reduce expenditures), and a two-month advance notice given to classified employees was sufficient to allow the parties to negotiate before the implementation of the layoffs. A similar result was reached by PERB involving the layoff of certain employees in the state's juvenile correctional facilities.[26]

Implementation Following Completion of the Bargaining Process

A public employer may unilaterally implement changes to working conditions if it negotiates in good faith, the parties reach a bona fide impasse, and the employer exhausts its impasse procedure obligations in good faith.

Good faith. The obligation to negotiate in good faith has been interpreted by the courts and PERB to mean that a party must exhibit the subjective attitude which requires a genuine desire to reach agreement. In establishing the presence or absence of good faith, PERB and the courts generally review the totality of the circumstances. A party's willingness to exchange reasonable proposals, and its attempts to reconcile differences during the bargaining process, are indicative of an intent to bargain in good faith. However, the duty to bargain does not compel either party to make concessions. Insistence on a firm position, if sincerely held and explained, also can be consistent with the obligation to negotiate in good faith.[27]

Existence of impasse. The state's public sector bargaining laws for public schools, community colleges, and other higher education employees set forth the definition of impasse and the procedure for identifying the existence of an impasse. So too, do most local agency employer-employee relations resolutions/ordinances enacted pursuant to the Meyers-Milias-Brown Act (MMBA), which does not define the term.[28]

The Dills Act (or State Employer-Employee Relations Act), which covers state employees, does not specifically define impasse or provide for formal determination of when an impasse exists. Instead, the act authorizes the parties to progress to mediation when no agreement has been reached after a reasonable period of time.[29] The Trial Court Employment Protection and Governance Act (TCEPGA) and the Trial Court Interpreter Employment and Labor Relations Act (TCIELRA) have provisions similar to those of the Dills Act.[30]

The Educational Employment Relations Act[31] provides a good working definition of an impasse: "A point during negotiations over matters within the scope of representation at which the parties' differences in positions are so substantial or prolonged that future meetings would be futile." [32]

Unless the parties agree they are at impasse, the existence of a bona fide impasse is a question of fact that must be determined on a case by case basis. PERB's regulations provide guidance to the parties:

In determining whether an impasse exists, the Board shall investigate and may consider the

number and length of negotiating sessions between the parties, the time period over which the negotiations have occurred, the extent to which the parties have made and discussed counter-proposals to each other, the extent to which the parties have reached tentative agreement on issues during the negotiations, the extent to which unresolved issues remain, and other relevant data.[33]

Exhaustion of impasse procedures. Unlike the private sector, which has no mandatory impasse procedures, most public sector laws require the parties to participate in good faith. A breach of this duty, in the absence of a valid defense, is unlawful, and if committed by the employer, would preclude the employer from taking unilateral action.[34] Impasse procedures under EERA and HEERA are not considered complete until the parties have met with a mediator, gone to factfinding, considered the factfinders' report, and engaged in any post-factfinding negotiations.[35] Indeed, in *Modesto City Schools*,[36] PERB held that if one party makes significant concessions after issuance of the factfinders' report, the duty to bargain is reactivated and the other party commits an unfair practice if it refuses to negotiate (or unilaterally implements). If the parties again reach a deadlock, the obligation to negotiate ceases (is suspended), and the employer is then free to implement terms and conditions of employment.

Unlike EERA and HEERA, impasse resolution under the Dills Act is limited to mediation. Like EERA and HEERA, however, the Dills Act requires the parties to participate in good faith in impasse procedures. A breach of this duty constitutes an unfair practice, and if committed by the state would preclude the state from taking unilateral action.[37] Mediation is permissive under both the TCEPGA and the TCIELRA. However, like the other laws described above, the employer's failure to participate in the impasse procedure in good faith is unlawful.[38]

Under the MMBA, the impasse procedure includes both procedures adopted by the local agencies themselves, as well as recently enacted statutory provisions. Local agency procedures generally provide for an impasse meeting and a governing body hearing procedure, and occasionally mediation and interest arbitration.[39] AB 646, which went into effect January 1, 2012, provides that if mediation is unsuccessful, an employee organization may request the matter be sent to factfinding. Under such circumstances, the statute provides, a local agency may not unilaterally implement changes unless/until it has completed the factfinding process and holds a public hearing regarding the proposed changes.[40] The foregoing statutory impasse resolution process does not apply to charter cities and counties that have binding interest arbitration governing the unit whose negotiations are at impasse.[41]

Authorized Unilateral Actions

If the public employer has negotiated in good faith, reached impasse, and exhausted the impasse procedures in good faith, it may legally and unilaterally adopt changes to wages, hours, and other terms and conditions of employment. Under most public sector labor laws, the employer may implement changes consistent with offers it made to, and which were rejected by, the union. Thus, the changes implemented need not be exactly those offered during negotiations, but must have been reasonably comprehended within the pre-impasse proposals.[42] PERB has stated, "matters reasonably comprehended within pre-impasse proposals include neither proposals better than the last best offer nor proposals less than the status quo which were not previously discussed at the table." [43]

Under the Dills Act and MMBA, statutory language provides that, following exhaustion of the impasse procedures, an employer may implement its last, best, and final offer.[44] But even here, PERB has held that "the employer need not implement changes absolutely identical to its last offer on a given issue," provided the unilateral action is "reasonably comprehended within the pre-impasse proposals." [45] In practice, most public employers implement their last, best, and final offer.

The range of issues that can be unilaterally implemented is not unlimited. For example, an employer may not unilaterally impose a waiver or limitation on the bargaining rights of the exclusive representative. In *Rowland USD*, PERB held that the district committed an unfair practice by unilaterally implementing a limitation on the number of subjects the employee organization could propose for negotiations during a designated period of time.[46]

In addition, where a public employer seeks to unilaterally implement proposals that are less generous than the status quo, and such proposals affect vested rights, the law may restrict the employer's ability to act. Courts have deemed certain benefits to be vested rights. These benefits include pensions, retiree health insurance, and other benefits that accrue based on years of employment. A public employer is generally

precluded from making unilateral changes to such benefits unless it provides comparable benefits to those affected by the change.^[47]

Duration of the Unilateral Action/Continuing Duty to Bargain

Although PERB has suggested an employer may lawfully implement a provision that defines the period for which the terms and conditions of employment will be effective,^[48] an employer may not insulate itself from negotiations for an extended period of time. First, most public sector laws provide that (notwithstanding unilateral action) the recognized employee organization has the right to negotiate with the employer prior to the adoption by the agency of its next budget.^[49] In addition, even though an employer has reached impasse and unilaterally changed terms and conditions of employment, the duty to negotiate is simply suspended (not ended), until changed circumstances indicate that an attempt to reach agreement is no longer futile. Thus an employer's duty to resume negotiations arises if the union proposes a concession from its earlier position that demonstrates circumstances have changed and agreement may be possible.^[50]

Conclusion

The duty to bargain in good faith is one of the hallmarks of public sector labor law. Unilateral employer actions without good faith negotiations and exhaustion of the impasse procedures usually constitute a violation of applicable public sector laws. While there are exceptions to this general rule — e.g., waiver, necessity — these exceptions are narrowly construed.

If a public employer has negotiated in good faith, reached impasse, then exhausted required impasse procedures in good faith, the employer may unilaterally implement certain changes to wages, hours, and working conditions.

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^[1] *Public Employment Relations Bd. v. Modesto City Sch. Dist.* (1982) 136 Cal.App.3d 881, 900, following *NLRB v. Katz* (1962) 369 U.S. 736, 745. The duty of the employer and exclusive representative to negotiate in good faith regarding mandatory subjects of bargaining is codified at Gov. Code Secs. 3543.5(c) and 3543.6(c) of EERA (public school and community college districts); Gov. Code Secs. 3571(c) and 3571.1(c) of HEERA (CSU, U.C. system employees); Gov. Code Secs. 3519(c) and 3519(c) of the Dills Act (state employees); Gov. Code Sec. 3505 of the Meyers-Milias-Brown Act (local agency employees); Public Utilities Code Secs. 99563.7(c) and 99563.8(c) of the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (MTA supervisors); Gov. Code Sec. 71634.2 of the Trial Court Employment Protection and Governance Act (court employees); Gov. Code Sec. 71818 of the Trial Court Interpreter Employment and Labor Relations Act (court interpreters); and 29 USC Secs. 158(a)(5) and 158(b)(3) of the National Labor Relations Act (private sector employees). When interpreting the duty to negotiate, the courts and the Public Employment Relations Board take guidance from cases interpreting the NLRA and California labor relations statutes with parallel provisions. (See *Firefighters Union v. City of Vallejo* (1974) 12 Cal.3d 608; *City of Whittier* (2005) PERB Dec. No. 1761-M.)

A unilateral change in practice that does not change a term or condition of employment is not a breach of the duty to negotiate in good faith. See *Trustees of the California State Univ.* (2005) PERB Dec. No. 1751-

H (workplace violence prevention policy and guidelines); *San Francisco USD* (2009) PERB Dec. No. 2048-E (reporting location); *Los Angeles Superior Court* (2010) PERB Dec. No. 2112-I (elimination of assignments, not filling vacancies).

[2] *Public Employment Relations Bd. v. Modesto City Sch. Dist.*, *supra*.

[3] *Fibreboard Paper Products Corp. v. NLRB* (1964) 379 U.S. 203, 211; *Oakland Unified Sch. Dist. v. Public Employment Relations Bd.* (1981) 120 Cal.App.3d 1007, 1011.

[4] *Placentia Unified Sch. Dist.* (1986) PERB Dec. No. 595.

[5] *Marysville Jt. Union High Sch. Dist.* (1983) PERB Dec. No. 314; See also *California Dept. of Personnel Admin.* (1993) PERB Dec. No. 995-S (change in released time); *Antelope Valley Union High Sch. Dist.* (1998) PERB Dec. No. 1287 (change in promotional interview policy).

[6] *Los Angeles Community College Dist.* (1982) PERB Dec. No. 252; *Marin Community College Dist.* (1995) PERB Dec. No. 1092.

[7] *Independent Union of Pub. Serv. Employees v. County of Sacramento* (1983) 147 Cal.App.3d 482, 487-488. However, PERB has held that a general management rights clause which reserved to the employer the right to suspend employees allowed unilateral imposition of a short disciplinary suspension unlike anything used or contemplated by the parties at the time the clause was negotiated. *Mammoth Unified Sch. Dist.* (1983) PERB Dec. No. 371.

[8] See *Stockton Police Officers Assn. v City of Stockton* (1988) 206 Cal.App.3d 62, 66 (request to negotiate not made until over three months after notice of proposed change); *Sylvan Elementary Sch. Dist.* (1992) PERB Dec. No. 919; *Newman Crows Landing Unified Sch. Dist.* (1982) PERB Dec. No. 223; *Metropolitan Water Dist. of Southern California* (2009) PERB Dec. No. 2055-M.

[9] *Delano Jt. Union High Sch. Dist.* (1983) PERB Dec. No. 307; Accord, *Sylvan Elem. Sch. Dist.*, *supra*; *El Centro Sch. Dist.* (1996) PERB Dec. No. 1154; But see *Goleta Union Sch. Dist.* (1984) PERB Dec. No. 391 (demand to meet and discuss, demand to rescind action deemed not a waiver citing *Newman Crows Landing*, *supra*).

[10] *Morgan Hill Unified Sch. Dist.* (1985) PERB Dec. No. 554a.

[11] See *Compton Community College Dist.* (1989) PERB Dec. No. 720.

[12] *Calexico Unified Sch. Dist.* (1983) PERB Dec. No. 357; *Compton Community College Dist.*, *supra*; *Long Beach Community College Dist.* (2009) PERB Dec. No. 2002.

[13] *Sonoma County Org. of Pub. Employees v. County of Sonoma* (1979) 23 Cal.3d 296; *San Mateo Community College Dist.* (1979) PERB Dec. No. 94; *San Francisco Community College Dist.* (1979) PERB Dec. No. 105.

[14] In *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989, the California Supreme Court held that although the governor (probably) lacked the authority to unilaterally implement furloughs based on his declaration of a fiscal emergency, the implementation of furloughs (without negotiations) was authorized because the state legislature later ratified the governor's actions by legislative enactment. The California State Legislature's right to enact unilateral changes in terms and conditions of employment is probably unique in California public sector law, and thus, should not be thought of as having application to other public sector bargaining laws.

[15] See *Calexico Unified Sch. Dist.*, *supra*; *San Mateo Community College Dist.*, *supra*; *San Francisco Community College Dist.*, *supra*.

[16] *Sonoma County Org. of Pub. Employees v. County of Sonoma*, *supra*.

[17] *Mt. Diablo Unified Sch. Dist.* (1983) PERB Dec. No. 373.

[18] *California School Employees Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th 923, 936; *San Mateo Community College Dist.*, *supra*; *San Joaquin County Employees Assn. v. City of Stockton* (1984) 161 Cal.App.3d 813, 818-819; *NLRB v. Katz*, *supra*; *NLRB v. Hinson* (8th Cir. 1970) 428

F.2d 133, 136; *NLRB v. Cone Mills Corp.* (4th Cir. 1967) 373 F.2d 595, 598-599.

[19] *NLRB v. Haberman Constr. Co.* (5th Cir. 1980) 618 F. 2d 288, affirmed on rehearing 373 F.2d 351 (5th Cir 1981); see also *Industrial Union of Marine & Shipbuilding Workers Union* (1963) 320 F.2d 618; *Los Angeles County Association of Environmental Health Specialists v. County of Los Angeles* (2002) 102 Cal.App.4th 1112, 1119-1120. The Dills Act, however, which covers state employees, explicitly provides that the provisions of a memorandum of understanding will remain in effect unless and until a new agreement is reached or the parties reach impasse (Gov. Code Sec. 3517.8).

[20] See e.g., Gov. Code Sec. 3540.1(i); *Kern High School Dist.* (1999) PERB Dec. No. 1319 (maintenance of membership provision); *California Dept. of Youth Authority* (1992) PERB Dec. No. 962-S; *Antelope Valley Union High School Dist., supra*; *Rowland Unified Sch. Dist.* (1994) PERB Dec. No. 1053. Under some public sector labor relations statutes, the duty to pay agency fees survives the expiration of the contract. See Gov. Code Sec. 3515.7(b) (Dills Act) (fair share deduction must continue until the effective date of a successor agreement or implementation of the state's last, best and final offer, whichever comes first); Gov. Code Sec. 3508.5(c) (MMBA) (agency fee obligations continue in effect for as long as the employee organization remains the exclusive representative, notwithstanding the expiration of a collective bargaining agreement).

[21] *Litton Financial Div. v. NLRB* (1991) 501 U.S. 190.

[22] Gov. Code Sec. 3517.8; see also *Professional Engineers in Calif. Gov. v. Schwarzenegger, supra*, 50 Cal.4th 989.

[23] *Eureka City Sch. Dist.* (1992) PERB Dec. No. 955; *El Centro Elem. Sch. Dist.* (2006) PERB Dec. No. 1863. In the *Eureka* case, PERB found that a smoking policy was not within the scope of representation, largely because of legislative mandates regarding the desire to eliminate smoking on school campuses. The same holding may not apply to other jurisdictions. In the *El Centro* case, PERB stated that it was not an unfair practice for the employer to repudiate a contractual provision containing a permissive subject of bargaining because the employer does not have a duty under EERA to negotiate that term; however, such a breach may incur a breach of contract claim (which is not within PERB's jurisdiction).

[24] See *San Mateo City Sch. Dist.* (1984) PERB Dec. No. 375.

[25] *Compton Community College Dist.* (1989) PERB Dec. No. 720.

[26] *Ibid*; *State of California (Dept. of Corrections & Rehabilitation, Dept. of Personnel Administration)* (2010) PERB Dec. No. 2115-S. For a more thorough analysis of this case, as well as the topic of implementing a non-negotiable decision before completing bargaining on negotiable effects, see M. Carol Stevens' "Implementing a Non-Negotiable Decision Before Completing Bargaining on Negotiable Effects," CPER No. 200 (August 2010), pp. 5-11.

[27] See *Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9; *County of Riverside* (2004) PERB Dec. No. 1715-M; *Oakland Unified Sch. Dist.* (1982) PERB Dec. No. 275; *Regents of the University of California* (2010) PERB Dec. No. 2094-H; *State of California (Dept. of Corrections & Rehabilitation)* (2010) PERB Dec. No. 2108-S.

[28] The Meyers-Milias-Brown Act is codified at Gov. Code Secs. 3500 et seq.

[29] See Gov. Code Sec. 3518.

[30] Gov. Code Sec. 71634.4 (TCEPGA); Gov. Code Sec. 71820 (TCIELRA).

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

[32] Gov. Code Sec. 3540.1(f). See also Gov. Code Sec. 3562(j) (HEERA).

[33] 8 Cal. Code Reg. Sec. 32793.

[34] Gov. Code Sec. 3543.5(e) (EERA); Gov. Code Sec. 3571(e) (HEERA). See also *Temple City Unified Sch. Dist.* (1990) PERB Dec. No. 841 (overruled in part by *Charter Oak Unified Sch. Dist.* (1991) PERB Dec. No. 873).

[35] See *Modesto City Schools* (1983) PERB Dec. No. 291.

[36] *Ibid.*

[37] Gov. Code Secs. 3517, 3519(e).

[38] 8 Cal. Code Reg. Sec. 32696(e) (TCEPGA); 8 Cal. Code Reg. Sec. 32608(e) (TCIELRA).

[39] Mediation may be permissive or mandatory — more often it is permissive. Interest arbitration is contained in the local agency's charter. Code of Civil Procedure Secs. 1299 et seq. (SB 402, SB 442) requires local agencies to take police and firefighter economic disputes to binding interest arbitration. SB 402 was declared unconstitutional by the California Supreme Court in *County of Riverside v. Super. Ct.* (2003) 30 Cal.4th 278. In 2003, the legislature passed SB 442, which largely duplicates the provisions of SB 402. This statute was declared unconstitutional by a court of appeal in *County of Sonoma v. Super. Ct.* (2009) 173 Cal.App.4th 322, rev. denied.

[40] Gov. Code Secs. 3505.4-3505.7.

[41] Gov. Code Sec. 3505.5(e).

[42] *Public Employment Relations Bd. v. Modesto City Sch. Dist.*, *supra*, 136 Cal.App.3d at 900-901 (citing private sector precedent); *Laguna Salada Union Sch. Dist.* (1995) PERB Dec. No. 1103; *County of Sonoma* (2010) PERB Dec. No. 2100-M.

[43] *Ibid.* PERB will not, however, dissect a package proposal to “separately compare each provision of the package to prior proposals concerning that provision.” *Charter Oak USD* (1991) PERB Dec. No. 873; *County of Sonoma* (2010) PERB Dec. No. 2100-M.

[44] Gov. Code Sec. 3517.8 (Dills Act); Gov. Code Sec. 3505.4.

[45] *County of Sonoma* (2010) PERB Dec. No. 2100-M.

[46] *Rowland USD* (1994) PERB Dec. No. 1053; see also *State of California (DPA)* (2010) PERB Dec. No. 2130-S.

[47] See e.g., *Betts v. Board of Admin. of the Pub. Employees' Retirement System* (1978) 21 Cal.3d 859 (pension benefits); *Olson v. Cory* (1980) 27 Cal.3d 203 (pension benefits); *Thorning v. Hollister Sch. Dist.* (1992) 11 Cal.App.4th 1598 (retiree medical insurance); *Ventura County Retired Employees Assn., Inc. v. County of Ventura* (1991) 228 Cal.App.3d 1594 (retiree medical insurance); *California League of City Employee Assns., SEIU Local 660 v. Palos Verdes Library Dist.* (1978) 87 Cal.App.3d 135 (longevity pay, vacation and sabbatical leave policies); *San Bernardino Pub. Employees Assn. v. City of Fontana* (1999) 67 Cal.App.4th 1215 (distinguishing *Palos Verdes* case in matter involving collective bargaining agreement); *Retired Employees Assn. of Orange County v. County of Orange* (2011) 52 Cal.4th 1171 (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).

The NLRB has identified another exception that would apply in situations when implementation of the particular proposal would be inherently destructive to the principles of collective bargaining. In *McClatchy Newspapers*, 321 NLRB 1386, 153 LRRM 1137 (1996), enforced, 131 F.3d 1026, 157 LRRM 2023 (D.C. Cir. 1997), the employer implemented its proposed merit increase system granting it complete discretion over wage increases without any participation by the union. Such unfettered discretion, the NLRB ruled, was inconsistent with the NLRA's purpose to promote collective bargaining. PERB has not been faced with a similar situation, so how it would rule in such a case is uncertain.

[48] *Rowland USD* (1994) PERB Dec. No. 1053; *State of California (DPA)* (2010) PERB Dec. No. 2130-S. In the *State of California* case, PERB was asked to determine whether the state unlawfully adopted a three-year economic package as part of its unilateral imposition of terms and conditions of employment. After the complaint was issued, the state formally withdrew its proposed economic changes for the second and third years, and the legislature never approved any of the economic changes contained in the LBFO. Nonetheless, the charging party continued in its assertion that the state had unlawfully unilaterally implemented its LBFO for a three-year term. PERB found no violation, holding that DPA neither implemented its LBFO for a three-year term (or any other specific term), nor unilaterally waived or limited

the union's right to bargain. In determining that the state's action did not unilaterally waive or limit the union's right to bargain, PERB suggested that adoption of multi-year changes in wages, hours, and other terms and conditions of benefits was permissible so long as the union's right to negotiate was not otherwise limited.

[49] Gov. Code Sec. 3543.7 (EERA); Gov. Code Sec. 3517 (Dills Act); Gov. Code Sec. 3505.4 (MMBA); Gov. Code Secs. 3572, 3572.1, 3572.3 (HEERA).

[50] *Public Employment Relations Bd. v. Modesto City Sch. Dist.*, *supra*; *Rowland USD*, *supra*; *State of California (DPA)* (2010) PERB Dec. No. 2102-S. It is incumbent on the party asserting that the impasse has been broken to point to the changed circumstances which suggest future bargaining might produce positive results. Mere speculation regarding possible concessions by the other party is insufficient to revive bargaining. There must be substantial evidence that a party is committed to a new bargaining position. *State of California*, *supra* (citing *Serramonte Oldsmobile, Inc. v. NLRB* (1996) 86 F.3d 227, 233).

CPER Journal Online

Feminist Collective Bargaining Meets the Civil Service



Below is the third and final chapter that 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.

Now, some things are happening among clerical workers that are impelling us to unionize, things that are going on in women's heads. As far as I can tell, there are definitely new feelings of pride and dignity in being a woman, and outrage at the wages that we get. I think that the Women's Liberation Movement overall has had a decided impact on working women, especially clerical workers.

— Maxine Jenkins, organizer

The American Federation of State, County and Municipal Employees (AFSCME) was one of the beneficiaries of the destruction of the United Public Workers (UPW), gaining thousands of members on the east coast as the left-led union was picked apart in the early 1950s following its expulsion from the CIO. West coast AFSCME did not follow suit, mainly because its organizing director was not fond of "Jews and commies," according to David Novogrodsky. On the basis of those prejudices, AFSCME turned down UPW leader Elinor Glenn before she approached George Hardy of the Building Service Employees Union (BSEU) to take in UPW Local 246 in Los Angeles.

AFSCME may have fallen behind at the outset of public worker organizing in California, but by the mid-1960s it was toiling hard to make up for lost time, organizing in schools, city and county employment, and in the University of California system.

In San Jose, the city's civil service workers association, the Municipal Employees Federation, affiliated with AFSCME in 1972, forming AFSCME Local 101. It was here, in the city that Mayor Janet Gray Hayes never tired of describing as "the feminist capital of the world," that the old civil service personnel administration methods of adjusting salaries and job descriptions ran into a three-way pileup with collective bargaining and the impact of feminism on workplace organizing.

Steering the women workers through the collision and out to the other side was a determined and visionary organizer, Maxine Jenkins. Her vehicle, or weapon: *comparable worth*, which was based on the revolutionary idea that male and female workers should be paid equally for work requiring comparable skill, effort, and responsibility under similar working conditions. (This is different from "equal pay for equal work," which was codified in federal law in 1963, and had its own history of struggle in California dating back to Kate Kennedy, a century earlier.) The battle in San Jose for comparable worth had national reverberations, challenging union tradition, employment law, and gender roles.

By the late 1970s, Local 101 had grown to 11 chapters (including other cities and school districts within

what was about to be called “Silicon Valley”) and represented a cross-section of San Jose city workers. Local 101 included office workers, librarians, custodians, park and recreation employees, and building trades workers, but had long been dominated by male public works employees. The local bargained with city management over wages and working conditions, and advocated on behalf of its members before the city’s personnel commission.

A Progressive Era reform, personnel commissions were part of a civil service system intended to remove politics from hiring and promotion in public employment. In the bad old days, newly elected politicians would fire all the previous administration’s employees and install their friends. Personal relationships and politics — and a generous amount of corruption — ruled the process. Instead, as designed in “good government” social engineering, individual job applicants would be screened through a civil service system that fairly hired, promoted, and retained employees through examinations based on merit, or ability, experience, and accomplishments, including education. These tests depended on job classification procedures that analyzed the work necessary for the city, county, or other government employers, and grouped similar types of workers in categories for purposes of administration and compensation.

In theory, this was a fair way to run a public bureaucracy. In reality, by placing employment decisions in the hands of a personnel commission, real power lay with managers whose deliberations were often shrouded in mystery. And the supposedly “objective” nature of the standards on which they based their decisions were, as it turned out, shaped by social and cultural biases that were anything but objective.

Women who worked in San Jose City Hall and the public library, some of whom were members of Local 101, had learned about these biases over the previous decade. Most were college-educated, and had received their higher education at a time when the women’s movement was having a tremendous impact on campuses, first through political organizing, and later in the development of curriculum. Although mostly “middle class” in outlook and upbringing, their employment in city services placed them squarely in the working class — and in a part of the working class that received, on average, 40 percent less compensation than another part, based on one qualification: whether they were women or men.

Shut out of Local 101’s policy discussions by the male public works employees in leadership, and unable to influence collective bargaining around their issues, the women formed two independent groups to figure out what to do: City Women for Advancement (CWA) and Coalition of Library Activist Workers (CLAW), which also included men. They criticized the union leadership and the city administration. But their ideas fell on deaf ears until Maxine Jenkins arrived on the scene.

Jenkins had moved to the Bay Area from rural Mississippi, where she was born in 1936 into a family of sharecroppers. Before migrating west, she attended the University of Missouri for two years, hoping to become a librarian. Jenkins then enrolled in U.C. Berkeley in 1964, earning a living as a clerical worker on campus while she attended classes. She soon became involved in helping to organize AFSCME Local 1695, and in addition to working for collective bargaining rights with clerical employees, brought together campus workers, students, and faculty in the widening, overlapping circles of the Free Speech and anti-Viet Nam war protests. Captivated by organizing, she never graduated. Instead she worked for several Bay Area unions, including SEIU Local 400, the San Francisco municipal workers union that was heir to the old United Public Workers.

By the time she went to work for AFSCME Local 101 in 1977, Jenkins had been arguing for years that women’s wages were suppressed by sexism, and that the typical methods used for determining women’s wages in the public sector were fundamentally flawed. In a women’s conference sponsored by the California Labor Federation in 1973, Jenkins put it bluntly:

In the determination of salaries, we must get out of the bind of depending on surveys which compare salaries with already depressed rates elsewhere. We must make it clear that our unions are not going to accept such surveys any longer as legitimate.

Through her organizing campaigns with various occupational groups of women workers in both the public and private sectors, she had learned to reject the standard “market value” comparisons governing public employee pay classification because discrimination in the private sector translated into discrimination (and low salaries) in the public sector too.

Jenkins helped CLAW and CWA activists to form a new group within Local 101, the Affirmative Action Committee, which soon came to be known simply as the “Women’s Committee.” It became the launching

pad for much of the next generation of Local 101 leadership.

In 1978, the city administration went to a consulting firm, San Francisco-based Hay Associates, which specialized in analysis of civil service employees' job duties and compensation compared to their counterparts in the private sector. The city asked Hay to examine managerial pay practices to ensure the salary-setting system was consistent and equitable. The Hay investigation found that in predominantly female managerial job classes, pay lagged significantly behind classes with mostly male managers who possessed comparable or lesser education, skills, and job duties. As a result, some managers got whopping pay increases — nine-and-a-half percent and pay adjustments for most in these classes, and in the Library, and Park and Recreation Departments, up to 20 percent.

The Local 101 Women's Committee produced a paper, "Working Women," that outlined central issues for female San Jose city workers, and called for comparable worth. The paper specifically addressed the needs of working mothers, such as childcare and flexible hours, as well as demanding bilingual pay for clerical workers who had to speak Spanish at their jobs. The paper's authors argued that men were being paid much more than women for work of similar difficulty and training requirements. For instance, librarians with college educations were being paid less than road equipment operators. The women called for adjustment of the city's pay scales. The Hay management pay study confirmed their informal analysis. They demanded a similar study for non-managerial workers.

The committee also built an alliance with custodians, who, like the women, had been ignored by union leadership. The mostly Latino janitors and mostly white women semi-professionals together elected their candidate for president of the San Jose city worker chapter of AFSCME Local 101, Mike Ferrero, a librarian.

The Committee's paper was a revelation for many of the union members, who had suspected that job classes were not compensated in quite as "objective" or systematic a manner as the civil service/personnel commission made things seem. Librarian Joan Goddard, for instance, had worked for the library in various capacities and branches since 1971. She hadn't paid close attention to the CWA or CLAW, and only became active in the union when she was asked to run for secretary of Local 101 in 1978. Despite a civil rights and anti-war background (her husband served time in federal prison for refusing to be inducted into the military), her union activities remained separate in her mind from feminist consciousness until she read the paper and became convinced of the importance of comparable worth.

By April 6, 1979, the Women's Committee grew weary of waiting for a response from city management. On that day, Jenkins organized a "sick-out" — a strike by another name. Most of the strikers were women, based in their City Hall and Parks and Recreation department strongholds. Roughly 100 workers participated in the stoppage, the first strike for comparable worth in the United States. In addition to comparable worth, the strikers demanded equal treatment of management and non-management city employees. Before the day was out, city management announced it would contract with Hay in a new study of non-management job classes. This represented a substantial commitment of half a million dollars.

A few months later, at a San Jose city council meeting, Jenkins pushed the city administration one important step further. During his presentation about the upcoming study, the city manager, aware that Jenkins was present, tried to preempt her view of comparable worth by maintaining that the study would be based on labor market wage comparisons. He said that therefore, "some women" might not be satisfied by the outcome.

In response, Jenkins spoke passionately and effectively on behalf of "the women of the city," and against the market standard for wage setting. She demolished the city manager's argument "comparing depressed wages to depressed wages that are artificially depressed not because of the value of the labor but because most of the people doing the work happen to be women." Her clear analysis and forceful presentation gained a commitment from the city council majority to include market-based wage comparisons as only one factor among others — like internal civil service job comparisons across departments — in the Hay study.

Reinforcing the understanding, Local 101 negotiated a side agreement to the collective bargaining contract stating that the city would bargain with the union over the eventual results of the study. The findings from the new Hay study were delivered before Christmas 1980, and supported Local 101's position that the pay scales associated with the job classes filled mostly by women were distorted by sex

discrimination.

Negotiations between AFSCME and the city administration began in the new year. Several factors complicated bargaining. The impact of Proposition 13, which California voters had passed in 1978, lowering property taxes and reducing revenues to local government, was now taking full effect. The force of the blow to public services had been delayed by distribution of a state treasury surplus to city and county governments in the first year. That money was gone, and, across the state, painful reductions in public services and the employees who delivered them were taking place.

In addition, the fall 1980 elections had brought into office a relatively inexperienced city council. Its majority remained committed to the previous administration's promise, but struggled to balance it with the budget difficulties they faced. One council member solidly in the union camp was Iola Williams. Maxine Jenkins had convinced Local 101 to back Williams' campaign for an empty council seat. Members went door to door with petitions to get her on the ballot, and she repaid their assistance by remaining a strong ally throughout negotiations. Williams also agreed with Jenkins that the Hay non-management study committees had to include workers, not just managers, from each occupational category.

On the union side of the bargaining table, tensions between groups of city workers had widened over comparable worth. Maxine Jenkins left Local 101 in early 1980 to work with other unions, but her perspective lived on in the AFSCME Women's Committee. The male-dominated blue collar and technical departments took control of the negotiations committee by packing the meeting at which bargaining representatives were elected. They were more interested in a general wage increase than equalizing pay for the job classes affected by gender discrimination. But the upstart women janitor coalition still held a majority on the union's executive council, and they were able to reach a compromise: the bargaining team continued to include the comparable worth demand in negotiations alongside the more traditional position for an across-the-board increase.

The Women's Committee also argued that men were adversely affected by the pay discrimination suffered by the union's women. As librarian Joan Goddard, who later served terms as MEF and Local 101 president, said, "We explained that pay equity was a family issue, along with being a women's issue. The rank-and-file men understood that women's low pay brought down their household income and affected them as well." This was persuasive to many, if not all, of the union's male members.

Recognizing the city's financial difficulties, AFSCME proposed that the pay inequities found in the second Hay study be redressed over four years, instead of asking for the immediate adjustments that managers had received. The management bargaining team did not respond to this flexibility with any of its own. Instead, it told union negotiators, it would let them know if it decided to bargain over the second Hay study.

The move infuriated the union leadership, which set a strike deadline of May 5, 1981, if the administration failed to come to terms. A one-day wildcat strike by library and recreation workers in late March — which the union later referred to as "Hay fever" — signaled the determination of the workers to follow through with their threat. This drew the attention of the state Public Employment Relations Board, which sent a mediator to assist in negotiations. He got the union to postpone the strike deadline until July 5, the day the contract was scheduled to expire.

In the meantime, as bargaining continued, union leadership ramped up organizing efforts among the workers with meetings, leafleting, and rallies, including the transformation of Secretaries Day through a "Raises, not Roses" demonstration in front of City Hall. When the city attempted a transparent "divide and conquer" tactic by proposing to fund the comparable worth adjustments from the general wage increase, thereby reducing the size of the across-the-board raise, AFSCME called its members out on strike.

This nine-day work stoppage closed the city's libraries and parks, stacked up paperwork in City Hall, and reduced transportation services when Teamsters and union bus drivers honored picket lines. Local 101 business agent Bill Callahan led the walkout. He had worked in the Parks and Recreation department before his election to union office and subsequent hiring as Maxine Jenkins' replacement on union staff. Callahan was a college-educated father of two daughters. He wanted to make sure his children, when they grew up, could advance economically without being dragged back by sex discrimination. He sported a button that read, "A woman's place is in her union."

Callahan later recalled that this was his "fifteen minutes of fame." He appeared on more radio and television programs than he could count, as the story of the strike for pay equity in the "feminist capital of

the world” made national as well as local news. In the end, Local 101 gained \$1.5 million in a fund to elevate wages in more than 60 job categories, in addition to general wage increases of more than 15 percent over two years. The comparable worth increases for job categories dominated by women brought workers in those classes near to parity. The strikers also attained an agreement that the city would continue to bargain on closing the rest of the pay equity gap.

Assessing what the San Jose city workers accomplished, Callahan predicted, “We have lit the fuse in San Jose. I don’t think it’s going to stop here.” He was right. The strike resulted in a nationwide discussion of the comparable worth idea, and helped to establish a strong commitment within public sector unions for women’s issues in the workplace.

SEIU Local 535’s social workers pushed for and gained comparable worth provisions in contracts across the state. County workers, represented by SEIU locals in Santa Clara, San Mateo, and Contra Costa counties, successfully bargained comparable worth concepts as well.

At the same time unionized women workers were pushing for pay equity through collective bargaining, non-represented women elsewhere looked to the courts and government agencies for help. As the San Jose city worker drama unfolded in spring 1979, prison matrons in Oregon, paid less than male prison employees with jobs of similar difficulty, won a Supreme Court case. It found that workers could sue their employers for comparable worth pay differences. As a result, women could file complaints through the Equal Employment Opportunity Commission, and Local 101 filed one, hoping to pressure the city managers at another stress point. The union dropped the complaint when the city settled the contract.

The ‘Big Squeeze’ Begins

The rise of public sector unionism coincided with California organized labor still near its mid-century peak, within a strong diversified economy and tax base. The gains of these workers movements of the 1960s and 1970s — like those of the farm workers — were solidified at a moment when the firm belief in government as the solution for social problems still prevailed in public political discussion. But the ground soon shifted under public workers’ feet.

Following passage of the Educational Employment Relations Act (EERA), a few more state laws over the next couple years brought nearly all the major groups of public workers the right to organize and bargain collectively with their bosses through organizations of their own choosing. Workers in the California State University and University of California systems were folded into the Higher Education Employment Relations Act (HEERA), and state workers under the State Employer-Employee Relations Act (SEERA, now called the Dills Act), both in 1977.

These laws streamlined various public sector collective bargaining procedures and reconfigured the Educational Employment Relations Board. EERB was expanded from three to five appointees and redesigned to become the Public Employment Relations Board (PERB). Essentially and finally, it became the “public sector NLRB” sought for years by some unionists. PERB was authorized, funded, and staffed to oversee state and local public employment labor issues as well as its original sphere of K-12 and community college public education.

But at the very moment these legislative successes finally gave collective bargaining rights to groups of workers long denied them, the prospects for California’s public sector unions to win major economic advances for their members — let alone reform and improve the services they provided to the public — began to deteriorate in the face of changes in the economic and political landscape.

The inflation rate had tripled by the mid-70s over what it had been a decade earlier. Wages lagged behind the cost of living, spurring public worker militancy, which crested in 1975 with 446 public sector strikes in the country, the most ever.

In the midst of another wave of walkouts in 1978, a conservative backlash began to gain momentum. The most visible sign of the pushback against public sector unionism was the passage of Proposition 13.

This measure, placed on the ballot by the Howard Jarvis Taxpayers Association, an anti-tax group backed by big business, did several things. By capping the increase in residential property taxes at 1 percent a year, Prop. 13 provided help for older worker-homeowners settled in their neighborhoods, and especially retirees on fixed incomes. In an inflationary period, their yearly property reassessment and growth in taxes represented a financial strain.

But in a largely unnoticed coup for big business, the cap on property tax increases applied to large corporate properties too. Worse, the law put in place rules for sale of corporate property that allowed businesses to delay the official transfer of property for years after it actually changed hands, during which time property taxes remained at the old rate.

Thus Prop. 13 made it impossible, for instance, to do the kind of bargaining over tax windfalls for local government that Richmond AFT Local 866 attempted in 1966, when the industrial properties of the areas were reassessed at a higher value, which brought in more money for schools.

Prop. 13 also raised the margin necessary to pass new taxes or increase existing taxes from a simple majority of the state legislature to two-thirds, and of local municipal tax elections placed before the public as well.

With the higher bar to jump over to pass a tax, and property taxes no longer keeping pace with inflation and the growth in demand for public services, there was a squeeze on the ability of state revenues to fund adequate services for the public. Over time, Prop. 13 created a shift in who paid for public services statewide, with a smaller share from big business and the wealthy, and a larger share from everyone else.

Such policy changes were accompanied by a hardening of resolve by public administrators to hold the line on union activism in their workforce, starting at the very top. In the early 1970s, public administrators had little appetite to permanently replace strikers. By the end of the decade — and before Ronald Reagan redefined the country's labor relations by firing 11,000 air traffic controllers in 1981 — other public officials had already ended strikes with mass firings.

The target of the new political mood, and of the social forces that orchestrated it, was not limited to public employees and their unions. That attack was just the opening wedge in a quickly widening battle to restructure economic power relationships in California and the country. At stake were the ways capital and labor had divided wealth since World War II, and recalculating the proportions of the economic pie that went to each.

For this purpose, one more pioneering effect of Prop. 13 must be mentioned: its nasty, coded, racist tinge. The campaign scapegoated poor people and renters, especially people of color, as the most visible recipients of some public services, especially welfare. The backers of the ballot measure sent white male workers and homeowners a message that their hard-earned wages were being reduced by high taxes, which funded services for people who would rather receive government checks than work. Prop. 13's message and passage was carefully noted by conservative activists across the country for its ability to divide working people who, once united, had originally forced the gains of high wages and strong government programs into place.

As conservatives took control of government and the public agenda in the 1980s, unions such as SEIU, AFSCME, and the AFT slowly, almost imperceptibly began to set aside militant tactics. Instead, they forged coalitions with public administrators where they could to defend public services. They remained champions of civil rights, equal pay, and affirmative action. But the strikes and other direct action events of the '60s and '70s were replaced with political campaigns and legislative advocacy to accomplish similar ends. In this way, the public sector unions followed the path taken by private sector unions in the post-World War II period.

The replacement of direct action with political action is a sign of moving from the offensive to a defensive position. After the 1946 strike wave, unions found themselves facing political and public reaction, orchestrated by the employers, which resulted in the passage of the anti-labor Taft-Hartley Act of 1947. In much the same way, public sector workers in the late '70s and '80s suffered from a right-wing backlash portraying them as greedy, lazy bureaucrats wasting the public's hard-earned tax dollars. First crystallized in this guise in Prop. 13, anti-public worker sentiment became a potent political idea. It grew into an obstacle to funding for adequate public services as well as to the ongoing quest for economic justice for public sector workers.

Although no one knew it yet, these events signaled the beginning of the end of the post-World War II economic boom, of the diversified, industrial economy of California, and the social contract between labor and capital that had made the California Dream of upward mobility and "middle class" status real for so many working families.

Comparable worth and affirmative action were casualties within this broader political assault on unions, government, public employees, and taxes.

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CPER Journal Online

Chief Has PSOPBRA Rights Regardless of Property Interest in Employment

The Public Safety Officers Procedural Bill of Rights Act entitles police chiefs to notice of removal, a statement of reasons, and an opportunity to appeal termination, regardless of whether the chief has a property interest in employment, the Court of Appeal held in *Robinson v. City of Chowchilla*. The court also rejected the contention that the chief was not “removed” from office because the city continued to pay him after he was told to pack up and leave. In a second case, the appellate court decided that Robinson’s court victory met one of the criteria for an award of attorneys’ fees under Code of Civil Procedure Sec. 1021.5.

Employment Contract Expiring

John Robinson was employed as a police chief under a three-year agreement with the City of Chowchilla. The contract provided that it would automatically renew for another three years unless the city gave Robinson written notice of non-renewal six months in advance.

In March 2003, the city’s administrator, Nancy Red, told Robinson that the city council wanted to renegotiate his employment agreement rather than allow it to renew on September 29, 2003. Red testified that she prepared a letter on March 26, informing Robinson that his contract would not automatically be renewed, and took it to the police department the next day, but could not say whether she handed it to him or put it on his desk. Robinson claimed he did not receive the March letter until June 6, 2003, when he met with Red.

On September 5, Red told Robinson that the council had decided not to renew his contract. The city attorney told him that he would not receive six months severance pay because the contract was expiring on September 29. He was directed to pack up his belongings and leave the building that day, although he was paid until September 29. An acting police chief was appointed to replace him immediately.

Robinson petitioned the court to enforce his PSOPBRA rights. The trial court found that the city did not give Robinson notice of the contract’s nonrenewal six months in advance of its expiration, and therefore, the employment agreement had automatically renewed for an additional three years. The court found that the chief had been removed from his position and that he was denied his PSOPBRA rights to written notice, the reasons for removal, and an opportunity for an administrative appeal before being removed. The city, its council, and Red appealed.

Contract Preserved PSOPBRA Rights

Robinson’s employment agreement provided that it was not intended to conflict with the PSOPBRA, and that the act would prevail if there was a conflict. The city claimed that the act’s notice provisions would not apply unless the court found the chief had a property interest in employment. The city based this argument on the sentence in Gov. Code Sec. 3304(c), which states, “Nothing in this subdivision shall be construed to create a property interest, where one does not exist by rule or law, in the job of Chief of Police.” Rather than establishing a prerequisite for the right to notice, the court said, the provision was merely intended to prevent chiefs from arguing that the notice and appeal rights in subdivision (c) conferred constitutional due process rights.

The court noted that the city’s contention would essentially rewrite subdivision (c). Whereas it states, “No chief of police may be removed...without providing...written notice...,” the city’s interpretation would require the court to infer that the language really meant, “No chief of police with a property interest in his or her job may be removed” without the procedural safeguards. The court concluded the legislature did not intend to restrict the notice and appeal rights to chiefs having a property interest in their positions.

The city also contended that Robinson was not removed from his position because he continued to receive his pay until the contract expired. But the court dismissed this argument. It observed that the *Webster’s* dictionary definition of remove — “to force (one) to leave a place or to go away”...“to dismiss from office” — did not require ending pay for the position. It concluded, “The acts of forcing Robinson to

leave the physical office, taking the authority of police chief away from him, and giving both...to someone else constitute a removal from office.”

The court found this interpretation of “removed” consistent with the legislative history of subdivision (c). Comments in the legislative analyses indicated the bill would “protect chiefs from whimsical pressures” and insulate chiefs from community politics that could lead to corruption and favoritism. The court noted that the city’s interpretation would allow a city to avoid subjecting its reasons for dismissing a police chief to the scrutiny of the electorate just by continuing to pay the chief.

The court found that the trial court correctly interpreted the PSOPBRA and affirmed the judgment.

Attorneys’ Fees

In the second case, Robinson had appealed the trial court’s decision denying his motion for attorneys’ fees under Sec. 1021.5. That statute allows a court to award a successful litigant attorneys’ fees against an opposing party when the litigation has enforced “an important right affecting the public interest” and conferred a significant benefit on “the general public or a large class of persons,” and the “necessity and financial burden of private enforcement” make the award appropriate. The trial court had found that Robinson’s successful court fight primarily had vindicated his own financial interest, not an important right affecting the general public or a large group.

The appellate court disagreed. Robinson was a successful litigant because he obtained a court order requiring the city to afford him his PSOPBRA rights and an award of damages on a breach of contract claim. The court found the published decision on PSOPBRA rights was an important matter affecting the public interest, following multiple decisions, such as *Baggett v. Gates* (1982) 32 Cal.3d 128, 1982 Cal. LEXIS 215, 55 CPER 23, in which courts have awarded fees when a litigant enforced appeal rights. The publication of the *Robinson* decision conferred a significant benefit, not only on police chiefs statewide, but also on the general public, the court reasoned, noting that the PSOPBRA was intended to promote stable employee-employer relations between officers and their employers.

The court rejected the city’s contention that Robinson was not entitled to an award of attorneys’ fees because the lawsuit primarily vindicated his own interests. The statute does not require that the benefit conferred on a large group be the primary effect of the litigation, the court pointed out.

The court remanded the case to the trial court to determine whether the financial burden of the lawsuit — \$232,000 in attorneys’ fees — made an award of fees to Robinson appropriate. The lower court was directed to follow the analysis set out in *Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 2010 Cal. LEXIS 11969, where the court compared the costs of litigation with the “financial benefits that the litigation yields or reasonably could have been expected to yield.” (*Robinson v. City of Chowchilla* [2011] 202 Cal.App.4th 368, 2011 Cal.App.LEXIS 1634, 2011 DJDAR 18389 [PSOPBRA]; *Robinson v. City of Chowchilla* [2011] 202 Cal.App.4th 382, 2011 Cal.App.LEXIS 1636, 2011 DJDAR 18432 [fees].)

CPER Journal Online

Stockton Enters Pre-Bankruptcy AB 506 Mediation Process

Despite drastic cost reductions over the last three years, the City of Stockton is facing a \$20 million budget deficit next year. An independent financial analysis concluded that the city's budget is \$8.6 million in the red for 2011-12, even after having cut 25 percent of its authorized positions. Pending litigation with two unions could lead to another \$11 million in liabilities. The bleak scenario caused the city council to decide on February 28 to enter the pre-bankruptcy process mandated by AB 506 (Wieckowsky, D-Fremont).

Cuts Keep Coming

Stockton closed a \$28 million budget gap in 2009-10, and a \$23 million deficit in 2010-11. Some of the savings in 2010-11 came from compensation cuts unilaterally imposed on the police and firefighter bargaining units, which the Stockton Professional Firefighters successfully challenged in arbitration. By the time the arbitrator issued the award, however, the city and the union had reached a new collective bargaining agreement that included a waiver of the back pay due under the award. The union also agreed to eliminate some incentive pay, increase employee health plan and pension contributions, and lower the vacation accrual maximum.

In the spring of 2011, the city again found itself looking at a \$37 million budget gap. Personnel costs still accounted for 80 percent of the budget, and several union contracts called for raises on July 1, 2011. Stockton was able to negotiate compensation reductions with several of its labor unions. But two employee organizations balked at the give-backs. The Stockton Municipal Employees Association refused to reopen its contract, which does not expire until 2014, saying it already had given back \$5.2 million in concessions in 2010. And the Stockton Police Officers Association would not accept every concession the city demanded.

Last May, the city declared a fiscal emergency for the second time in two years. In June, the council decided to impose the compensation cuts on SMEA and SPOA, justifying the unilateral action by pointing to the city's severe fiscal condition. It "temporarily eliminated" the educational incentive pay and longevity pay in both contracts. It delayed the 2.5 percent raise that SMEA had negotiated for 2011-12, and the 3 percent increase due to SPOA unit members. It suspended its payment of the employees' pension contributions, and temporarily changed the medical plan and reduced employer health plan contributions. Furloughs set to end for SMEA members were extended. The city also suspended payments for police officers' deferred compensation, uniform allowance, and retiree medical plan.

While these measures subjected the city to litigation in the courts and before the Public Employment Relations Board, they were not enough. City Manager Bob Deis explained:

The sources of our fiscal situation include unsustainable retiree health insurance; unsustainable and unsupportable labor contracts; an extreme amount of debt issued in the first decade of this century that assumed hyper growth would last forever; state raids on our finances; the protracted Valley recession; and poor fiscal management practices.

After receiving an independent financial analysis, the city discovered that the 2010-11 and 2011-12 books were off. Parking ticket receipts of \$500,000 had been double-counted; uncollectible debts from past years were still showing as receivable; nearly \$4 million in redevelopment agency debts now must be paid off by the general fund; payroll tax errors had been made; property tax revenues are still declining; and expenses increased unexpectedly, among other problems. The city now asserts it is in the red over \$11.5 million, *before* accounting for unexpected legal and labor relations costs. It expects a 2 percent decline in its revenues, from \$158 million to \$154 million, and an increase of 5 percent in expenditures, including \$2 million for reserves, in 2012-13.

New Pre-Bankruptcy Process

Concluding that Stockton is on the brink of insolvency, the city council had to make some decisions. Since AB 506 went into effect on January 1, a municipality must meet one of two conditions before it may file for Chapter 9 bankruptcy. An entity may enter a confidential mediation process with its creditors, labor

organizations, a retiree association, and other parties with which it has contracts. The mediation process must continue for 60 days — and can be extended for another 30 days — unless the parties reach agreement or the entity's financial situation declines to the point it will be unable to pay its obligations within the next 60 days. At that point, it may declare a fiscal emergency by majority vote of the city council at a noticed public meeting.

But the mediation process is not a prerequisite to bankruptcy if the city is able to meet the conditions of fiscal emergency at the outset. Beyond the inability to pay obligations within 60 days, the declaration of fiscal emergency must include findings that, unless it enters bankruptcy, the city's fiscal condition will jeopardize the health, safety, or well-being of its residents.

City staff recommended the mediation process. There was a consensus that Stockton would not be able to raise tax revenues while 20 percent of its residents remain unemployed. Services already have been cut in prior years, but 77 percent of the budget still supports fire and police services. The reduction required to balance the budget would mean the layoff of 30 community services officers, 64 sworn police officers, and 41 firefighters, as well as support services staff, for a total of 190 personnel reductions. Labor costs are expected to rise 6 percent in 2012-13, even if the city continues to impose furloughs and pay restrictions on SMEA and SPOA. Stockton expects to spend more on retiree health care next year than it does on active employee health plans, and the cost is expected to double from \$9 million in 2012-13 to \$18 million in 10 years. The city is scheduled to make over \$13 million in debt service payments from unrestricted funds in the coming fiscal year.

On February 28, the council decided to continue the state of fiscal emergency that it has used to justify unilateral labor cost reductions, and to enter the AB 506 mediation process. To assist with the process, it authorized another contract with Management Partners, which had conducted the independent financial report. The council voted to suspend \$2 million in debt payments due from unrestricted funds to maintain liquidity.

In addition, to preserve cash, the city will suspend leave payouts to departing employees. It claims that it would be unable to pay out 100 percent of its liability for vacation, holiday, and sick leave payoffs at separation of employment without affecting public services. Therefore, the council found, "While any risk to the city's ongoing ability to provide necessary public safety services to its citizens is a grave concern, the current level of crime in Stockton makes the risk one the council is unwilling to incur." City Manager Deis promised in a letter to employees that he would soon issue "an alternative policy that strikes a balance between our ability-to-pay and the past leave payout policy."

Retirees from city employment recently formed the Association of Retired Employees of the City of Stockton, headed by a former city manager, to represent retirees during the mediation. The city hopes to renegotiate retiree and many other obligations during the process, which it estimates will cost \$3.5 million in legal and other fees. In particular, it would like to resolve litigation filed by SMEA and SPOA that seeks to overturn \$11 million in unilaterally imposed compensation cuts in 2010 and 2011. If the mediation is unsuccessful at settling the litigation, one court is likely to rule on SPOA's claims at a hearing on May 3.

CPER Journal Online

Bill Seeks to Clarify AB 646 Process

On February 7, Assemblymember Henry Perea (D-Fresno) introduced AB 1606 to clarify the factfinding law, AB 646, enacted last fall. AB 646 allows an exclusive employee organization to demand that a local public employer enter factfinding once the parties reach impasse in collective bargaining. Factfinders selected by each side work with a neutral chairperson to recommend to the parties how to settle their contract based on the evidence the parties present at a hearing concerning such factors as the employer's ability to pay compensation and the compensation similar employees receive in other workplaces. The process has been used successfully in the educational labor relations context for decades.

As originally drafted, AB 646 would have required mediation of impasses in local government bargaining disputes, but mandatory mediation was dropped from the bill. Unfortunately, during the give-and-take of the legislative process, the language was not adjusted. The new Section 3505.4(a) 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' difference be submitted to a factfinding panel." Some management representatives have claimed that factfinding is not required, even if a union demands it, unless the parties agree to mediation.

The new bill would clarify that the employee organization may demand factfinding if either (1) the parties do not go to mediation within 30 days of the date one party declared impasse in writing, or (2) the parties do not settle their contract within 30 days after the mediator is appointed, in those cases where the parties agree to mediation.

The timelines in AB 1606 seem similar to the deadlines the Public Employment Relations Board set by emergency regulation last December, but AB 1606 does not set outer limits on how long the union has to request factfinding once 30 days have passed. PERB's regulations are clearer about the short window the union has to demand factfinding. PERB requires the union to request factfinding "not later than 30 days" following the date either 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.

CPER Journal Online

SEIU Strikes After Fresno County Imposes Pay Cuts

On November 10, the County of Fresno presented six units represented by SEIU Local 521 with last, best, and final offers, along with a deadline to accept them by November 23. SEIU decided to let its members vote on the proposed 9 percent salary cuts and other givebacks. When the vote was not concluded by the deadline, the county unilaterally implemented the LBFOs.

In addition to a 9 percent pay cut for most of the 4,000 employees, the county reduced paid bereavement leave, ceased counting holiday time toward the overtime pay threshold, reduced pay differentials and stand-by pay, eliminated the employees benefits articles, and imposed a lower tier of retirement benefits for new hires. Employer health insurance contributions were frozen. The county eliminated the seniority article for the unit of professional, para-professional, and technical employees. The county estimates it will save \$17.4 million in the remainder of the fiscal year.

In response, the union filed an unfair practice charge with the Public Employment Relations Board, which issued a complaint in January. The complaint alleges that the county came to the table in August with 700 modifications or eliminations of contract language, set a deadline of October 31 for agreement, and indicated that a rejection of any proposal would constitute a rejection of the entire package. The county accepted only two union proposals and presented its LBFO while there were still 500 items to be negotiated, according to the complaint. It also asserts that the county failed to supply information and denied employees their right to discuss union business on their breaks.

The county insists its action was justified, since the parties met 14 times over three months before impasse was declared. Board members told the *Fresno Bee* that the union never made an acceptable offer.

At the time the county's board of supervisors voted to declare impasse and implement the LBFO on December 6, the union had made a counteroffer that would have cut employee pay 2 percent for three years, and agreed to temporary office closures of 40 hours in 2012-13 and 2013-14, for a savings of \$21.6 million over three years. Even after members rejected the county's LBFO, the union attempted to bring the county back to the table with an indication the union had significant proposals to make.

When the union could not convince the county to restart negotiations, it announced a three-day strike. The union represents nearly two-thirds of the county's employees, including correctional officers, parks and maintenance workers, librarians, clerical employees, social workers, and supervisors. The union claims that nearly half of the members of the six units walked off the job on January 23 through 25. The California Nurses Association, which also has unfair practice charges pending before PERB, honored the picket lines.

Little movement occurred in the month after the strike. SEIU subpoenaed several members of the board of supervisors to appear at a March 13 PERB hearing, which the board members resisted. As the hearing approached, the parties agreed to mediation but were unable to reach an agreement.

CPER Journal Online

Names of Officers Involved in Shooting Not Protected From Disclosure

Generalized safety concerns were insufficient to prevent disclosure of the names of Long Beach police officers involved in a shooting, according to the court in *Long Beach Police Officers Assn. v. City of Long Beach*. No other exceptions of the California Public Records Act applied that would keep the names confidential.

Reporter's Request

In December 2010, Long Beach officers killed an unarmed man who was carrying a garden hose nozzle that resembled a gun. A reporter for the *Los Angeles Times* requested the names of the officers involved in the shooting.

When the City of Long Beach informed the Long Beach POA that it intended to disclose the names, LBPOA went to court for a temporary restraining order and injunction. Before the *Times* was notified of the court hearing, the trial court granted the TRO. After being notified, the *Times* intervened and filed an opposition. By this time, the city had decided to support LBPOA.

Lieutenant Lloyd Cox declared that the department's policy was not to release the names of officers involved in shootings because the shootings were automatically subject to an administrative investigation and investigation materials are placed in the officer's personnel file. Unless the department receives a *Pitchess* motion or a request through court discovery processes, the names are kept confidential, he asserted. Cox stated that the department had issued safety bulletins about potential threats to officers involved in shootings. Because of the ease of finding information on the Internet, Cox explained, the department protects the identity of such officers to ensure the safety of the officers and their families.

The trial court denied LBPOA's request for a preliminary injunction. Both LBPOA and the city appealed.

Names not 'Personal'

The purpose of the CPRA is to make public records accessible to the public, although Government Code Sec. 6250 does recognize privacy concerns. The act requires disclosure of public records unless they fit an exemption in the law, the appellate court explained.

One exemption in the act is a catch-all provision that refers to exemptions in other California laws, including Penal Code Sec. 832.7(a). That statute protects from disclosure "[p]eace officer...personnel records and records maintained by any state or local agency." Section 832.8 of the Penal Code defines "personnel records" to mean a file maintained by the employer that contains personal data; medical or employee benefits information; employee advancement, appraisal or discipline records; complaints or complaint investigations; and "other information the disclosure of which would constitute an unwarranted invasion of personal privacy."

The appellate court previously had ruled that the CPRA mandated disclosure of the names of officers involved in a shooting incident, but the California Supreme Court had partially disapproved of the holding in cases where the request for records related to an officer's appeal of discipline in *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 2006 Cal.LEXIS 10229. A year later, the Supreme Court allowed disclosure of officers' names and their places and dates of employment in *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 2007 Cal. LEXIS 8916, [187 CPER 21](#). In *POST*, the court decided that the list of items defined as personnel records in the Penal Code was a complete list of records that were intended to be protected under Sec. 832.7, and did not include the identities of officers.

Looking anew at the question of whether names of officers involved in shootings were confidential under the CPRA, the appellate court determined that they were not. It relied on the reasoning of *POST*, where the court stated it could find no indication that the legislature was concerned about keeping peace officers' identities or employment confidential. The *POST* court stated, "[T]he legislative concern appears to have

been with linking a named officer to the private or sensitive information listed in section 832.8.”

The *Long Beach* court therefore examined whether the names requested by the *Times* in this case were included in the types of information protected under Section 832.8. The *POST* court held that an officer’s name is not “personal data,” as the listed examples of personal data were items that were generally not publicly known, unlike a name, which appears on the officer’s badge. But LBPOA argued that *Copley Press* made the names of officers involved in shootings confidential because it protected the identities of officers subject to complaints. The appellate court disagreed, since *POST* distinguished between requests for names linked to a protected “personnel record” and names that were not connected to private information. In fact, the appellate court concluded, *POST* approved the result of the original case where names of officers involved in shootings were disclosed, *New York Times v. Superior Court* (1997) 52 Cal.App.4th 97, 1997 Cal.App. LEXIS 39. It therefore found that identities of officers are not personal data under Section 832.8.

LBPOA also contended that the names were protected under the “appraisal” exemption of the CPRA because officers involved in shootings are automatically investigated. The *Times* requested only the names of officers involved in the shooting, the appellate court responded, not whether they were disciplined or how they were evaluated. In addition, the fact that the employer has a policy that subjects officers to investigation should not render the officers’ names confidential, it reasoned, or agencies could circumvent the CPRA by enacting policies. And, *POST* held that information is not exempt from disclosure merely because it is in a file with information that is confidential, the court reminded the association. It found *Copley* did not require a different result because the officers’ names would not derive from or result in disclosure of information about the employees’ “advancement, appraisal, or discipline.”

The court also rejected LBPOA’s argument that the names were protected by the “investigation of complaints” criterion of Section 832.7. The court reasoned that the legislature did not intend to keep confidential all internal investigations, only “investigations of complaints.” It buttressed this conclusion by pointing to legislative history that expressed the purpose of Section 832.7 to be to regulate disclosure of citizen complaints against officers.

Publicity vs. Privacy

The CPRA also protects information when disclosure would be “an unwarranted invasion of personal privacy.” Relying on a balancing test used in *POST*, the court held that the disclosure of an officer’s name was not an invasion of privacy unless there was a particular reason, such as the fact he was an undercover officer, that outweighed the public’s interest in disclosure. It quoted the *POST* court, which found “no established social norm that recognizes a need to protect the identity of all peace officers.” LBPOA asserted that Lt. Cox’s declaration showed a need for privacy of identities of officers involved in shootings, but the court found the fears of the department “generalized and speculative.” Again it cited *POST*, where the Supreme Court noted that the identity of many officers is known in their communities and concluded that speculation about possible endangerment is insufficient to justify keeping the names confidential, particularly because of the public’s interest in an officer’s misuse of authority.

For the same reason, the court turned aside the assertion that Section 6255 of the CPRA applied because “the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.” “Beyond reiterating their generalized safety concerns, appellants have failed to identify any public interest that would be served by nondisclosure,” the court said. It upheld the trial court’s decision to deny LBPOA’s request for a preliminary injunction. (*Long Beach Police Officers Assn. v. City of Long Beach* [2012] 203 Cal.App.4th 293, 2012 Cal.App. LEXIS 109.)

CPER Journal Online

Bus Funding Saved — Districts Relieved

Lawmakers, responding to an outpouring of protests, passed legislation to restore school bus funding that would have been cut under the terms of the budget bill passed last summer, affecting thousands of children.

As *CPER* reported previously, Senate Bill 87 provided that if state revenues were more than \$2 billion short of projections by December, automatic cuts would go into effect at the beginning of the year, including up to \$238 million for school bus programs. (See “New Legislation Saves Teachers’ Jobs — For Now,” [203 CPER online](#).)

The gap did indeed exceed the threshold. Rural and other districts whose students count on buses to get to and from school made their outrage known to legislators. For some districts, the cuts would have exceeded \$1,000 per student. The affected districts claimed that the buses were indispensable, students could not get to school without them, and they had no other money in their budgets that could be used to pay for them. They voiced safety concerns for students forced to walk long distances. And, they argued, if students could not get to school, districts would lose per-diem state funding. Some claimed that they would be forced into bankruptcy by the cuts.

Los Angeles Unified School District filed a lawsuit to keep the state from eliminating the transportation funding. It claimed that it is required to provide buses for 35,000 students due to a 1981 court order arising out of a desegregation case. It also must provide transportation for another 13,000 disabled students in order to comply with state and federal laws.

Of California’s 1,042 school districts, 960 provide school transportation. According to Mike Rea of the West County Transportation Agency in Santa Rosa, there are approximately 20,000 school bus drivers in the state, 50 percent of whom potentially could have been impacted by the cuts. Districts would not have been allowed to cut federally required busing for disabled students, which accounts for 50 percent of all school busing in the state.

In reaction to the outcry from districts and parents, a bipartisan group of lawmakers introduced Senate Bill 81. The legislation provides the cut will be shared by all districts, resulting in an average loss of \$42 per student, or 0.65 percent of districts’ general purpose funding. The funds will be distributed based on the transportation needs of each district. The bill was supported by the Education Coalition, whose members include the California School Boards Association, the California School Employees Association, the state Parent Teacher Association, and the California Teachers Association.

The bill, which required a two-thirds vote, passed 60 to 8 in the Assembly and 26 to 8 in the Senate. Some members objected or abstained because districts would be charged more money under the new legislation than previously. Governor Jerry Brown signed the bill into law last month.

Initially, parents and districts feared that SB 81 might not survive beyond this school year because Brown had proposed eliminating all funds earmarked for school busing, \$496 million, in his 2012-13 budget. Instead, districts’ block grants would have been increased and local school boards would have decided how to spend the money. However, Brown presented a modified plan to lawmakers that will pay for bus service next year by reducing the amount to be paid towards the state’s debt. The new proposal is contingent on the voters approving his plan to raise income and sales taxes, and it could permit districts to spend the bus funds for other items. Brown also indicated that he intends to eliminate earmarked funding for school transportation in the 2013-14 budget.

CPER Journal Online

Competing Tax Initiatives Each Claim to Be Best for Schools

Governor Jerry Brown has a plan to increase school funding by 10 percent over last year. He has proposed a deal to California's voters: he will leave intact the minimum levels of funding guaranteed to schools by Proposition 98 in his 2012-13 budget, if they will pass an initiative in November that would increase the sales tax and raise income taxes on the wealthy. If the initiative fails, schools will experience a \$4.8 billion mid-year trigger cut. This is the equivalent of shortening the school year by three weeks, explained Department of Finance Director Ana Matosantos, putting it in perspective. The likelihood of passage greatly increased when proponents of a competing initiative agreed to support Brown in exchange for modifications in the plan.

As originally conceived, Brown's initiative called for a .5 percent increase in the sales tax, from 7.25 percent to 7.75 percent. Income taxes on individuals earning at least \$250,000 a year would have increased 1 percentage point from 9.3 percent to 10.3 percent; for those making between \$300,000 and \$500,000 to 10.8 percent; and for those with an income of \$500,000 or more to 11.3 percent. The higher taxes would have expired after five years. Brown estimated that, if passed, the initiative would have raised \$6.9 billion each year.

Although he garnered powerful support for his plan from the California Teachers Association and the Service Employees International Union State Council, among others, until this month he was unable to convince supporters of another popular initiative to drop their signature drive. The Millionaires Tax of 2012 initiative was backed by groups such as the California Federation of Teachers, the Courage Campaign, the California Nurses Association, and MoveOn.org. It called for a 3 percent increase in taxes on incomes over \$1 million annually and 5 percent on incomes over \$2 million. Backers estimated that it would raise over \$6 billion annually, 60 percent of which would have funded early-childhood through higher education. The balance would have gone to counties for public safety, road maintenance, and services for seniors and the disabled. Supporters were critical of Brown's initiative, believing that it put too much of a burden on middle-class and poor Californians, and not enough on the rich.

Fearing defeat if votes were split between tax increase initiatives, Brown worked hard to convince "millionaires tax" supporters to drop their signature-gathering drive. He even made a personal visit to the home of CFT President Joshua Pechthalt, spending two hours trying to convince him to withdraw the proposal. Pechthalt refused, telling the *Los Angeles Times* that the union believed its initiative had the best chance of winning. In fact, this was the most popular initiative according to recent polls.

Finally, after months of negotiations, the two sides reached a compromise. The modified initiative, if passed, would raise the sales tax to 7.5 percent, .25 percent lower than Brown's original initiative. This change was important to CFT and other supporters because sales tax is paid by all California residents, regardless of income. Taxes on the two highest-paid income brackets would increase by greater amounts than Brown proposed initially. Individuals making between \$300,000 and \$500,000, and couples making between \$600,000 and \$1 million, would pay 2 percent more in personal income tax, or 11.3 percent. Individuals making \$500,000 or more, and couples making \$1 million or more, would pay an additional 3 percent, or 12.3 percent. The sales tax increase would expire after four years, while the increase on personal income tax would continue for seven. Officials at the Department of Finance project this new initiative would bring in \$9 billion in the first year and \$7.1 billion in subsequent years.

Significant hurdles to passage remain, however. Business groups, including the California Chamber of Commerce and the California Business Roundtable had remained silent on Brown's original initiative while actively opposing the others. It is unclear whether they will remain passive in the face of the changes. Further, some supporters of the "millionaires tax" may also be disappointed. And, even if the measure is cleared for circulation by early next month, there will be only a few weeks left to gather the 807,615 signatures to get it on the ballot.

Pechthalt estimates the signature drive could cost \$6 million.

Legislative Analyst Mac Taylor, the state's top budget advisor, warned that most school districts will plan for the worst and not wait for the results of the November election, meaning that they already will have

implemented spending cuts. Taylor also cautioned that increased reliance on taxes from high earners, whose incomes can fluctuate greatly from year to year, means that state revenue will become more unpredictable.

In addition, Brown has not yet been able to convince the backers of another competing initiative to abandon their signature drive. The "Our Children, Our Future" initiative is being funded by Molly Munger, a civil rights attorney. If passed, this initiative would raise taxes progressively on couples filing jointly and earning over \$17,500 annually after all deductions. The increases would range from .4 percent to 2.2 percent and would raise approximately \$10 billion a year for 12 years, most which would go directly to early education and to K through 12 schools. For the first four years, \$3 billion would go to the state's general fund. The funds would operate outside of, and in addition to, the Proposition 98 guarantee, flowing to each school, including charters, based on student enrollment and demographics, and would be required to be spent at the site. Spending decisions would be made on the local level. The state treasurer, attorney general, auditor, director of finance, and controller would make up the supervising board. Each school would be required to provide the public with a detailed disclosure of how the money is spent at each site. The plan would be in effect for a period of 12 years.

The initiative has the strong support of the California State Parent Teacher Association, which has been recruiting and training parents throughout the state to get out and gather signatures. Munger already has donated nearly \$1.5 million towards the effort.

Anne Gust Brown, the governor's wife, and Senate Pro Tem Darrell Steinberg (D-Sacramento) contacted Munger to try to influence her to walk away from "Our Children, Our Future," but she refused. Brown's entreaties to state PTA President Carol Kocivar met with the same fate. She defended the initiative, arguing that it is better than the governor's because it gets the money directly to the classroom.

CPER Journal Online

San Diego Unified Seeks to Delay Teacher Pink Slip Deadline

Urgency legislation introduced by Assemblymember Marty Block (D-San Diego) would allow the San Diego Unified School District to negotiate a postponement of the dates that layoff notices are issued to certificated employees. The date of preliminary notices would be moved from March 15 to June 15, and the issuance of final notices shifted from May 15 to August 15. If passed, the legislation would apply to the 2011-12 school year only.

Assembly Bill 2417 resulted from an exchange of demands between the district and its employee unions. In January, Superintendent Bill Kowba requested that all units agree to concessions to address an anticipated \$124 million shortfall for the 2012-13 fiscal year. He asked that the unions agree to delay the implementation of a series of raises set to begin in July, and to increase health benefit contributions for 2012-13. He also called for an extension of furlough days for a third year, which would eliminate five school days and cut teachers' salaries by 2.7 percent. Under contracts approved two years ago, the district agreed to raise pay 7 percent in 2012-13 if employees agreed to furloughs for two years.

Kowba claimed that these changes would allow the district to rescind \$50 million in budget cuts immediately. He also proposed another \$41 million in contingency concessions if tax increases are voted down in November and mid-year cuts are required. Those savings would be achieved through salary reductions and the implementation of up to 15 additional furlough days.

Only one union, the 63-member San Diego Schools Police Officers Association, agreed to the concessions, including 15 additional furlough days resulting in a 6 percent salary rollback if mid-year cuts are required.

After the other five unions refused to agree to Kowba's terms, the district announced its plan to cut 1,169 employees, including 821 teachers, before the next school year.

San Diego Education Association President Bill Freeman strongly objected, arguing that the district had made the same claims of looming financial disaster in each of the last four years, and that every year most layoff notices are rescinded. He noted that of the 1,349 certificated pink slips issued before March 15, 2011, 90 percent were rescinded before the start of the school year. "Each year the layoffs are recalled, schools open fully staffed, and the District carries forward a positive multi-million dollar ending balance — *every single time*," he said in a February 8 open letter to parents, educators, students, and the San Diego community at large.

Freeman claimed that the district's budget projections were not reality-based. "Preliminary analysis of the District's own numbers shows that the District will remain fiscally stable without a single layoff, or slashing and burning educators' pay and benefits, even *if* the worst case occurs," he said. He blamed the repeated inaccurate estimates on the San Diego County Board of Education's requirements that districts approve budgets before receiving accurate data, and that they base them on a worst-case scenario. For example, while Governor Brown advised school districts to draft their budgets for next year based on the assumption that November tax measures will pass, San Diego's board of education advised just the opposite. Freeman ended his open letter by asking the school board to "commit to immediately cease your support for layoffs and contract concessions, and instead to stand with parents, students, educators and all school employees in a shared fight against the broken system which underfunds our schools and forces the District to budget in the dark."

The next day, Kowba and district school board president John Lee Evans issued a memo to the teachers union asking it to join with them in proposing legislation to move the layoff notice deadline from March 15 to June 15. The delay would allow the district to consider the governor's May revised budget plan before deciding whether to lay off employees. The district has until June 30 to adopt a final budget.

After initially agreeing to support the legislation, the union reversed itself less than 24 hours later, claiming that extending the deadline until June would impede the ability of laid-off teachers to find new jobs. Freeman said that the association would support the legislation only if the district promised not to issue any layoff notices before March 15. The district refused, arguing that it would be "reckless" to not issue

any notices unless an extension was authorized by law.

Assemblymember Block decided to go forward with his proposed legislation without SDEA's open support, although he reported that he was told the union will not oppose the bill. He acknowledged that it was unlikely to pass before the March cut-off date, but added that it may still succeed in pushing back the May 15 deadline to issue final notices until August, and could be amended to apply to the 2012-13 school year.

CPER Journal Online

Teacher Gets Another Chance After Being Misinformed About Disability Benefit Rights by CalSTRS

The California State Teachers Retirement Board provided misinformation on applicable eligibility requirements for disability retirement to a teacher who claimed she was disabled. As a result, the teacher did not apply for the benefits in a timely manner. The Third District Court of Appeal, in *Welch v. California State Teachers' Retirement Board*, sent the matter back to CalSTRS to consider how it could correct its error and "strive to the fullest extent possible" to relieve her of the harm she suffered because of it.

Years of Denial

Melanie Welch was attacked by a group of students in 1998 while working as a teacher. At the time of the attack, she had more than one, but less than five, years of service credit. She claimed she did not apply for disability retirement because, in 1999, a CalSTRS representative told her that there were no exceptions to the rule that required at least five years of credited service to apply for benefits. In fact, Education Code Sec. 24101(c) provides an exception for a member who had at least one year of credited service and was disabled as a direct result of a documented unlawful act of bodily injury while performing official duties. In 2005, upon learning that the information she had been given was incorrect, she applied for disability retirement based on a diagnosis of post-traumatic stress syndrome.

CalSTRS rejected her application. It found no evidence that Welch had been misled by its representative. Her application was denied on the grounds that it was untimely, and because she did not provide medical records to support her claim that she had been continuously disabled since the attack. An administrative law judge upheld CalSTRS' decision.

Welch filed an administrative mandamus proceeding challenging the decision. Although the trial court did find that Welch was disabled in 2005 or 2006, and had been misled by a CalSTRS representative, it denied her petition because she had failed to show that she was disabled in 1999, when she would have filed her application. Welch appealed.

Court of Appeal Relief

Welch argued that, under Sec. 24101(c), she was entitled to benefits as long as she showed that, as a result of the attack, she was disabled at some point in time, not restricted to 1998 or 1999. The appellate court disagreed. It pointed out that Sec. 24101 addresses eligibility requirements, but that the application timing requirement set out in Sec. 24102 also must be met.

Turning to consider the application deadlines, the court noted that Sec. 24102(a) requires an applicant to file for disability retirement while still employed or on a compensated leave of absence. Because Welch did not apply until many years after she was terminated, she could not meet this requirement. Nor did she comply with the timelines of Sec. 24102(d) because she did not file her application within four months of her last day of work.

The reason that the 1998-99 time period is important, the court explained, is because Welch's application could be considered timely only under Sec. 24102(b), which allows an applicant to file at any time so long as she can show that she has been disabled continuously from her last day of work until the date the application is filed. The court found that the evidence Welch had submitted was not sufficient for it to overturn the lower court's finding that she did not satisfy the application timing requirement under Sec. 24102(b).

However, there is another Education Code section that must be considered in this situation, noted the appellate court. Section 22308 allows CalSTRS to correct errors and omissions made by CalSTRS or its members. CalSTRS did not take this provision into account when it denied Welch's application. And, while the trial court did consider it, it determined that the code section was not applicable because Welch could not demonstrate that she was disabled in 1999 when she first inquired as to her eligibility for disability retirement benefits.

The Court of Appeal concluded that CalSTRS “had the power and the duty to correct the actions taken as a result of the misinformation it provided Welch in 1999,” and that it abused its discretion by not considering whether to apply Sec. 22308 to this case. And, the trial court erred when it failed to recognize that, by providing Welch incorrect information in 1999, CalSTRS “*deprived her of a reasonable opportunity to develop contemporaneous evidence of her disability...*”

The court found it was reasonable to conclude that, had CalSTRS correctly informed Welch in 1999 that she might qualify for benefits, she would have timely submitted her application. Further, CalSTRS, upon receipt of her application, would have requested medical information in support of her claim, and Welch would have sought to provide the specific medical documentation required.

“The matter must be remanded to CalSTRS for CalSTRS to consider, in the first instance, the proper application of section 22308 here. In doing so, CalSTRS must fairly consider how its misinformation to Welch in 1999 affected her ability to provide CalSTRS with contemporaneous medical documentation of her psychological condition, *and CalSTRS must strive to the fullest extent possible to relieve Welch of the disadvantage she suffered because of that lost opportunity*,” instructed the court. “Section 22308 requires no less.”

The court ordered the lower court to grant Welch’s petition for a writ of administrative mandamus directing CalSTRS to vacate its decision and reconsider whether to grant Welch’s application under Sec. 22308. (*Welch v. California State Teachers Retirement Board* [2012] 203 Cal.App.4th 1, 2012 Cal.App. LEXIS 85.)

CPER Journal Online

Community Colleges Get One-Two Punch

Just when they thought they had seen the worst of it, the 112 California community colleges learned they will lose \$149 million in state funding, in addition to the \$102 million in mid-year trigger cuts that went into effect January 1. This second hit is the result of miscalculations regarding anticipated income from student fees and property taxes.

When drafting the 2011-12 budget, the Department of Finance estimated that the increase in student fees from \$26 to \$36 per unit would bring in an additional \$110 million, for a total of \$456 million. It turns out that the projection was \$107 million too high. The department did not count on the jump in fee waivers for financially strapped students. This year, 62 percent of students received waivers. The additional \$42 million shortfall is due to property tax revenues coming in at a lower rate than estimated.

Including this most recent cut, the community college system's budget has been reduced by \$809 million since 2008-09, \$651 million of which occurred this fiscal year. While the State Chancellor's Office and the Department of Finance are working with legislators to come up with a plan to minimize the losses, no action is anticipated before the May budget revise.

Community colleges claim they cannot wait that long to implement cost-saving measures. The Los Angeles Community College District plans to use reserve funding to make up for the cuts and will consider a hiring freeze. Pasadena Community College removed 56 classes and is considering closing its campus for spring break and part of the summer. It may have to borrow money to meet its July payroll. Los Rios Community College District will not fill non-academic openings and is cutting back on discretionary spending, as well as deferring a good portion of the cuts to next year.

In a statement reacting to the unexpected cuts, California Community Colleges Chancellor Jack Scott warned that this new decrease "will result in colleges further reducing course sections, additional borrowing and staff reductions." "As a state," he said, "we need to recognize the lasting damage that the disinvestment in higher education is having and commit to properly funding our colleges and universities."

CPER Journal Online

Notice of Proposed Discipline Does Not Begin 30-Day Period for Notifying Officer of Decision to Impose Discipline

An employer of a public safety officer must inform the officer of its decision to impose discipline within 30 days of making that determination, as required by the Public Safety Officers' Procedural Bill of Rights Act. That 30-day period does not necessarily run from the date the employer notifies the officer that its investigation is complete and discipline may be imposed, ruled the Court of Appeal in *Neves v. California Department of Corrections and Rehabilitation*. Absent evidence that the final decision was made before the agency issued a notice of adverse action, the date of the adverse action notice itself may begin the 30-day period.

***Sulier* Notice**

On December 30, 2009, CDCR notified officer Lawrence Neves of its completion of an investigation into allegations of misconduct and informed him "a decision has been made to take disciplinary action against you." The recommended penalty was dismissal. The notice continued, "You may anticipate formal adverse action papers to be served upon you [within] the next thirty (30) days."

On January 27, 2010, the department issued a notice of adverse action, which informed Neves that he would be dismissed effective February 12, 2010. Neves did not receive the notice, however, until February 1 or 2.

Neves petitioned the court for an order directing CDCR to vacate his dismissal because the department had not served him the notice of adverse action within 30 days of the December 30 *Sulier* notice, named for *Sulier v. State Personnel Bd.* (2004) 125 Cal.App.4th 21, 170 CPER 76. The trial court agreed, and the department appealed.

Proposal Not a Decision

Government Code Sec. 3304(f) states:

If, after investigation and any predisciplinary...procedure, the public agency decides to impose discipline, the public agency shall notify the...officer in writing of its decision to impose discipline, including the date that the discipline will be imposed, within 30 days of its decision...."

Neves contended that the department was required to serve the notice of adverse action within 30 days of the December 30 notice, when the department made its decision to discipline. But the appellate court disagreed that CDCR made its final decision in December.

The court based its conclusion on *Sulier* and *Mays v. City of Los Angeles* (2008) 43 Cal.4th 313, 190 CPER 40. In *Sulier*, the department completed its investigation of a correctional officer, and notified him that it had decided to take disciplinary action and was recommending a demotion. It advised the officer that a formal notice of adverse action would be served within 30 days. Officer *Sulier* contended that this preliminary notice was not sufficient to comply with Sec. 3304(d), which requires that a public agency complete its investigation of an incident and notify the officer of its "proposed disciplinary action" within one year of the misconduct prompting the discipline. The *Sulier* court disagreed, concluding from the statutory language that the notice required under subdivision (d) was intended to be a preliminary informal notice of the proposed discipline. To buttress its conclusion, it noted that the legislature separately provided for formal notice of adverse action in subdivision (f), the 30-day notice provision.

In *Mays*, the notice at the conclusion of the investigation did not include a recommended level of discipline. The Supreme Court in *Mays* concluded that the term "proposed disciplinary action" was not a reference to a specific level of discipline, but only to the agency's determination "that discipline may be taken." Despite the lack of notice to Officer *Mays* of the proposed level of discipline, the court ruled the notice was sufficient to comply with subdivision (d) because it informed him of the completion of the investigation and identified the procedure that would be used to adjudicate discipline.

The Supreme Court explained that it would be “anomalous to require the public agency to reach a conclusion regarding potential discipline prior to any predisciplinary proceedings or response on the part of the officer.” Although the timing of the 30-day notice provision of Sec. 3304(f) was not at issue in *Mays*, the court advised, “Once the agency follows its relevant procedural mechanism and decides the level of specific discipline it intends to impose, it *then* has 30 days to so notify the officer.”

The *Neves* court relied heavily on the language in *Mays* and *Sulier* to conclude that, despite CDCR’s use of the phrase, “a decision has been made to take disciplinary action” in Neves’ December notice, no decision had been made that would start the running of the 30-day period for the formal adverse action notice. Because the December notice only “recommended” a demotion, the court found that the notice was not evidence that the department had decided on the level of discipline by December 30, and therefore, the 30-day period did not begin to run on that date.

The court found that Neves had presented no evidence the department made its final decision to discharge him prior to January 27, when it issued the formal adverse action notice. Therefore, service of the notice on Neves on February 1 or 2 complied with the 30-day deadline of subdivision (f). The court reversed the lower court’s order. (*Neves v. California Department of Corrections and Rehabilitation* [1-31-12] __ Cal.App.4th __, 2012 Cal.App. LEXIS 88, 2012 DJDAR 1316.)

CPER Journal Online

State Furlough Lawsuits Dwindle

Furloughs that former-Governor Schwarzenegger imposed on the state workforce three years ago spawned nearly 40 lawsuits asserting a myriad of arguments that the unpaid time off was illegal. While some were successful at the trial court level, most were doomed by the Supreme Court's decision in *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989, 2010 Cal. LEXIS 9757, [201 CPER 47](#). Two theories resulted in back pay for state employees in a handful of state agencies. In the last couple months, unions have dropped their severely weakened cases, but two lawsuits continue.

Settlements and Dismissals

In *Professional Engineers*, the Supreme Court ruled that the governor did not have authority to unilaterally impose the initial two-day-a-month furloughs on represented employees, but found that the legislature had ratified the order when it passed the budget. The reasoning later was applied to uphold the third furlough day imposed in July 2009, which later was ratified by the legislature.

The language used by the legislature was the key to the success or failure of most of the lawsuits. In February 2009, the legislature modified the 2008-09 budget. It stated:

Notwithstanding any other provision of this act, each item of appropriation in this act...shall be reduced, as appropriate, to reflect a reduction in employee compensation achieved through the collective bargaining process for represented employees or through existing administration authority and a proportionate reduction for nonrepresented employees (utilizing existing authority of the administration to adjust compensation for nonrepresented employees) in the total amounts of \$385 [million] from General Fund items....

The courts' focus on the phrase, "item of appropriation" was found to validate the furloughs of any employee who worked in an agency that received an item of appropriation from the general fund. (See story on *UAPD v. Brown* [2011] 195 Cal.App.4th 691, 2011 Cal.App. LEXIS 587, [202 CPER online](#)). In another case, an appellate court found that only five agencies received no appropriations from the general fund, and it remanded the matter back to the trial court for further examination. (See story on *Service Employees International Union, Loc. 1000 v. Brown* [2011] 197 Cal.App.4th 252, 2011 Cal.App. LEXIS 885, [203 CPER online](#).) Those agencies are the California Earthquake Authority, the California Lottery, First 5 California Commission, the Prison Industry Authority, and the Housing Finance Agency.

To avoid further litigation over the validity of the furloughs at the five agencies, the Brown administration recently settled the lawsuits brought by SEIU and the California Attorneys, Administrative Law Judges and Hearing Officers in State Employment. In those agencies, over 1,000 employees and former employees represented by the two unions, as well as excluded employees, will receive back pay, but without the interest payments they would have received if ordered by a court. In exchange, CASE and SEIU will drop their remaining furlough lawsuits. The employees shut out from the settlements are represented by PEGC and the California Association of Professional Scientists, who are still pursuing lawsuits.

Another successful theory applies only to employees of the State Compensation Insurance Fund. Funding for SCIF comes from contributing policyholders, not from the annual budget act. In addition, in *California Attorneys, Administrative Law Judges and Hearing Officers in State Employment v. Brown* [2011] 195 Cal.App.4th 119, 2011 Cal.App. LEXIS 538, [202 CPER online](#), the court found that a specific exemption of fund employees from "any hiring freezes and staff cutbacks otherwise required by law" trumped more general laws that conflict, such as the budget act. Most SCIF employees were spared from furloughs after September 2009, and received back pay according to court orders.

Hazardous Materials Workers

PECG and CAPS think they have found similar provisions that invalidate the furloughs of employees in positions charged with remedying and managing hazardous materials on military bases. They contend that over 250 engineers and scientists employed by the State Water Resources Control Board and the Department of Toxic Substance Control should have been exempt. The unions cite statutory language

that prohibits the state controller or the Department of Finance from imposing “any hiring freeze or personal services limitations” on these positions if funded by the federal government or by non-state government parties who must pay for the hazardous materials oversight and remediation performed by those agencies.

CAPS and PEGG also complain that Schwarzenegger imposed too many days of furlough on the employees they represent — the result being that those employees experienced a greater reduction of compensation in the 2010-11 year than non-represented employees such as supervisors and managers. Since the budget act that ratified the furlough order called for a “proportional reduction” in compensation between represented and non-represented employees, the last two furlough days in March 2011 were unauthorized, the unions claim. Those two unpaid days caused their members to lose 9.2 percent of their annual compensation, whereas non-represented employees lost only 8.5 percent. At that time, many of the unions, but not CAPS and PEGG, had ratified collective bargaining agreements that achieved compensation savings by granting leave for reduced pay rather than imposing furlough days.

Although the CAPS and PEGG lawsuit was filed in January 2010, the superior court still has not ruled on the unions’ theories. The case is scheduled to be heard in April.

CPER Journal Online

Terminated Officer Has No PSOPBRA Right to Review Personnel Files

In a case of first impression, the Court of Appeal has ruled that a former parole agent had no right under the Public Safety Officers Procedural Bill of Rights Act to see his personnel and internal affairs records. The court found that the lack of an employment relationship rendered the officer without Government Code Sec. 3306.5 rights even though the State Personnel Board hearing on his termination was still pending.

Multiple Investigations

Patrick Barber was terminated in April 2009. He filed an appeal with the SPB. He previously had been terminated in 2008, and had an appeal pending in that case as well.

In June 2009, Barber was looking at a civil court file online and noticed that a motion had been filed for his personnel records. He informed his employer, the Department of Corrections and Rehabilitation, that he should have been notified of the motion, and he requested representation. The court in that case granted the motion, and CDCR produced all of Barber's records from 1999-2004.

Six months later, Barber requested his records from 2005 through 2009, including records from four internal affairs investigations. CDCR denied the request. Barber insisted that he was entitled to the records because of the pending SPB hearings.

When the department refused to give him the records, Barber filed a petition in court for an order requiring disclosure. He based his claim on Section 3306.5 of the act and the memorandum of understanding between the state employer and his union, the California Correctional Peace Officers Association. Barber asserted that the department had withheld records in response to the motion in the civil case, and he wanted the documents for the SPB hearing. He had been informed by the SPB in another disciplinary case that he would have to obtain a court order for records he believed had not been provided in violation of his *Skelly* rights. He believed that the department had a history of concealing and destroying his records, he explained, so he wanted to review all of them.

CDCR insisted Barber already had been provided three internal investigation files that related to disciplinary actions. It denied the existence of two other files Barber had requested. The department also contended that Barber was not entitled under Section 3306.5 to the documents because he was no longer employed by CDCR. The trial court denied Barber's petition, and Barber appealed.

No Legal Precedent

The appellate court easily rejected Barber's claim that the MOU entitled him to review his personnel files, since the contract was limited to requests by "employees." Turning to Barber's second argument, the court found that the case law cited by Barber and CDCR did not answer the question of whether a former officer had rights under Section 3306.5 to see his personnel files.

The court examined the language of the section, which states:

Every employer shall...upon the request of a public safety officer, during usual business hours, with no loss of compensation to the officer, permit that officer to inspect personnel files that are used or have been used to determine that officer's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.

The court reasoned that there was no indication that the legislature intended former officers to be entitled to see their files, since the statute did not use the phrase "former employer" or "former officer." It also inferred this meaning from the provision prohibiting an officer's loss of compensation while he reviewed files.

The court acknowledged that the statute does apply to files that "are used or have been used to determine that officer's...termination," but legislative history and the PSOPBRA statutory scheme convinced the

court that lawmakers did not intend by these words to extend rights to former employees. Prior to the enactment of Section 3306.5, the act already allowed an officer to respond to any adverse comment before it was placed in his file. Section 3306.5 added the right to inspect files without loss of compensation, the legislative counsel wrote at the time. Quoting *McMahon v. City of Los Angeles* (2009) 172 Cal.App.4th 1324, 2009 Cal.App. LEXIS 510, 195 CPER 32, the court noted that the general purpose of the new section was to “facilitate the officer’s ability to respond to adverse comments potentially affecting the officer’s employment status.” In addition, the court found that the purpose of the PSOPBRA to maintain stable employer-employee relations would not be served by interpreting Section 3306.5 to apply to former employees.

The court observed that Barber was placed on administrative leave in January 2008, and was served with his notice of termination on March 24, 2009, before the effective date of his termination on April 10. The court stated, “[U]p until the effective date of termination, an officer has the right under section 3306.5 to review his or her employment records.”

Even if the PSOPBRA applies to former officers, the court reasoned, CDCR did not violate the law by rejecting Barber’s records request because it already had provided copies of all records relied on by the department when it terminated him. The court placed the burden on Barber to show that CDCR relied on records that it had not yet produced.

The court found persuasive the opinion in *McMahon* that an employer’s obligation to turn over files depends on whether they qualify as personnel files that have been used in making a personnel decision such as termination. In *McMahon*, the court found the officer had merely speculated that there were secret, stigmatizing allegations in the internal investigation files since the investigation already had determined that the complaints under investigation were unfounded. Likewise, the *Barber* court found Barber had provided no evidence that CDCR had withheld documents, and CDCR had shown that it had given him copies of evidence it relied on. Various allegations that the department had concealed and destroyed his records at other times did not prove that it had failed to supply records it had relied on or those containing adverse comments.

The court affirmed the judgment. (*Barber v. California Department of Corrections and Rehabilitation* [2-15-12] E052296 [4th Dist.] ___ Cal.App.4th ___, 2012 Cal.App. LEXIS 134, 2012 DJDAR 2085.)

CPER Journal Online

UPTE Agrees to Higher Contributions, Plans for Two-Tier Pension Negotiations

The University of California and the last holdout union finally reached an agreement to increase employee contributions to pension and health care benefits. In return, the United Professional and Technical Workers, CWA, gained a greater voice in the development of healthcare and post-retirement plans. The parties will begin bargaining this summer over U.C.'s proposed second-tier pension system for employees hired after June 30, 2013.

Pension Contributions Rise

In 2006, the university revealed a plan to restart employee contributions to the University of California Retirement System, which had received no payments since 1990 due to its superfunded status. At the time, the proposal was to ramp up employee contributions to 6 or 7 percent over several years. But unions representing UC employees dug in their heels. Salaries generally were 15 percent below market, and raises had been meager because of state budget cuts, the unions pointed out. Restarting pension contributions would mean less money in employees' pockets.

It has taken a long time, but in negotiations concluded since last July, the university wrestled concessions from five unions that require employees to increase their pension contributions to 3.5 percent in 2011-12, and to 5 percent in 2012-13. In the most recent agreement, UPTE acceded to the pension payments and increased healthcare contributions from approximately 8,700 researchers and technical workers it represents. The agreement was a result of reopener negotiations on benefits.

Historically, the university and each of its unions negotiated language that allowed UC to make annual changes to health and welfare plans and costs as well as changes to its pension plan, although the unions have negotiated limitations on that discretion in recent years. UPTE made further inroads on the university's rights to alter health plans and retirement benefits in the reopener agreement. The union will go along with premium increases imposed on other workers at U.C., but retains the right to bargain if employee contributions rise more than 50 percent in 2013.

The union plans to have more impact on costs, however. UPTE has had representatives on a joint-benefits committee for several years, but the scope of the discussions will change this year to include much more consultation with UPTE regarding the renewal process with health plan providers. Committee participants are required to sign a confidentiality statement to protect proprietary third-party vendor data and the decisionmaking process. In a newsletter to its members, UPTE pledged to work toward reducing plan costs by focusing on preventive and community-based health care.

A new labor-management committee will review funding of retiree health benefits and issue a report in July. The university currently provides contributions toward the benefits of retirees who have at least 10 years of service credit, but it has clearly reserved its right to discontinue the benefit. The purpose of the committee is to explore the establishment of a retiree healthcare funding account, but the university reiterated it was not committing to funding future retiree health benefits or implementing any item in the eventual report.

A third committee will begin discussions of the university's proposal to place newly hired researchers and technical workers in a less lucrative pension tier established last year for non-represented employees. (See story on the new pension plan in [CPER No. 201](#), pp. 43-45.) Employees in the new tier must work until 55 to be eligible for retirement benefits, and must work until 65, rather than 60, to reach the maximum benefit factor of 2.5 percent. The reopener pact contains deadlines beginning this month by which UC must provide information for the negotiations. If there is no agreement on pension benefits by the end of this year, the issue will be rolled into negotiations for a new contract to replace the one that expires in June 2013. That result appears likely, as UPTE's goal is to keep everyone on the same tier.

The university is still in full contract negotiations with a unit of healthcare workers also represented by UPTE. UC is demanding they accede to the second pension tier in exchange for wage increases, and is insisting on a five-year contract. UPTE is pushing for a one-year contract to expire in December 2012, so

that all three units — and several other UC unions — will be bargaining the issue at the same time.

CPER Journal Online

Is New CSU Executive Compensation Policy Enough for Legislature?

The Board of Trustees of the California State University reined in runaway compensation for campus presidents in January, but some critics think the university still has too much freedom to raise presidential salaries. Taking a cue from the Legislative Analyst's Office, they have scrutinized the list of comparator institutions that CSU uses to set compensation. Even after the new policy established limits on pay, Republicans showed their displeasure by blocking reconfirmation of CSU's longtime board chair. Three bills limiting executive's raises are in the legislature.

'Improperly Skewed' Data

After public outcry over the \$400,000 annual salary awarded to San Diego State University president Elliot Hirshman last July, the board appointed a special committee on presidential selection and compensation. In December, the committee proposed a new compensation policy that expresses the goal of the university "to attract, motivate, and retain the most highly qualified individuals to serve as faculty, staff, administrators, and executives," and to compensate all employees in a "fair, reasonable, competitive, and fiscally prudent" manner. The policy establishes a list of comparator institutions divided into tiers based on such factors as enrollment, budget, and research funding. The 23 different campuses will be evaluated on those factors for tier placement.

The policy proposal provided that presidential compensation decisions would be "determined with reference to the mean of the appropriate tier of comparison institutions, together with an individual candidate's reputation for national policy leadership" and executive experience. There was no cap or other restraint on executive pay. Proposed lists of comparators were attached to the committee report. This would eventually change.

The proposal drew a negative response from Senator Ted Lieu (D-Redondo Beach). He echoed the concerns of the Legislative Analyst's Office, which pointed out last November that CSU had compiled the comparator lists without external input. In addition, Lieu expressed frustration with the goal of attracting the "most highly qualified" executives without any recognition of budget constraints. In his ["White Paper on California State University's Proposed Policy on Presidential Compensation,"](#) he wrote, "The use of the "will be determined" language means that, regardless of CSU's budget or California's fiscal condition, CSU executive compensation will be determined by a survey composed of a narrow class of purported comparison institutions handpicked by CSU."

Lieu reiterated the observation of the LAO that CSU had ignored substantial non-cash compensation that CSU presidents enjoy. While purporting to set tiers based in part on the amount of research funding an institution receives, universities were deemed comparable even though their research funding was double that of a CSU campus. Lieu charged that the "data and comparison criteria handpicked by CSU are designed to improperly skew the average salaries higher." And, he asserted, the criteria do not include such factors as endowment funding, the presence of law or medical schools, and the prominence of athletics programs, all of which increase the complexity of running an institution. He concluded that a valid set of comparators would show that CSU presidents are being compensated at or above the level of their peers in similar institutions.

Proposed Policy Revised

Despite the LAO criticism and Lieu's white paper, the committee included the same institutions in its lists submitted to the full board on January 25, 2012. The policy language, however, was amended.

The list of compensation considerations for all employees now includes the system's budget and state funding, and the comparison lists will only "guide" the determination of presidential compensation. Significantly, the committee added another provision, which was adopted by the board. It states in part:

[U]ntil the Board of Trustees...determines otherwise, when a presidential vacancy occurs, the initial base salary, paid with public funds, to the successor president, shall not exceed ten

percent of the previous incumbent's pay.

The highest current annual presidential salary that is not funded in part by private foundations is \$325,000 with a housing supplement of \$60,000.

Political Consequences

Lieu applauded the policy amendments. "These...changes are significant reforms that will help rationalize CSU executive compensation decisions," he said. Nevertheless, he has not dropped legislation he proposed in January. SB 959 would cap CSU presidents' salaries at 150 percent of the salary of the chief justice of the California Supreme Court — now \$228,856, require compensation decisions to be made in open session, disallow increases within two years after a student tuition increase, and require the university to give preference to presidential candidates from within the CSU system and California before looking outside the state.

Also active are two bills introduced by other senators. Senator Leland Yee (D-San Francisco) introduced SB 967 to limit the salary of new presidents to no more than 5 percent higher than their predecessors' pay and prohibit raises within two years of a tuition increase or year in which CSU's state funding does not increase. The bill by Senator Elaine Alquist (D-San Jose), SB 952, would ban pay increases of more than 10 percent in a year in which student fees rise.

Similar legislation has failed in the past, but there is an indication that some curbs on executive compensation could be successful this year. In February, Republicans in the Senate blocked the confirmation of the board chair, Herbert Carter, citing his vote in favor of Hirshman's salary last July. While the opposition may have been more a swipe at Governor Brown than a statement of principle, the fact that there is bipartisan consensus on the issues raises the question of whether CSU's change in policy went far enough to satisfy the legislature.

CPER Journal Online

Going to Court When the Court Is the Party

When the El Dorado County Superior Court disagreed with an arbitration award reinstating a discharged court employee, the court petitioned itself for an order vacating the award. After challenging the jurisdiction of any trial court to hear the matter, IUOE Local 39 obtained an order appointing an appellate court justice to hear the case instead.

The California Arbitration Act permits a party to go to court to confirm, correct, or vacate an arbitration award. In this case, the El Dorado County Superior Court's petition claimed that the arbitrator exceeded his authority and the award could not be corrected. Before the union responded to the petition, all the judges on the El Dorado court bench recused themselves, and the case was assigned to a judge from the neighboring Nevada County Superior Court. While common, that is not the proper procedure under the Trial Court Act, Local 39's counsel, Leslie Freeman, told *CPER*.

The union filed a cross-petition to confirm the award and asked to have the case heard by an appellate justice as required by California Rule of Court 10.660(c)(2) and Government Code Sec. 71639.5. It challenged the Nevada County court's jurisdiction.

Section 71639.5 provides that a collective bargaining agreement which requires arbitration of "controversies arising out of the agreement," is subject to enforcement under the California Arbitration Act. It also mandates that the Judicial Council adopt rules that establish a panel of appellate court appeal justices to hear enforcement petitions. Rule 10.660 implements that directive. The panel includes at least one justice from each district of the state Court of Appeal, since the judge assigned to hear the petition must be from a different district than the one that hears appeals from the superior court which is party to the arbitration.

The Nevada County Superior Court easily determined that a "petition to vacate an award is a petition to enforce an arbitration agreement," as provided by Sec. 71639.5. But it spent more time addressing the question of whether the underlying disciplinary dispute was a controversy "arising out of the agreement."

The El Dorado court contended that some arbitrations should not be subject to the Rule 10.660 procedure. It argued that petitions to confirm, correct, or vacate awards involving a dispute between a single employee and the court employer do not have sufficiently broad implications to justify the use of the appellate justice panel. It suggested that the procedure be limited to cases involving contract interpretation that have a broad effect.

While recognizing the practicality of that contention, the Nevada County court rejected it. The court found that the language of the statute was clear, and that "the legislature meant what it said, no matter how impractical or burdensome that scheme might eventually turn out to be to the small cadre of Appellate Justices comprising the panel." In addition, the court noted, the employer court's petition in this case challenged an interpretation of the agreement. The El Dorado court claimed that the arbitrator did not have authority to require the court to use progressive discipline, an issue that would apply broadly to all employees subject to the collective bargaining agreement. Therefore, the Nevada County court ruled that an appellate justice from the Rule 10.660(e) panel was required to hear the petition to vacate the award.

After the decision was issued, the chief justice appointed a justice from the first appellate district based in San Francisco to sit in the El Dorado County Superior Court to hear the case. (*El Dorado County Superior Court v. International Union of Operating Engineers, Stationary Engineers, Loc. 39* [10-14-2011] Nev.Co.Sup.Ct. No. PC20110397.)

CPER Journal Online

Consideration of Projected Retirement Date Implies Age Discrimination: Summary Judgment Reversed

An employee's superior qualifications and two hiring panelists' inquiry into projected retirement dates were sufficient evidence to defeat the employer's summary judgment motion in a lawsuit alleging that the United States Army Corps of Engineers violated the federal Age Discrimination in Employment Act when it failed to promote him. The opinion was issued by the Ninth Circuit Court of Appeals in *Shelley v. Geren*.

The Evidence

Devon Scott Shelley, a GS-13 assistant chief of the Corps' contracting division, applied for a 120-day position as a GS-14 supervisory procurement analyst. The job was the first of a two-step process to hire a permanent chief of contracting. Shelley was 54 years old at the time of his application. He had 29 years of experience in contracting, 26 of which were with the Corps, and he had received numerous awards for his work.

Shelley was not given an interview for, nor was he hired into, the position. Rather, Vince Marsh, who had been serving in a GS-14 position for more than one year and had been with the Corps for less than two years, was selected. He was 42 years old.

Major Kelly Butler served as the selecting official for the position. There was no evidence that she interviewed any of the nine applicants for the 120-day position other than Marsh.

Regional contracting chief Joseph Scanlan participated in the hiring decision. He knew Shelley and was aware he was in his fifties. Scanlan had supervised Shelley and had worked with him for six years. He testified that Shelley was a good contracting officer. However, Scanlan supported Marsh for the position. Scanlan told the other members of the selection panel that he had worked with Marsh in Germany. However, he later testified that he had only met him at a social event and recommended him based on his reputation.

Shelley also applied for the permanent position, along with 32 other individuals. Under the rankings initially given by the hiring panel, he would have qualified for an interview, but one of the panelists later lowered his score and he was not interviewed. Marsh, the youngest interviewee, was selected for the permanent position.

At some point during the hiring process, Scanlan and another member of the hiring panel requested information from the contracting chiefs about projected retirement dates for employees in their divisions. Although the employees were not listed by name, their names could be easily deduced.

Shelley filed a complaint with the Corps' EEO officer 17 days after he learned that he had been denied an interview for the permanent position. After the EEO office denied his claim, he filed suit. The district court granted the Corps' motion for summary judgment.

Ninth Circuit Reverses

The Court of Appeals was not persuaded by the Corps' procedural argument that Shelley failed to pursue his administrative remedy for non-selection for the 120-day position in a timely manner. Federal employees must consult with an EEO officer within 45 days of the contested personnel action. Because Shelley did not contact the EEO officer until after he was denied an interview for the permanent position, which was more than 45 days after he learned that he had not been selected for the 120-day position, the Corps argued that the court could not consider his complaint regarding that position. The court disagreed, finding that the decisions not to hire Shelley for the 120-day position and not to interview him for the permanent position were part of a two-step hiring process for the permanent position, constituting a single course of conduct.

Turning to the age discrimination claim, the court found that the trial court used the wrong standard for evaluating the evidence when it relied on *Gross v. FBL Financial Services, Inc.* (2009) 557 U.S. 167, 2009 U.S. LEXIS 4535, 196 CPER 63, in ruling that Shelley had not proved that age was the "but for" cause of

the adverse action. The Ninth Circuit pointed out that the Supreme Court in that case was dealing with whether a mixed-motive instruction should be given to a jury at trial, not the “evidentiary framework applicable to a motion for summary judgment.” The proper test to be used for summary judgment is the burden-shifting analysis set out in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 1973 U.S.LEXIS 154, and nothing in *Gross* requires a different conclusion, said the court.

Applying *McDonnell Douglas*, the court found that Shelley had met his burden of proving all the elements of a prima facie case of failure-to-promote age discrimination. He produced evidence that he was at least 40 years old, was qualified for the position, was denied the position, and that the promotion was given to someone substantially younger .

The burden of persuasion then shifted to the Corps to show that its failure to promote Shelley was for a nondiscriminatory reason. The Corps argued that hiring Marsh was a lateral move because he was already a GS-14, whereas it would have been a promotion for Shelley. The court found this to be a “facially legitimate explanation.”

The burden then shifted back to Shelley to raise a factual question as to whether the Corps’ explanation was a pretext for age discrimination. The court concluded that he did so through the presentation of both direct and indirect evidence. The fact that some of the decision-makers inquired about the projected retirement dates of employees, including applicants for the position, during the time that the hiring decision was being made “raises an inference that they considered this information relevant to their decisions,” the court said. In addition, there was a factual dispute as to which candidate was best qualified for the position. “Evidence of a plaintiff’s superior qualifications, standing alone, may be sufficient to prove pretext,” instructed the court. Here, Shelley had more years of contracting experience and more experience with the Corps than did Marsh. Shelley was already employed in the contracting division while Marsh was not. Shelley had an M.B.A. whereas Marsh held no graduate-level degree.

The court noted that the Corps’ rationale that Marsh was already a GS-14 was only relevant to the 120-day position. Had Shelley been hired into that position, he also would have been a GS-14 at the time the permanent position became available.

In addition to asking for projected retirement information, Scanlan’s misrepresentation of the extent of his contact with Marsh was also suspect, said the court. And it was reasonable to conclude that his support for Marsh negatively influenced Butler against hiring Shelley for the 120-day position.

If the rejection of Shelley for the 120-day position was based on age discrimination, “then the inference that the decision-makers were biased would carry over to their decision-making for the permanent position,” the court reasoned.

The court was not persuaded by the Corps’ argument that there could be no inference of age discrimination in the selection process for the permanent position because some of the applicants who were interviewed were close to Shelley’s age. “Stacking the interview pool with older candidates does not immunize the decision to hire a younger one,” said the court.

The appellate court reversed the grant of summary judgment and remanded the case to the lower court for further proceedings. (*Shelley v. Geren* [9th Cir. 2012] 666 F.3d 599, 2009 U.S. App. LEXIS 623.)

CPER Journal Online

Employer Not Required to Reasonably Accommodate Employee Not Otherwise Qualified

A special education teacher, with a history of depression and bipolar disorder, who failed to meet the requirements to renew her certificate, is not a “qualified individual with a disability” within the meaning of the Americans with Disabilities Act. According to the Ninth Circuit Court of Appeals in *Johnson v. Board of Trustees of the Boundary County School Dist. No. 101*, an individual who fails to satisfy the job prerequisites is not “qualified” unless the prerequisite itself is discriminatory.

Under the laws of Idaho where she was teaching, Patricia Johnson was required to renew her teaching certificate every five years. In order to do so, she had to complete at least six semester hours of professional development training, including three for college credit. Her certificate was set to expire on September 1, 2007. By the start of the summer of 2007, Johnson had not yet completed the three semester hours for college credit. During that summer, she suffered a major depressive episode that rendered her unable to complete the requirement. The superintendent informed her that she could not teach during the upcoming year unless she could convince the district’s board of trustees to apply for provisional authorization from the state board of education. The board of trustees refused to apply for the authorization. Johnson filed a lawsuit alleging that the board failed to reasonably accommodate her disability. The district court entered summary judgment for the board, and Johnson appealed.

The Ninth Circuit noted that it adopted the Equal Employment Opportunity Commission’s regulation defining a “qualified individual” as the test for whether an individual is qualified within the meaning of the ADA in *Bates v. United Parcel Service, Inc.* (9th Cir. 2007) 511 F.3d 974, 2007 U.S. App. LEXIS 29870, 189 CPER 92. The regulation provides that “a qualified individual with a disability” is one “who satisfies the requisite skills, experience, education and other job-related requirements” of the position “and who with, or without reasonable accommodation, can perform the essential functions of such position.”

The issue in this case was whether the court must consider reasonable accommodation when considering the first step of the test. The board contended that Johnson’s lack of a certificate meant she was unqualified under this step. Johnson argued that because she could have obtained legal authorization to teach if the board had granted her request for accommodation, she was qualified.

The court agreed with the board. It pointed out that the first step of the EEOC test, unlike the second, contained no reference to reasonable accommodation, and concluded that this was a deliberate omission by the EEOC. It also found support for its interpretation in the EEOC’s interpretive guidance on Title I. The guidance explains that “the first step is to determine if the individual satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc.,” and that “an obligation to make reasonable accommodation is owed only to an individual with a disability who is qualified within the meaning of Sec. 1630.2(m) in that he or she satisfies all the skill, experience, education and other job-related selection criteria.” The court concluded that these and other statements in the guidance “make clear that unless a disabled individual independently satisfies the job prerequisites, she is not ‘otherwise qualified,’” and, therefore, no reasonable accommodation is required.

The only exception, instructed the court, is where the employee can show that the qualification standard discriminates on the basis of disability. In that case, the burden then would shift to the employer to show that the standard is job-related, consistent with business necessity, and that there is no reasonable accommodation which could enable performance. The exception does not apply in this case, however, because Johnson did not allege that the legal authorization requirement was discriminatory. “Rather, the basis for Johnson’s discrimination claim is the Board’s failure to accommodate her disability, which is analytically distinct from a claim of disparate impact or disparate treatment under the ADA,” the court explained.

The court affirmed the trial court’s judgment. (*Johnson v. Board of Trustees of the Boundary County School Dist. No. 101* [9th Cir. 2011] 666 F.3d 561, 2011 U.S. App. LEXIS 24305.)

CPER Journal Online

No Substantial Evidence of Retaliatory Intent in Termination of Employee for False Allegations

A police officer who was terminated for fabricating allegations of sexual harassment by a supervisor did not present sufficient evidence to support a jury's verdict that the employer's action violated California's Fair Employment and Housing Act. The Second District Court of Appeal in *Joaquin v. City of Los Angeles* determined that the Los Angeles Police Department had a legitimate reason for the firing, and that the officer did not prove retaliatory intent by the board of rights, which recommended his termination.

Background

After Officer Richard Joaquin complained that he was sexually harassed by Sergeant James Sands, a departmental investigation ensued. The department's board of rights found that Joaquin had fabricated the charges, and recommended termination. The chief of police adopted the recommendation and terminated Joaquin.

Joaquin filed a petition for writ of mandate, and the superior court ordered him reinstated, concluding that the department's findings were not supported by the weight of the evidence.

After he was reinstated, Joaquin sued the City of Los Angeles, alleging that his termination was in retaliation for having filed a sexual harassment complaint in violation of the FEHA. The jury found in his favor and awarded him \$2 million. The city appealed.

Proving Intentional Retaliation

The appellate court explained that, under the FEHA, once a plaintiff proves a prima facie case of retaliation, the burden of persuasion shifts to the defendant to articulate a legitimate non-retaliatory reason for its action. Here, Joaquin established a prima facie case: he showed that he engaged in protected activity by reporting sexual harassment, was performing competently, and was terminated. However, the department's rationale for its action, that he had made false claims of sexual harassment, was legitimate and non-discriminatory, which negated the presumption of retaliation and shifted the burden back to Joaquin.

In order to prove intentional retaliation, Joaquin had to establish that he engaged in a protected activity, that the employer had retaliatory intent, that it took an adverse action against him, and that a causal link existed between the retaliatory animus and the adverse action, instructed the court, citing *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 2008 Cal.App. LEXIS 1165.

The city argued that, to prevail, Joaquin had to prove retaliatory intent on the part of those who made the decision to terminate him, and that he did not do so. Joaquin disagreed, contending that he only had to show a causal connection between his complaint of harassment and his termination. He pointed to the board of rights' findings in its statement of decision as proof of the link.

The court agreed with the city. It acknowledged that Joaquin had shown a direct causal connection between his harassment complaint and his termination. "However, the Board of Rights did not recommend termination merely because Joaquin had reported sexual harassment, but rather because it concluded that he had fabricated the accounts of sexual harassment," explained the court. "In other words, the Board of Rights recommended termination not because Joaquin reported sexual harassment, but because it concluded that he had done so *falsely*."

While the court could find no California case that addressed the question of whether an employee may be disciplined if the employer determines that he has falsified a claim of sexual harassment, it did find several cases brought under Title VII of the federal Civil Rights Act and other states' anti-discrimination laws.

In *Richey v. City of Independence* (8th Cir. 2008) 540 F.3d 779, 2008 U.S.App. LEXIS 18795, the plaintiff was terminated for falsely alleging that he had been sexually harassed by a coworker. The plaintiff sued the city, alleging that his termination violated the Missouri Human Rights Act. The Court of Appeals upheld

the summary judgment against the plaintiff, stating that, in such a case, a plaintiff must show there existed “a genuine issue of fact about whether the employer acted on a good faith belief that the employee violated a workplace rule,” not merely that there was a question as to whether the employee violated workplace rules.

And, in another case, *EEOC v. Total System Services, Inc.* (11th Cir. 2000) 221 F.3d 1171, 2000 U.S.App. LEXIS 18976, the court ruled that an employee “could be properly discharged based on Defendant’s good faith belief that she lied in an internal investigation.” “[W]hether to fire an employee for lying to the employer in the course of the business’s conduct of an important internal investigation is basically a business decision; this decision, as with most business decisions, is not for the court to second-guess as a kind of super personnel department,” it explained.

The court in this case followed the reasoning of these and other similar cases, holding that “in appropriate circumstances, an employer may discipline or terminate an employee for making false charges, even where the subject matter of those charges is an allegation of sexual harassment.” To hold otherwise, it added, would mean that employers could not terminate employees for defaming other employees or the employer, and that an employee could immunize his malicious or false internal complaints simply by filing a discrimination complaint with a government agency.

No Substantial Evidence of Retaliatory Intent Here

Having settled the preliminary issue, the court considered whether there was substantial evidence presented in this case that would support the jury’s finding of retaliatory animus. It concluded there was not.

Joaquin argued that Sands wanted him disciplined in retaliation for making the sexual harassment complaint, and that Sands’ retaliatory animus infected the internal affairs investigation. The court found no evidence from which a reasonable jury could infer that the investigation was tainted. And, it noted, the termination decision was made by the board of rights, not internal affairs. The hearing before the board of rights did not make any reference to the evidence produced during the investigation, and Joaquin produced no evidence that any of the board members had any retaliatory animus toward him. The jury heard little evidence of what was presented to the board. Thus, it concluded, “there is no evidence that any improper motive that may have infected the Internal Affairs investigation also infected the Board of Rights.”

The same failure to show what evidence was produced to the board undermined Joaquin’s argument that the board intentionally overlooked compelling evidence that Sands was not credible, the court concluded.

Jury Instruction Defining Retaliation Criticized

During the course of its deliberations, the court discovered a “significant flaw” in the Judicial Council’s retaliation instruction given to the jury in this case. The jury instruction fails to include retaliatory intent as an essential element of a cause of action for retaliation under the FEHA. The omission of this element was material, and may have made the jury’s verdict in favor of Joaquin “inevitable,” said the court, because the city did not dispute any of the other elements. “We urge the Judicial Council to redraft the retaliation instruction and the corresponding special verdict form so as to clearly state that retaliatory intent is a necessary element of a retaliation claim under the FEHA,” it wrote.

The court reversed the judgment. (*Joaquin v. City of Los Angeles* [2012] 202 Cal.App.4th 1207, 2012 LEXIS 35.)

CPER Journal Online

Brown's Pension Reform Legislation Being Carried by Republicans

While the governor's pension reform plan does not go far enough for some reform proponents, it apparently goes too far for Democrats in the legislature. Brown released his proposed constitutional amendment and statutory language on January 31, but no one from his party introduced the bill, which would establish a new hybrid defined benefit/defined contribution system, increase retirement ages for full pension benefits for new hires, and hike employee contribution rates for current employees. Instead, on February 22, Republican Senator Bob Huff (Walnut) introduced the governor's proposal as SB 1176. Assemblymember Cameron Smyth (R- Santa Clarita) is carrying the constitutional amendment, ACA 22. Californians for Retirement Security, a coalition of labor unions, vehemently opposed the governor's plan, asserting:

Governor Brown's pension proposals amount to an unprecedented and unacceptable assault on current and future California...public employees. They abrogate the very collective bargaining laws he first enacted, attempt to violate Constitutional rights of current workers, severely harm middle-class and low-wage workers and will force workers in back-breaking manual labor jobs to work 30 to 40 years, until age 67, only to receive 50 percent less in secure defined benefits.

The Financial Problem

Employer contribution rates were very low at the turn of the 21st century when the state legislature passed bills allowing public employers to offer enhanced retirement benefit formulas to their employees. (See story in *CPER* No. 157, pp. 20-22.) Hundreds of retirement plans, including the University of California Retirement System, were overfunded, some by as much as 40 percent. They took "contribution holidays," not making or requiring any payments into their retirement systems. Many public employers agreed to apply the enhanced benefit formulas to past service, as well as future service, even though the contributions for that past service had been based on lower expected pensions.

Due to the market crash in 2008-09, contribution holidays, raises of approximately 50 percent over 10 years, and the retroactively enhanced benefits, public employers' retirement contribution rates now have skyrocketed. For example, the state contribution rate in 2000-01 was near zero. The state employer paid only \$156 million into the pension fund that year. It must pay \$3.5 billion this year. The employer contribution rate for miscellaneous employees is about 17 percent of payroll, while the peace officer and firefighter percentage ranges from 27 to 31 percent. School employers who contribute for non-certificated employee pensions have seen their rates rise from 0 percent to nearly 11 percent since 2000-01.

The high contribution rates are not unprecedented. In 1980-81, school employer contribution rates were 13.1 percent. In 1981-82, the state paid approximately 20 percent of payroll for all employees except highway patrol officers, for whom it contributed 32 percent. But, the rates began to decline after 1981-82, whereas they still are climbing for public employers now. In December 2009, the California Public Employees Retirement System projected that the state contribution rate for miscellaneous employees would rise from about 17 percent in 2010-11 to 25 percent of payroll by 2024-25, and stay there until 2040-41. Since that time, state employees have been required to make higher contributions — which lowered the employer costs by \$170 million this year — but decades of high pension costs remain.

Obviously, the money spent on retirement contributions could be expended elsewhere if the payments into pension funds could be curbed. As the Little Hoover Commission pointed out in its February 2011 report, "[Public Pensions for Retirement Security](#)," cities are having to prepare to spend one-third of their operating budget on retirement contributions.

The Constitutional Amendment

ACA 22 requires that a public employer offer only a hybrid pension plan to employees hired after June 30, 2013, unless the employer's plan has less risk and lower costs than an available hybrid plan. The hybrid plan would be composed of defined benefit and defined contribution components and, if a retiree is eligible for Social Security benefits, Social Security income. It would provide a benefit equal to 75 percent of the

employee's final compensation, but only if the employee remains on the job for at least 35 years and to age 67, 30 years and age 57 for safety employees. Benefits would be based on the highest average 36-month pay rate. Employees would be required to work a minimum of five years and reach age 57 to receive any pension, age 52 for safety employees.

Current employees would contribute at least one-half of the normal cost of the defined benefit plan, and employers would not be allowed to pick up the employee contribution as compensation. Any increased benefit formulas or other enhancements could only be applied prospectively, and no employee could buy service credit. To avoid impairment of union contracts, the provisions of the constitutional amendment would not go into effect until the expiration of collective bargaining agreements currently in effect. ACA 22 also limits post-retirement employment and changes the membership of the CalPERS board.

The governor's proposed constitutional amendment would essentially etch changes into stone. Any amendments to the constitution require a two-thirds vote of both the Assembly and the Senate, as well as a majority vote in a state election. Any of the statutes mentioned in ACA 22 could be amended only with the vote of two-thirds of each house and only if the statutory amendment is consistent with the purpose of the new constitutional provisions. If the legislature later decides that the retirement age for a full pension is too high for manual laborers, or that hybrid plans are failing to ensure the security of retired public employees, a mere majority vote would not be sufficient to change the rules. That is apparently intentional, as Labor and Workforce Development Agency Secretary Marty Morgenstern told a group of San Francisco lawyers recently that the changes need to be placed into the constitution to prevent the legislature from dismantling the new provisions the next time public coffers are full.

The provisions of SB 1176 contain many of the proposed constitutional changes, and also include other restrictions on retirement benefits. The bill would prohibit public employers from taking "contribution holidays." The bill also would expand forfeiture provisions in current law to forfeit the retirement benefits of any public employee convicted of a felony related to work duties or obtaining benefits, such as disability retirement fraud. The bill would also amend the Public Employees Medical and Hospital Care Act by setting maximum employer contributions to retiree health plan premiums and increasing to 25 the years of service a state employee hired after January 1, 2013, must work before earning retiree health benefits. The bill would not be implemented unless the constitutional amendments are approved by the voters.

Unconstitutional Changes?

Opponents of the governor's plan believe that the provisions requiring current employees to contribute half the normal cost of their pensions could violate the constitution. Most public employees in California would be required to increase their contributions if the plan becomes law. Essentially, employees would be required to pay more for the same pension.

California courts generally have not allowed public employers to decrease pension benefits or make other changes that negatively affect pensions of current employees unless the disadvantages are offset by advantageous new changes in the pension system. These cases are based on provisions in the state and federal constitutions that prohibit the state from impairing contractual obligations. (See "[Declarations of Fiscal Emergency: A Dead-on-Arrival Means of Limiting Public Pension Costs and Impairing Local Agency MOUs](#)," by Christopher Platten, in *CPER* No. 203 online [December 2011], and "An Update of the Vested Benefits Doctrine and Its Effects on Collective Bargaining," by Arthur Hartinger and Amy Lynn Lyman, in *CPER* No. 162 [October 2003]).

The first question is whether the employees were promised that they would not have to pay more than a specific contribution rate. For most state employees, for example, the legislature reserved the right in 1995 to increase contribution rates. These employees have no contractual right to a particular rate.

If promised a specific contribution rate, that rate is part of the contract for compensation. Increased pension contributions diminish the value of the benefit the employees eventually receive, employee advocates contend. A similar argument convinced a trial court judge in Arizona to overturn a law boosting public employee pension contributions in that state.

If it is found that some employers are unable to increase employee contribution rates, those employers will see no short-term savings from the governor's plan. In fact, there is some concern that costs will increase in the first few years after implementation of the hybrid retirement system.

Costly Start-Up?

When Governor Brown began discussing a hybrid pension plan last year, CalPERS released an issue brief, [“The Impact of Closing the Defined Benefit Plan at CalPERS.”](#) The March 2011 paper pointed out that it costs more to run two plans than one. The old defined benefit plan continues until the last participant retires and dies. And, there are start-up costs associated with establishing new defined contribution accounts.

Large defined benefit plans generally have lower administrative costs than defined contribution plans. CalPERS’ DB plan costs averaged .25 percent of assets from 1997 to 2004. CalPERS claims that the annual cost of managing a DC plan can be up to 2 percent of assets. In addition, defined benefit plans generally have a 1 percent higher return on investment than DC plans, and investment expenses are typically .5 percent lower.

If the defined benefit plan is closed to new hires, certain advantages of defined benefit plans are compromised, CalPERS explained. As the membership of the DB plan ages, it is necessary to change the risk level of the investment assets, which usually reduces the plan’s investment return. That kind of allocation toward safer investments is not needed when young, new employees are always entering the system. In addition, Governmental Accounting Standards Board rules will require that the payoff of unfunded liability occur in a shorter period of time than in an open system where contributions continue to grow as new employees are hired and employees earn higher salaries as time goes along.

This year, the Joint Legislative Conference Committee on Public Employee Pensions asked CalPERS to analyze the costs of a hybrid plan that would provide retirement income amounting to 75 percent of an employee’s salary. One-third of the income would come from a defined contribution component. For safety employees, who are not eligible for Social Security benefits, 50 percent of the retirement income would be a defined benefit. For miscellaneous employees, the defined benefit component would replace 25 percent of salary, and the remainder would be provided by Social Security benefits.

CalPERS’ February response notes the lack of detail in the governor’s plan and makes many assumptions, which it lays out in the report, [“Actuarial Cost Analysis: Proposal for the Creation of a Hybrid Plan for New Hires.”](#) It assumes that the defined benefit component of the plan would average an annual return of 7.75 percent, rather than the 8.4 percent average return over the last 20 years. The report states that the cost increase concerns discussed in the March 2011 issue brief on closing the defined benefit plan for current employees still exist. The hybrid plan shifts the risk of underfunded retirement benefits to the employee, but that will not necessarily reduce the employer costs for the hybrid plan, it warns.

CalPERS predicts that the normal cost of the defined contribution component of the plan would require a total contribution of 6.4 percent of salary for the miscellaneous member who has 35 years of service and retires at age 67, and 11 percent for the safety employee who retires at age 57 with 30 years of service. The defined contribution component would require another 3.5 to 4 percent of payroll for miscellaneous members and 14 to 16 percent for safety members.

CalPERS predicted the potential employer savings for the state will be .6 percent of payroll for new miscellaneous employees, .7 percent for peace officers and firefighters who under current law would be entitled to a 2.5-percent-at-55 formula. Costs will rise 2.1 percent of pay, however, for peace officer and firefighter members who are entitled to a 3-percent-at-55 formula, and would grow .5 percent for highway patrol employees. School employers would save 2 percent of payroll for non-certificated employees.

One of the reasons that the state’s cost savings are not higher is that the law and collective bargaining agreements changed recently to require state employees to pay half the normal retirement costs, and rolled back pension formulas to eliminate 3-percent-at-50 plans for new hires. Because many local public employers may still offer the higher benefits, CalPERS predicts that local governments could save more than the state in the long run. Of course, the lower costs come at a price to future retirees. CalPERS states, “When comparing the proposed hybrid plan to the existing benefit, the reader should be aware that the proposed hybrid benefit will generally result in a benefit reduction to new hires.”

CPER Journal Online

Whistleblower's Motive Not Relevant to Whether Disclosure Was Protected

An administrator who was demoted after she blew the whistle on hiring irregularities and challenged the legality of college policies is entitled to a new trial as the result of erroneous jury instructions that may have led to a finding against her in a whistleblower retaliation lawsuit. In *Mize-Kurzman v. Marin Community College Dist.*, the Court of Appeal clarified what disclosures are protected under Labor Code Sec. 1102.5 and Education Code Sec. 87160. It also held that allowing the jury to consider the administrator's prospective retirement benefits as mitigation of back pay was erroneous.

Challenging the VP

Pamela Mize-Kurzman was dean of enrollment services for the Marin Community College District, a position she had held for over 12 years. In January 2006, she began to report to vice president Anita Martinez. In April 2006, she became aware that Martinez had tried to manipulate the hiring process by attempting to convince the hiring committee that the district president wanted three candidates from which to choose, rather than the two the committee had recommended. When confronted, Martinez admitted that she had wanted a specific person for the job. Mize-Kurzman told the district president that the committee believed the job had been set up for a particular candidate. Although she did not claim in her email to the president that tampering with hiring was illegal, she testified that she believed it would have violated the Education Code if Martinez' conduct had led the committee to include her favored candidate in its recommendations.

Mize-Kurzman also challenged the legality of several college policies. She contacted the district's legal counsel about her belief that a particular publicly funded grant was targeted for scholarships for Latino students. She relayed to Martinez and the district president the counsel's opinion that such a grant would be unconstitutional. The grant proposal was changed, but Martinez told Mize-Kurzman not to contact legal counsel again without her permission.

Soon after this directive, the district reorganized Mize-Kurzman's position and took away some duties that she considered important to her job.

Mize-Kurzman also believed that a new district policy allowing students who owed past fees to register for classes without paying the current registration fees was unlawful. She conducted an email list-serv survey of colleagues on the legality of the policy and questioned its lawfulness in an email to Martinez. She later forwarded to Martinez an opinion she received from the community colleges chancellor's office that indicated the district should not continually allow deferral of fees.

After she told Martinez that she thought the policy was illegal, Martinez reprimanded her for obtaining legal opinions and for trying "to cast [herself] in the role of a whistleblower." She was ordered to bring any questions about illegality to Martinez first, not to survey her colleagues on the official college email list-serv about legal questions, to give Martinez copies of any correspondence she had about the lawfulness of college policies, and not to contact legal counsel in the chancellor's office without Martinez' permission. When Mize-Kurzman disputed the reprimand as unwarranted, Martinez responded that further challenge to the discipline would be deemed insubordination.

A few months later, Mize-Kurzman questioned a new policy of not asking students to provide citizenship and residency information on their applications. She obtained an opinion from the community colleges chancellor's office and told Martinez that the data was legally required to be transmitted to the chancellor's office.

After this communication, Mize-Kurzman received a negative evaluation. The district removed her from her administrative position and placed her on leave. She was later reassigned to a counselor position because she had tenure with the district.

Mize-Kurzman filed a lawsuit. The jury found against her on claims that the district violated Labor Code and Education Code provisions protecting whistleblowers from retaliation. She appealed.

Whistleblower's Motive

Because the standard jury instructions do not explain what constitutes a “disclosure of information” under Labor Code Sec. 1102.5 or a “protected disclosure” under Ed. Code Sec. 87162, the trial judge construed the jury instructions based on case law interpreting the similar federal Whistleblower Protection Act. The appellate court found the trial court could properly draw from federal case law to word the jury instructions, but it concluded the lower court had misinterpreted the federal law.

The plaintiff challenged an instruction that to merit protection from retaliation, she had to prove any disclosure was made in good faith and for the public good, rather than for personal reasons. The appellate court found the lower court had misconstrued federal law when it based this instruction on *Garcetti v. Ceballos* (2006) 547 U.S. 410, 2006 U.S. LEXIS 4341, [180 CPER 13](#), which was a First Amendment case that did not address the scope of whistleblower statutes. Another federal case on which the trial court relied had been overturned when Congress amended the federal law.

The appellate court observed that a personal agenda often motivates an employee to disclose conduct the employee believes is illegal or constitutes misconduct. However, it found the whistleblower's motivation irrelevant to the purposes of the whistleblower statutes. The court cautioned that an examination of the employee's motivation could distract from determining whether the employee had “reasonable cause to believe” conduct was improper or illegal, as required by the Labor Code, or a “good faith communication,” as required by the Education Code. Finding that neither statute required a protected disclosure to be for the public good rather than for personal reasons, the court ruled the lower court's instruction erroneous.

Asserted Illegality

The lower court also had instructed the jury that debatable opinions about policy matters were not protected disclosures, but it failed to instruct the jury that an assertion that conduct was illegal is protected even if there is a dispute whether the conduct actually is unlawful. As the legal experts at trial disagreed whether two of the challenged policies were illegal, Mize-Kurzman claimed that the instruction misled the jury into believing that her assertions of illegality were not protected against retaliation unless the policies were actually illegal.

The court noted that federal cases have limited the protection for disclosures of misconduct to instances where reasonable people would agree there were serious errors, and have not extended protection to whistleblower claims regarding debatable opinions about policy matters. However, the federal courts have made a distinction for policies of disputed legality. The court explained, “Disclosures of a policy that the employee reasonably believes violates a statute or regulation are protected disclosures, *whether or not the existence of an actual violation or the wisdom of the policy are debatable.*” Otherwise, the reasonable belief standard would be eviscerated, the court reasoned.

Disclosure in the Course of Duties

The appellate court found erroneous an instruction that information given to a supervisor in the employee's normal course of duties is not a protected disclosure. The Labor Code provides protection for “[a] report made by an employee of a government agency to his or her employer,” the court noted. And several state cases have found that employees were protected from retaliation under Labor Code Sec. 1102.5, even when they were just “doing their job” when they reported improper activity to a supervisor.

The appellate court made a distinction, however, for reporting improper conduct to a supervisor who is the alleged wrongdoer. It pointed to state cases holding that a complaint to a supervisor about the supervisor's conduct is not a protected disclosure because the supervisor already knows about the wrongdoing. The court reasoned also that a complaint to the miscreant supervisor does not serve the statute's purpose “to encourage disclosure of wrongdoing to persons who may be in a position to act to remedy it.” CPER readers should note that this statement of the law is not in accord with the opinion in *Jaramillo v. County of Orange* (2011) 200 Cal.App.4th 811, 2011 Cal.App. LEXIS 1397, [204 CPER online](#), where the court found an assistant sheriff's complaint to the sheriff about the sheriff's wrongdoing protected.

The court rejected Mize-Kurzman's challenge to several other jury instructions. It concluded that reports of publicly known facts are not protected under either the Labor or Evidence Codes, as they do not constitute “disclosures” under the ordinary meaning of the word, “to reveal something that was hidden and not

known.” The court also ruled that an instruction that “efforts to determine if a practice violates the law are not protected disclosures” was correct.

The court found that the three erroneous instructions were not harmless, as they could have affected the outcome of the trial. Before remanding the case, however, it addressed another error to guide the lower court on retrial.

Pension ‘Mitigation’ Evidence

The trial court had admitted evidence of Mize-Kurzman’s eligibility for a pension and the amount of the benefit, finding it relevant to whether she had mitigated her damages. The district argued that she could have avoided a loss of income by retiring and receiving a pension higher than her salary as a counselor.

Mize-Kurzman testified she had not seen dean position openings at other districts, and that she would have lost 30 years of tenure if she had left the district. She explained she wanted to continue to work, and had reasons to postpone deciding whether to elect to take a full pension or a lesser benefit so that a disabled son could continue to receive benefits after her death.

The court noted that no California court had decided whether the availability of a pension may be considered when determining whether a wrongfully terminated or demoted employee has mitigated damages. There is case law concerning the “collateral source” rule, however, which convinced the court that retirement benefits could not have been deducted from the plaintiff’s back pay award if she had retired. The court reasoned that it would “make little sense to allow introduction into evidence of retirement benefits that plaintiff never received on the issue of mitigation where such evidence would have been precluded under the collateral source rule had she actually received the benefits.” Therefore, the court advised that the admission of evidence on prospective retirement benefits and the instruction that invited the jury to use the information in calculating damages was in error.

The case was remanded for trial. (*Mize-Kurzman v. Marin Community College Dist.* [2012] 202 Cal.App.4th 832, 2012 Cal.App. LEXIS 14.)

CPER Journal Online

Reverse-CPRA Action Permitted; Investigation Report May Be Disclosed

In a case of first impression, the Second District Court of Appeal held that a teacher's action to prohibit disclosure of records under the California Public Records Act was permissible. However, the teacher's request to enjoin release of the records regarding the investigation of a student's allegations of sexual harassment was properly denied, the court ruled in *Marken v. Santa Monica-Malibu Unified School District*.

The Investigation and Procedural Posture

Ari Marken, a teacher at Santa Monica High School, was accused of sexual harassment by a student. After an investigation, Marken was issued a letter of reprimand and allowed to return to the classroom. Two years later, Michael Chwe, the parent of two students at the high school, made a CPRA request seeking copies of all records related to the investigation.

Upon being notified by the district of its intention to comply with the request, Marken filed an action to enjoin release of the records. The court granted a temporary restraining order and set a hearing on the preliminary injunction. Chwe's application for leave to intervene was denied, and he appealed.

The trial court denied Marken's request for a preliminary injunction, finding the documents requested were subject to disclosure under the CPRA. Marken appealed.

Reverse-CPRA Suit Permissible

The CPRA, Government Code Secs. 6250 et seq., provides that every person has the right to inspect any public record, except those exempted from disclosure by express provisions of law, instructed the Court of Appeal. Courts have held that these statutory exemptions must be narrowly construed.

Section 6258 of the act specifically provides that the person requesting disclosure, if not satisfied with the agency's response, has the right to ask for a judicial determination of the agency's obligation to disclose the records and enforce his right to inspect them. However, the California Supreme Court, in *Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 2002 Cal.App. LEXIS 4361, held that the CPRA does not authorize a public agency to bring a court action to determine its own obligation to release documents to a member of the public.

The question presented by this case, never before decided in a published opinion, was whether the person who claims his rights would be infringed by disclosure of the requested records can seek a judicial ruling prohibiting the agency from releasing the documents. Chwe contended that Marken had no right under the CPRA to file an action for a court order to preclude Chwe from obtaining the records. The Court of Appeal disagreed.

The Supreme Court observed in *Filarsky* that federal courts have allowed an action under the Freedom of Information Act, the federal counterpart to the CPRA, by third parties seeking to preclude the disclosure of documents, even though the FOIA does not expressly provide for such a cause of action. The high court noted such actions are authorized under the federal Administrative Procedures Act, which authorizes judicial review of agency actions that adversely affect another person. The appellate court here concluded that this provision of the APA is not "functionally different" from the right of an interested party under California Code of Civil Procedure Sec. 1085 to seek a writ of mandate to compel a public agency to comply with the law. "Thus, mandamus should be available to prevent a public agency from acting in an unlawful manner by releasing information the disclosure of which is prohibited by law," said the Court of Appeal.

The court also found compelling the conclusion that, if a public agency decides to disclose documents in response to a CPRA request, "absent an independent action for declaratory relief or traditional mandamus, no judicial forum will exist in which a party adversely affected by the disclosure can challenge the lawfulness of the agency's action."

Further, said the court, allowing a reverse-CPRA action would not impair the act's procedural protections of the party requesting disclosure. Active participation by the requesting party in the lawsuit would not be mandatory. He or she may simply allow the agency itself to defend its action. The court was more equivocal about possible delay, as the expedited procedures required by the act would not apply. "Ultimately, however, any additional delay that may result from permitting a reverse-CPRA action is outweighed by the statutory right of an interested party to ensure that public agencies do not disclose records whose confidentiality is mandated by law," it reasoned.

Chwe argued that allowing a reverse-CPRA action between the subject of the documents and the agency would deprive the requestor and the public of their right to enforce the act's disclosure requirements. The court responded to Chwe's "legitimate concern" by pointing to the procedures of joinder and intervention as a means of allowing someone who claims an interest in an action to participate in the case. "The requestor plainly has a stake in the outcome of the reverse-CPRA proceedings; and his or her interests generally should be represented, if not by joinder as a real party in interest, then at least upon motion to be allowed to intervene in the action," the court instructed.

Request for Preliminary Injunction Properly Denied

Marken contended that disclosure of the investigation report and letter of reprimand would violate his right to privacy protected by the state constitution. Therefore, he argued, the documents were exempt from mandatory disclosure under Sec. 6254(c) of the act and their disclosure was "otherwise prohibited by law."

The court recognized that Marken had a significant privacy interest in the requested documents. "A public sector employee, like any other citizen, is born with a constitutional right of privacy. A citizen cannot be said to have waived that right in return for the privilege of public employment, or any other public benefit, unless the government demonstrates a compelling need," said the court, quoting *Long Beach City Employees Assn. v. City of Long Beach* (1986) 41 Cal.3d 937, 1986 Cal. LEXIS 184, 69X CPER 1. However, invasion of a privacy interest does not violate the constitutional right to privacy if it is justified by a competing interest, it instructed. "One such interest, grounded in both the California Constitution and the CPRA, is the 'strong public policy supporting transparency in government,'" it explained, citing *International Federation of Professional & Technical Engineers, Loc. 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 2007 Cal. LEXIS 8918, 187 CPER 21.

Section 6254(c) provides that certain categories of documents are exempt from disclosure under the act, including "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." The test for determining whether release of the requested personnel documents would be an "unwarranted invasion of personal privacy" requires balancing the individual's privacy interest against the public's interest in disclosure.

In a case involving a charge of misconduct, cases have held that where there is reasonable cause to believe the complaint is well-founded, the records should be disclosed, said the court, citing *American Federation of State etc. Employees v. Regents of University of California* (1978) 80 Cal.App.3d 913, 1978 Cal. App. LEXIS 1474, 36 CPER 4, and *Bakersfield City School Dist. v. Superior Court* (2004) 118 Cal.App.4th 1041, 2004 Cal.App. LEXIS 1772, 167 CPER 44. Further, in *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 2006 Cal.App. LEXIS 1525, 181 CPER 30, the court ordered release of the records of an investigation of a school superintendent even though the investigator had concluded most of the allegations were not reliable.

Applying this test to the facts before it, the Court of Appeal found that the public's interest in disclosure of the investigation report and letter of reprimand outweighed Marken's privacy interest. Marken argued that the misconduct which was the subject of the investigation was not substantial and was not based on well-founded information because the complaining student was not interviewed by the investigator and he had no opportunity to cross-examine her. The court rejected his arguments, stating that they "rested on a fundamental misreading of the case law."

Both *American Federation* and *Bakersfield* held that disclosure is mandated if the complaint at issue was upheld by the agency, or discipline imposed, said the court. And, even without finding that the complaint is true, "if the information in the agency's files is reliable and, based on that information, the court can determine the complaint is well founded and substantial, it must be disclosed," the court explained, citing *Bakersfield*.

The investigator in Marken's case found that a number of alleged acts or comments likely occurred based on "substantial credible corroborating evidence of certain conduct." The district determined that Marken's conduct violated its policy prohibiting sexual harassment of students and issued him a written reprimand. Marken "occupies a position of trust and responsibility as a classroom teacher, and the public has a legitimate interest in knowing whether and how the District enforces its sexual harassment policy," said the court, concluding that the Section 6254(c) exemption from mandatory disclosure was inapplicable and the release of the records was required under the CPRA.

The court affirmed the denial of the preliminary injunction and denied Chwe's appeal on procedural grounds. (*Marken v. Santa Monica-Malibu Unified School Dist.* [2012] 202 Cal.App.4th 1250, 2012 Cal.App. LEXIS 47.)

CPER Journal Online

City Did Not Have Just Cause to Terminate Employee After Flawed Investigation

An anonymous report and an overzealous private investigator led Arbitrator Ed Scholtz to recommend that the City of Hesperia reinstate an employee with full back pay. The arbitrator also noted that the employee should not have been disciplined a second time for several items in the list of charges.

The grievant was an animal control officer who had been employed for over two years by the city. Her previous supervisor had twice evaluated her work performance as meeting standards.

In January 2009, a new supervisor was put in charge of animal control. Because he also supervised another department, he delegated supervisory duties to senior animal control officers. The grievant received a verbal counseling for writing up a leash law citation with no witness, improperly assisting with dog grooming, euthanizing a dog when she should have been in the field, and making a false statement about not having a new report template. In April 2009, she was asked to make a statement about another incident involving a dog in a closed yard, but the incident did not lead to discipline.

In August 2009, she was given a notice of intent to terminate her employment on the basis of 29 acts of misconduct. She was placed on administrative leave while a private investigator interviewed her and other witnesses. This was the first time she had heard of 21 of the charges. The remainder were the four charges for which she already had been counseled, and four more relating to the April incident for which no discipline was issued.

The investigation was prompted by an unsigned report of the grievant's performance deficiencies, which was sent to the Human Resources office in an envelope with the supervisor's name on it. But at the hearing, the supervisor testified he had not seen the report. Senior animal control officer Sanders reluctantly admitted to having written the report. He claimed the supervisor had asked him to compile it, but Arbitrator Scholtz was not persuaded, since it seemed unlikely that the supervisor would not have asked to see a report he had requested before taking disciplinary action.

Without knowing who wrote the report, the investigator had interviewed witnesses, including Sanders. The investigator, a former police commander, also searched for evidence of additional misconduct. She used a GPS printout to interrogate the grievant about a location the grievant frequently stopped to visit. The grievant explained that it was her boyfriend's house, which she had used for bathroom breaks, and that she had logged the stops into her logbook. The investigator found several instances the grievant had not logged and charged her with dishonesty.

Arbitrator Scholtz found that the entire disciplinary process was begun by Sanders, "who abused his position as an acting supervisor when he, without authorization, secretly prepared an anonymous report in an attempt to get rid of a co-worker he did not like." Sanders testified at the hearing that he was not biased against the grievant, but he had told the investigator that he sometimes did not like coming to work because the grievant was there and that the department interacted like family when she was absent.

The arbitrator ruled that the grievant should not have been disciplined again for four charges about which she already had been counseled. She also should not have been charged with another four items that had been examined in April 2009, because management previously had decided not to discipline her for the incident that led to those charges.

Twelve of the remaining charges had arisen from Sanders' "unsubstantiated hearsay report," Scholtz noted. They had been investigated without the investigator knowing that the author of the report disliked the grievant. The investigator also could not know whether the author had personally observed any of the transgressions or whether they were hearsay, the arbitrator explained.

Arbitrator Scholtz also criticized the investigator for not knowing the duties and responsibilities of animal control officers and treating the case like a police investigation rather than an employment investigation. He found that the investigator's action creating the charge of dishonesty showed the bias of the investigator. The grievant explained at the hearing that she was not required to log in every stop if she was

merely on call.

The arbitrator also based his recommendation on the fact that the grievant was not notified of her alleged deficiencies in a timely way. She first learned of questions about March and April incidents in August. In addition, since she was counseled only once, the city had not used progressive discipline when it suddenly terminated her for multiple charges that secretly had been compiled over several months. As Sanders was acting as the grievant's supervisor, he should have notified her of any deficiencies and given her an opportunity to correct them prior to terminating her. The arbitrator concluded the termination was not for just cause. (*Appellant and City of Hesperia; Representatives: Jennifer Rosner (Liebert Cassidy Whitmore) for the city, and James Cunningham (Hayes and Cunningham) for the appellant. Arbitrator: Edward Scholtz.*)

CPER Journal Online

Terminated Employee's Retirement Does Not Divest Arbitrator's Authority Over the Termination Dispute

When an employee chose to arbitrate his discharge, rather than appeal it to the civil service commission, the termination dispute was still arbitrable after he applied for retirement benefits. In some cases involving civil service appeals, the courts have ruled that a commission lost jurisdiction of a disciplinary appeal when the employee retired. But the Court of Appeal in *Service Employees International Union, Loc. 1021 v. San Joaquin County* criticized the application of concepts of "jurisdiction" to arbitration, emphasizing that the arbitrator's authority derives from the parties' contract.

Employee Elected Arbitration

The County of San Joaquin discharged Robert Riedinger from employment in February 2009. Under the memorandum of understanding between the county and his union, SEIU Local 1021, he had the option to appeal his termination to the civil service commission or to submit it to binding arbitration. Riedinger chose arbitration. The union requested arbitration on his behalf. In March 2009, Riedinger applied for retirement benefits, which he began to receive in April 2009.

The county responded to the arbitration request by agreeing to an arbitrator and informing him of his selection and the logistical details of the hearing. However, two months later, the county informed Riedinger's attorney that the county would not arbitrate the matter because Riedinger had retired. It asserted he was no longer employed, and his future employment was no longer in dispute.

The union filed a petition to compel arbitration. The trial court ruled in favor of the county on two grounds. First, the court found that the county did not agree to arbitrate employment disputes with former employees as the MOU did not apply. Also, the court ruled the union had not shown how an arbitrator could retain jurisdiction over the termination of a retired employee. SEIU appealed.

County Agreed to Arbitration

"The right to arbitration depends upon the terms of the contract," the appellate court explained. It had no problem finding that the county and the union had agreed to arbitrate disciplinary actions involving employees represented by the union. In addition to the express language of the MOU allowing the employee to elect arbitration, the county had confirmed the agreement when it selected an arbitrator and set the hearing, the court pointed out.

The court turned aside the county's argument that Riedinger was not entitled to arbitration because he was no longer an employee under the MOU once he retired. Following this argument to its logical conclusion, a terminated employee would never be able to arbitrate his dismissal because an employee is already separated from employment by the discharge, the court reasoned. As this interpretation would allow the county to evade arbitration of terminations, in conflict with provisions of the MOU, the court rejected it. "Where a former employee has been terminated, seeking retirement benefits does not result in a voluntary resignation from employment," explained the court.

The court also disagreed with the county's assertion that it had the right to refuse to arbitrate terminations because the MOU provided that arbitrations be conducted in accordance with the civil service rules. "The MOU's borrowing of procedures for selecting the arbitrator and having the arbitration award ratified by the appropriate authority does not mean that the right to arbitrate was not contractual," the court reasoned. In addition, the parties' agreement provided that the MOU would prevail over conflicting provisions of other documents relating to terms and conditions of employment. Therefore, the court found that the contractual right to elect arbitration would prevail even if there were a conflict with the civil service rules. The trial court therefore erred when it ruled there was no agreement to arbitrate Riedinger's termination.

Retirement Not a Waiver

The California Code of Civil Procedure makes a written arbitration agreement irrevocable, but as with other contractual terms, the right to arbitration may be waived. The county did not assert that Riedinger

voluntarily and knowingly waived his right to arbitration, just that his retirement “defeated” his earlier election to arbitrate his termination. The courts have considered three factors when determining whether a party has waived arbitration — whether a party has taken steps inconsistent with arbitration, has delayed seeking arbitration, or has acted in bad faith.

Comparing Riedinger’s act of retiring to the conduct found to be a waiver in other cases, the court decided Riedinger did not take steps inconsistent with arbitration. He did not pursue a lawsuit on the same issue as the one being arbitrated, repudiate the arbitration agreement, or fail to ask for arbitration. The court did not find his retirement after termination inconsistent with arbitrating his termination. Retirement after termination “was independent of his interest in continued employment for the County,” the court said. As the right to arbitration was timely invoked, and the union and Riedinger cooperated in setting the hearing, there was no basis for finding a waiver of the right to arbitrate the termination.

Arbitrator Retains Authority

The county argued that the arbitrator lost jurisdiction over the disciplinary appeal once Riedinger retired. It pointed to cases involving civil service commissions where the courts have ruled the commissions lost jurisdiction over the appeal when a terminated employee retired.

In *Hall-Villareal v. City of Fresno* (2011) 196 Cal.App.4th 24, 2011 Cal.App. LEXIS 679, [CPER 203 online](#), the court disagreed with the prior cases concerning a commission’s loss of jurisdiction. But the *SEIU* court decided it did not need to choose which case to follow. “[A]n arbitrator does not have ‘jurisdiction’ over a dispute. The arbitrator’s powers are contractual,” the court explained.

The contract between SEIU and the county contained an agreement to arbitrate termination appeals, and the county had agreed to arbitrate Riedinger’s termination. His retirement did not nullify that agreement, the court said.

The county argued Riedinger became a former employee when he retired, and thus was no longer covered by the MOU. The court again rejected this argument, reminding the county that his termination ended his employment and made him eligible for retirement. His application for benefits did not change any of his rights under the contract.

The court reversed the trial court’s order denying SEIU’s petition to compel arbitration. (*Service Employees International Union, Loc. 1021 v. San Joaquin County* [2011] 202 Cal.App.4th 449, 2011 Cal.App. LEXIS 1639.)

CPER Journal Online

Resources

Workers' Rights on the Job

What should workers do when they are threatened with or actually subjected to investigations, interrogations, and discipline and discharge? Answers are in *Hey, the Boss Just Called Me Into the Office: The Weingarten Decision and the Right to Representation on the Job*. This booklet provides explicit guidance and advice for workers and those that represent them in dealing with these situations. Written and updated by labor lawyers, "Hey the Boss" reviews the law on the workers' right to representation on the job and provides concrete details on how those rights can be implemented. A "must have" booklet for workers, shop stewards, labor lawyers, and anyone else concerned about workers' rights.

The new fourth edition was updated in fall 2011 by David Rosenfeld, Caren Sencer and Jonnah V. Manansala. Just \$8 each, with a discount for orders over 50. Order from the Center for Labor Research and Employment, at the Institute for Research on Labor and Employment, UC Berkeley, <http://laborcenter.berkeley.edu/workersrights/>.

New Edition of MMBA Guide for Local Government

If you are involved with labor-management relationships in California local government — cities, counties, and most special districts — you'll want the latest edition of CPER's *Pocket Guide to the Meyers-Millas-Brown Act*. The new edition reflects important changes from the previous (2006) 13th edition:

- Updated statutory language and discussion concerning AB 646, which took effect January 1, 2012, and implementing regulations. This new legislation provides for mandatory impasse procedure if requested when the parties have not reached a settlement of their dispute.
- The latest Public Employment Relations Board cases on representational issues and reasonableness of local rules.
- Court cases decided since the last edition, including *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623 and *International Assn. of Firefighters Local 188 v. PERB* (2011) 51 Cal.4th 259.
- Statutory changes to the act, including new provisions that became effective January 1, 2012.

The book provides an easy-to-use, up-to-date resource for those who need the MMBA in a nutshell. It's a quick guide through the tangle of cases affecting local government employee relations and includes the full text of act, a glossary, table of cases, and index of terms. The 14th edition covers new Public Employment Relations Board decisions and regulations spelling out unfair practices.

The guide, written by Bonnie G. Bogue, Carol Vendrillo, Marla Taylor, and Eric Borgerson, was recently updated by attorney Timothy G. Yeung. Copies are just \$18 each. Order or see the complete Table of Contents, at <http://cper.berkeley.edu>.

Unionosity.com

This new resource is the brainchild of unionside labor attorney Jeffrey Boxer (with the LA law firm of Bush Gottlieb Singer Lopez Kohanski Adelstein & Dickinson). [Unionosity](http://unionosity.com), a 501(c)(3), works across media platforms to make a positive contribution to the discourse surrounding workplace-related quality of life issues. Through its website, speakers bureau and special events, Unionosity seeks to empower workers, union members and people in the labor movement to build stronger capacity and stay informed on issues that matter to them.

New Labor Project Website

The Labor Project for Working Families, a national non-profit organization that builds alliances between unions, advocacy, and community groups to advance and implement family-friendly workplace policies, has launched a newly redesigned website. It features downloadable resources, publications, research, and contract language on family-friendly workplace policies such as family leave, paid sick days and worker-controlled flexibility.

Visit <http://www.working-families.org>.

50th Anniversary of Industrial Relations Journal

The January issue of *Industrial Relations: A Journal of Economy and Society*, the UC Berkeley-Institute for Research on Labor and Employment academic journal, is currently available online.

Celebrating its 50th year of publication, *Industrial Relations* publishes scholarship about the world of work, including worker motivation, employee involvement, organizational behavior, race and gender issues, and other labor market structures around the world that produce low pay and unemployment.

Industrial Relations has been a leading source of multi-disciplinary research about the workplace since its inception; as the Institute celebrates 50 years of publishing, it will be reprinting some of the seminal articles that have appeared in the journal.

CPER Journal Online

Public Sector Arbitration Log

- Arbitrability
- Class size

El Dorado Union High School Dist. and EDUHSD Faculty Assn., CTA/NEA (11-14-11; 20 pp.)

Representatives: Ben Hance (Girard Edwards & Hance) for the employer; Laura P. Juran (CTA) for the union. *Arbitrator:* Katherine Thomson.

Issues: Is the grievance arbitrable? Did the district violate the agreement's class-size provisions?

Employer's position on arbitrability: (1) The contract requires that the workstation committee be convened before the arbitrator can hear the merits of a grievance contending that the contract is violated when the number of students in science classes exceeds the number of workstations.

(2) The contract gives the committee primary jurisdiction over the issue; therefore the grievance must be dismissed without prejudice, or the arbitration proceeding stayed, until the association exhausts its contractual remedies.

Association's position on arbitrability: (1) The grievance is arbitrable. The contract does not require a workstation committee to meet and confer before it can file a class-size grievance.

(2) The committee provision pertains only to disputes over the number of workstations per classroom, not the number of students assigned to each station; therefore, the agreement does not require exhaustion of the committee process to resolve the present dispute.

Arbitrator's holding on arbitrability. (1) The grievance is arbitrable.

(2) The contract's committee process applies only to disputes over the number of workstations per room, and does not apply here because number of stations is established and not in dispute.

(2) Even if managers did not initially recognize the grievance involved a dispute over the number of workstations, the district cannot add this question to the issues on the eve of arbitration in an attempt to raise an arbitrability defense that would delay the arbitration. The grievance was processed up to the arbitration step without any reference to the workstation issue.

Association's position on the merits: (1) The district has violated the contract, which limits science class enrollment to the number of workstations.

(2) The contract states that "in no instance" will enrollment exceed the number of workstations in a classroom by more than 10 percent. It also states it is "imperative" that students not outnumber workstations if overcrowding would cause a safety hazard. Science classes fall within that proviso.

(2) Each science room at the high school has 32 work stations. A "harmonious reading" of the class-size provisions requires science classes be limited to 32 students, but the district assigned 35 students.

(3) There is no established, mutually accepted past practice of exceeding the workstation limits. Enrollment has exceeded the number of workstations only at the beginning of the year, to allow attrition to reduce enrollment to the maximum of one per station.

(4) The district must be directed to limit science class sizes to the number of workstations, exceeded only by 10 percent at the year's start, so attrition will level class size to the maximum of 32, one student per workstation.

Employer's position on the merits: (1) The district did not violate the contract, as the maximum assigned to rooms with 32 workstations was 35, within the 10 percent allowance.

(2) No language limits the duration of the 10 percent to the first of the school year. In negotiations, the association made, but then dropped, proposals for time limits on the 10 percent allowance.

(3) In the other high schools in the district, science class enrollment has exceeded the number of workstations, but the association has not filed a grievance, which creates a binding practice in application of the contract language.

(4) The district limits enrollment to the number of workstations in only certain classrooms, rather than to all science classrooms, which gives effect to the contract requirement that enrollment match workstations where more students would cause a safety risk. It cannot reasonably apply to classes with any potential risk, such as art classes where sharp objects are used.

(5) The association was aware when the building was renovated, with 32 workstations per science room, that the design allowed space for additional students to share workstations.

Arbitrator's holding: The district violated the agreement when the number of students assigned to science classes exceeded the number of workstations.

Arbitrator's reasons: (1) The contract language is ambiguous. It limits class size to the number of workstations, but then creates an exception, allowing that limit to be exceeded by 10 percent, but without stating when that exception applies. It also states that it is "imperative" to limit students to the number of workstations in classes with a health/risk hazard.

(2) The association contends the 10 percent allowance applies only at the beginning of the school year; however, the contract does not impose any deadline by which the 10 percent overage must cease. No agreement was reached on association proposals to impose a deadline.

(3) The district argues that the 10 percent allowance applies either to all classes, or at least to rooms where it would be unsafe for students to exceed workstations.

(4) Bargaining history and contract language indicate that the 10 percent exception applies unless the overcrowding would pose a health and safety hazard. The contract does not require a determination of whether there are safety problems before the workstation limit applies; rather it defines the kinds of classes where overcrowding would create a hazard and makes it imperative that the limit apply in those classes. That language clearly applies to science classes.

(5) The district's past practice argument that the enrollment had exceeded workstations at other high schools and the association accepted that practice is not supported by evidence that the association was aware but failed to grieve that application. Nor was it consistent districtwide, as it had never been applied to the high school where this grievance arose.

(6) The arbitrator is aware of the funding pressures on schools. The contract allows the parties to reassess the number of workstations per room, or identify science classes not encompassed in the safety hazard proviso. But the district is prohibited by the contract's language from applying the 10 percent allowance to science classes that meet that definition.

(Advisory Grievance Arbitration)

- Agency fee objections

American Federation of State, County and Municipal Employees, Loc. 1902, and Agency Fee Objector in Los Angeles Metropolitan Water District Bargaining Unit (8-29-11; 5 pp.)

Representatives: Rich Amar (Rothner, Segall and Greenstone) for the union; Individual Objector, self represented.. *Arbitrator:* Phillip Tamoush (AAA Case No. 72-673-00389811).

Issue: Should the union's calculation of agency fees at 81.39 percent of members' dues be upheld; if not what should be the chargeable figure?

Agency fee objector's position: (1) The mail received from the union is not related to negotiating, administering collective bargaining agreements, and processing grievances.

(2) The union incorrectly categorized salary and outside staffing expenses as "indirect" rather than "direct" expenses.

(3) The union incorrectly declared decreases in postage expenses and increases in office supplies and expenses.

(4) By using email, the agency fee “*Hudson* notices” were incorrectly served on nonmembers.

(5) The union improperly requires that challengers/objectors disclose Social Security numbers when filing an agency fee objection.

(6) The requirements on how objections are served should include the option of objectors emailing their challenges.

Union’s position: (1) The mail complained of was mailed by the L.A. County Federation of Labor, not the local union.

(2) Regarding distributing the *Hudson* notices by email, prior agency fee arbitrators have sustained this method as the most effective and efficient way for the union to communicate with both members and nonmembers.

(3) Office expenses were categorized as “nonchargeable” to nonmembers because the union contracted with persons to perform administrative support, whereas in the past, when persons were employed to perform such support, those salaries were categorized as “chargeable.” The change substantially benefited nonmembers by reducing chargeable expenses.

(4) Postage, office supplies, and expenses were audited and supported by proper documentation.

(5) The union agrees to change procedure and only require nonmembers/challengers to disclose the last four digits of Social Security numbers.

(6) In the future, challengers may file their objections by email rather than only by U.S. mail.

(7) None of the objections should affect the 81.39 percent chargeable expenses calculation.

Arbitrator’s holding: The union has appropriately allocated its expenditures to calculate the agency fee amount of “chargeable” expenses to be 81.39 percent of member dues.

Arbitrator’s reasons: (1) California and federal case law hold that nonmembers may be assessed an “agency fee” to cover the costs of negotiations, contract administrations, and other activities, including governing and operation of the union, because it is required to represent all members of the bargaining unit, including nonmembers of the union. Expenses not germane to those purposes are “nonchargeable” to nonmembers.

(2) The union has shown how its breakout of chargeable and nonchargeable expenses conformed to relevant law and the “rule of reasonableness,” and that it applied the courts’ principles in analyzing expenditure categories.

(3) The union’s auditor substantiated the chargeability and nonchargeability of expenditures to accurately arrive at the percentage of regular union dues that can be assessed of nonmembers.

(4) The objector’s concern about requiring disclosure of Social Security numbers is well taken; the union has agreed to modify that practice in future agency fee proceedings.

(5) The objector’s suggestion to allow objections to be filed by email is well taken, and the union has agreed to allow that method in the future.

(Agency Fee Arbitration)

- Substantive arbitrability
- Layoff

University of California, Berkeley, and AFSCME Loc. 3299 (12-18-10; 14 pp.) *Representatives:* Virginia Coffre (U.C. Labor Relations Advocate) for the employer; Vincent Harrington (Weinberg Roger &

Rosenfeld) for the union. *Arbitrator*: Paul Staudohar.

Issue: Is the grievance substantively arbitrable?

Union's position: (1) The contract prohibits the university from contracting out services that result in layoff of bargaining unit employees. Three limited-term employees were released while an outside contractor continued to perform the same work. The grievance is substantively arbitrable because it alleges a violation of the contract's layoff provision when the university released "limited term" employees while an outside contractor performed the same work.

(2) The university released the employees prior to the end of their limited-term appointment to avoid them accruing 1,000 work hours, which would have entitled them to convert to career status; the contract expressly prohibits release for that purpose. This is one of the two scenarios in which a limited-term employee may grieve termination of appointment.

(3) Although the contract restricts termination grievances by limited-term employees, the article banning layoffs caused by contracting out work does not preclude limited-term employees from grieving their release as a violation of the layoff clause.

(4) The "Steelworkers Trilogy" holds that the right to arbitrate a grievance should not be denied unless it can be stated "with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."

Employer's position: (1) The contract expressly puts the burden of proof on the union to show that the termination of a limited-term employee is arbitrable; it has not met that burden.

(2) The contract allows only two exceptions to the express provision that limited-term employees may not grieve their termination, i.e., they were released after completing 1,000 hours (not the case here), or they were released solely to prevent accrual of 1,000 hours and gaining career status.

(3) The evidence does not support the inference that the university released the employees to prevent them from achieving career status, since they could not have accrued the necessary 1,000 hours even had they worked until the end of their limited-term appointments.

(4) Given the explicit language disallowing limited-term employees to grieve termination, the contract cannot be read to create a separate avenue for them to grieve their displacement when it is arguably due to contracting out; no bargaining history supports such an interpretation.

Arbitrator's holding: The grievance is substantively arbitrable.

Arbitrator's reasons: (1) Two witnesses testified that a manager said the released employees were near "their maximum hours anyway," which supports an inference they were released to avoid their accruing 1,000 hours and career status.

(2) While the university's witnesses, including the manager, could not recall that being said, it suggests the manager may have been motivated to release them to avoid that outcome.

(3) This evidence does not prove that the employees were released for the sole purpose of denying them career status, and it is possible they could not have accrued the necessary 1,000 hours before their limited terms expired; however, at the arbitrability stage, the union has made a reasonable showing that the university may have violated the layoff clause or the clause preventing release of limited-term employees for the "sole purpose" of preventing career status.

(4) Case law holds, "Doubts as to whether an arbitration clause applies are to be resolved in favor of coverage." The union has met that standard. The grievance is remanded for a hearing on the merits of whether the contract was in fact violated.

(Binding Grievance Arbitration)

- Reappointment to coaching position
- Selection procedures

California State University and California Faculty Assn. (11-06-10; 19 pp.) *Representatives:* James P. Czaja for the employer; Bernhard Rohrbacher for the union. *Arbitrator:* Sylvia Skratek.

Issue: Did the employer violate the agreement when it did not reappoint the grievant as head soccer coach? If so, what is the remedy?

Union's position: (1) The grievant's non-reappointment to the one-year head soccer coach position, after being reappointed every year since first hired in 1992, violated the agreement. The university did not give his reappointment careful consideration as required by the contract.

(2) His non-reappointment was the result of bias, a weakening of the peer review process designed to prevent his reappointment, and failure to comply with the evaluation provisions in the agreement. The athletic director relied on material not in the grievant's personnel action file and changed the evaluation criteria. She evaluated only the grievant in 2008-09.

(3) The grievant's non-selection when he reapplied for the position, after it was opened for recruitment, was not based on careful consideration of his record as the agreement requires. He was excluded from the interview process, even though he ranked highly.

(4) The grievant should be reinstated as head soccer coach, or granted the alternative of an award for back pay and loss of future earnings.

Employer's position: (1) The university complied with the agreement when it did not reappoint the grievant as the head soccer coach for the next academic year.

(2) The grievant did not have the right to automatic reappointment, but only to have his application for a subsequent appointment carefully considered.

(3) The university complied with its obligation to carefully consider his application. He had advance notice that he would not be reappointed without a candidate search, and had notice of the evaluation criteria that the university applied.

(4) His non-selection was based on a proper evaluation under the terms of the agreement.

(5) The decision not to reappoint him was not arbitrary, capricious, or discriminatory.

(6) While not disputing the grievant's positive contributions during his prior appointments, the university has the managerial right to make appointments; it met its burden of giving careful consideration to his application, as the agreement requires.

Arbitrator's holding: The grievance is granted.

Arbitrator's reasons: (1) The employer violated the agreement when it did not reappoint the grievant as head soccer coach for the next academic year.

(2) The head coach appointment is temporary and must be renewed for each academic year upon application of the incumbent. The grievant had consistently performed for 16 years in a manner that resulted in reappointment every year.

(3) The university has not met its burden of showing that it would not have reappointed him, regardless of the errors it committed in the evaluation and selection procedures that it applied to his application. The athletic director ignored the "instructional achievement" criterion of previous evaluations, disregarded peer reviews, considered matters not in the personnel action file, and evaluated only the grievant for reappointment, although all coach appointments were up for renewal.

(4) The university contends that subsequent reappointments are not guaranteed; that contention lacks credibility because every other head coach was reappointed that year, without being subjected to the contractually mandated evaluation procures that the university imposed for the first time on the grievant, and which it then used as the basis for denying him reappointment.

(5) The athletic director's biased evaluation violated the contractual requirement that the grievant be given careful consideration.

(6) The grievant is entitled to reinstatement for the academic year in question, and made whole for lost pay. He is to be appointed to that position every year thereafter until he declines the position, or until a recommendation for non-reappointment is properly documented and acted on in a non-prejudicial, procedurally correct manner.

(Binding Grievance Arbitration)

- Discharge
- Dishonesty
- Unlawful misconduct

City of Oakland Police Dept. and SEIU Loc. 1021 (6-5-11; 10 pp.) *Representatives:* Tracy Chriss (Oakland City Attorney's Office) for the employer; Kristina Zinnen (Weinberg Roger & Rosenfeld) for the union. *Arbitrator:* C. Allen Pool (CSMCS Case No. ARB-09-0548).

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

Employer's position: (1) The city had just cause to terminate the grievant, a police service technician, for disobeying the law and being untruthful in the internal affairs investigation of an incident when she injured her husband.

(2) The grievant admitted to backing her vehicle into her husband, seriously injuring him, and to striking him with her fist and a bottle. She was intoxicated at the time.

(3) She left the scene of a felony.

(4) She was untruthful to the police officer at the scene and to the Oakland IA investigator.

Union's position: (1) The grievant did not disobey the law and was not untruthful to the officer on the scene or in the IA investigation.

(2) She admitted backing her vehicle into her husband, but it was accidental.

(3) There is no evidence she was intoxicated.

Arbitrator's holding: The city did not have just cause to terminate the grievant.

Arbitrator's reasons: (1) The city has not presented sufficient proof of misconduct to support its claim of just cause.

(2) The vehicle incident was an accident, as the grievant and her husband testified. There is no evidence that the grievant was angry at her husband. Rather, he was upset and got out of the vehicle, and she accidentally backed over him because she forgot it was in reverse. The IA officer concluded that the incident was willful and deliberate, but on cross-examination, he acknowledged he could not be positive.

(3) Because the civilian witness statements were inconsistent about her striking her husband with her fist and a bottle, the city dropped that charge.

(4) The city has not supported the charge she was intoxicated when she struck her husband with the vehicle and then drove him to the hospital.

(5) The Hayward officer who stopped her, following a witness call that she had left the scene of the accident, said she was not driving erratically. He accompanied her to the hospital. No sobriety test was taken and no charges were filed against her.

(6) The charge of untruthfulness is not supported. At the traffic stop, her vehicle was searched and her OPD uniform was found. She told the Hayward officer she was not a police officer, but on further questioning acknowledged she was a civilian police service technician. The IA investigator called her response a lie, but it was at most an omission and not untruthful.

(7) The IA investigating officers, in recommending termination, said they relied on the Hayward police

report, but the officer did not file a report and his supervisor's report was not placed in evidence. This omission was critical to the disposition of the issue.

(Binding Grievance Arbitration)

CPER Journal Online

Public Employment Relations Board Orders and Decisions

Summarized below are all decisions issued by PERB in cases appealed from proposed decisions of administrative law judges and other board agents. ALJ decisions that become final because no exceptions are filed are not included, as they have no precedential value. 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

TRIAL COURT ACT CASES

DILLS ACT CASES

Representation Rulings

Petition to sever peace officers from state bargaining unit 7 denied: State of California.

(*State of California, Peace Officers of California, and California Statewide Law Enforcement Assn.*, No. 2214-S, 11-1-11, 11 pp. + 45 pp. ALJ dec. By Member Huguenin, with Chair Martinez and Member McKeag.)

Holding: The board denied the severance petition filed by the Peace Officers of California because the Dills Act does not include language that gives peace officers the right to belong to an employee organization composed solely of peace officers and the POC failed to demonstrate that the proposed bargaining unit it sought was more appropriate than the existing unit.

Case summary: State bargaining unit 7, the protective services and public safety unit, is represented by the California Statewide Law Enforcement Association. POC filed a petition seeking to sever from unit 7 all job classifications that are declared by law to be peace officers within the meaning of Penal Code Sec. 830.

In his proposed decision, an administrative law judge found that state-employed peace officers do not have a statutory right to a separate peace-officer-only unit and that POC failed to rebut the presumption that existing bargaining unit 7 is more appropriate than POC's proposed unit.

On appeal, the board affirmed the ALJ's recommendation that the severance petition be dismissed. PERB noted that, contrary to the language found in the Brown Act and the Meyers-Milias-Brown Act, the Dills Act does not convey the right to belong to an employee organization comprised only of peace officers. Section 3521.7 of the Dills Act grants the board the discretion to designate positions or classes of positions that have duties consisting primarily of the enforcement of state laws. However, in *State of California (Dept. of Personnel Administration)* (1989) No. 773-S, 83 CPER 56, PERB declined to do so and relied instead on the criteria set out in Sec. 3521 to make its unit determination decisions. And, in *State of California (Dept. of Personnel Administration)* (1990) No. 794, 84X CPER 22, PERB announced a rebuttable presumption in favor of the 20 state bargaining units configured in 1979 in *Unit Determination for the State of California* (1979) No. 110-S, 44 CPER 62.

In this case, the board again declined to designate positions or classes of positions whose primary duties involve the enforcement of state laws, and found that POC failed to rebut the presumption that the existing unit is more appropriate. Employees in the petitioned-for unit share a community of interest with other employees in unit 7. The record does not show there is a lack of common skills, working conditions, or duties between existing and proposed unit members.

The board also found that the salary disparity between peace officers in unit 7 and peace officers in other units does not indicate that the interests of unit 7 peace officers have been trampled or ignored. And, PERB added, the current representative of unit 7 employees has made genuine efforts to cure pay disparity issues. Where the incumbent union has been unsuccessful in achieving pay parity, POC did not show that that lack of success was due to the incumbent's failure to adequately represent the peace officers in the unit.

EERA CASES

Unfair Practice Rulings

Reversing ALJ, board finds no evidence that decision not to reemploy teacher was because of protected activity: Fallbrook Union ESD.

(*Fallbrook Elementary Teachers Assn. v. Fallbrook Union Elementary School Dist.*, [No. 2171](#), 3-1-11, 16 pp. dec. By Member McKeag, with Chair Dowdin Calvillo; Member Wesley dissenting.)

Holding: The charging party failed to demonstrate the district decided not to reemploy a second-grade teacher because of her work as a union site representative.

Case summary: The Fallbrook Elementary Teachers Association alleged the district decided not to reemploy a second-grade teacher in retaliation for her service as a site representative for the union.

The board found that the teacher engaged in union activities in an ongoing capacity, that the principal was aware of her activity, and that she suffered an adverse action when the district elected not to reemploy her.

The board found an inference of unlawful motive and nexus from the fact that the teacher had been reemployed in the two prior school years before her union activity. But, while the principal failed to comply with the evaluation requirements set out in the collective bargaining agreement, the board noted that he had failed to comply with contract requirements before the teacher began serving as a site representative. Therefore, the principal's departure from established procedures did not support an inference of unlawful motive.

The board also discounted the principal's comment to the teacher that her union duties had gotten in the way of her teaching objectives. This "relatively benign statement" does not convey union animus, the board said.

Therefore, PERB concluded the association failed to establish a prima facie case of retaliation because it did not demonstrate a nexus between the teacher's protected activity and the district's decision not to reemploy her.

In her dissent, Member Wesley found the principal's departure from the evaluation procedures and his statement about her involvement in union activities demonstrated a nexus between the teacher's protected activity and the district's decision not to reemploy her. She found little support for the district's assertion that it did not reemploy her because of her average teaching skills. Her prior evaluations were "irreconcilable" with the reasons the district advanced for its decision, Wesley said. The Court of Appeal denied the association's petition for review.

Absent request to negotiate effects of decision to cancel classes, no unfair practice found: Pasadena Area CCD.

(*Pasadena City College Faculty Assn. v. Pasadena Area Community College Dist.*, [No. 2218](#), 11-9-11, 3 pp. + 7 pp. ALJ dec. By Member Dowdin Calvillo, with Chair Martinez and Member McKeag.)

Holding: The association failed to establish that the district violated the act because it made no request to negotiate the effects of the district's decision to reduce the number of intersession classes.

Case summary: The Pasadena City College Faculty Association filed an unfair practice charge asserting that the district violated the act when it cancelled 60 percent of the classes offered during the 2010 winter intersession. An administrative law judge dismissed the complaint, finding that a community college's decision to cancel classes is outside the scope of bargaining. And, while the district gave the association no advance notice of its decision to cancel intersession classes, the association made no formal request to bargain over the effects of the district's decision during the six months between the time the decision was announced and its implementation.

On appeal, the board affirmed the ALJ's proposed decision.

No adverse action in changed office location: LACCD.

(*Baprawski v. Los Angeles Community College Dist.*, No. 2219, 11-15-11, 2 pp. + 7 pp. ALJ dec. By Member Dowdin Calvillo, with Chair Martinez and Member Huguenin.)

Holding: The charging party failed to demonstrate that she suffered an adverse action when the district changed her work location or that the office move was taken in retaliation for her protected activities.

Case summary: The charging party alleged that she was transferred to a different work location in retaliation for engaging in protected activities. An administrative law judge determined that the charging party exercised rights granted by EERA when she filed a grievance and two unfair practice charges against the district, participated in an informal settlement conference conducted by PERB, and testified at a PERB hearing.

However, the ALJ found that neither of the district administrators who were involved in her move to another office had knowledge of the charging party's protected activities. The ALJ also determined that, while the charging party felt "lonely, isolated, and punished" at her new work location, there was no objective evidence that a reasonable person would find it to be a bad place to work.

The ALJ also concluded that the charging party failed to prove that the district changed the location of her office because of her protected activity.

On appeal, the board affirmed the ALJ's proposed decision. It upheld the ALJ's credibility determination that one of the district officials responsible for the office move had no knowledge of her protected activity despite the charging party's assertion that they had chatted about it.

Teacher denied mentoring position because of her union activism: Chula Vista ESD.

(*Abram v. Chula Vista Elementary School Dist.*, No. 2221, 11-23-11, 28 pp. + 10 pp. ALJ dec. By Chair Martinez, with Members McKeag and Dowdin Calvillo.)

Holding: The district denied the charging party's reapplication for a support provider position because she was a union activist; the district failed to show it would have denied her the position absent her protected activity.

Case summary: The charging party worked as a teacher for the district for 39 years. For the last eight years of her tenure, she worked as a support provider in the beginning teacher support and assessment induction program. The BTSA program matches beginning teachers with experienced teachers, who serve in the role of mentors for a one-year term that is renewable on a year-to-year basis.

In 2008, after her retirement, the charging party's application to be a support provider for the 2008-09 school year was denied. She filed an unfair practice charge alleging that the district denied her reapplication because of her well-known union activism. An administrative law judge concluded that the charging party exercised her rights under EERA as a union activist and that the district was aware of her activities. The ALJ found ample circumstantial evidence of a nexus between the charging party's protected activity and the district's decision to deny her reapplication to be a support provider.

On appeal, the board adopted the ALJ's proposed decision. The board, like the ALJ, noted that the charging party continued to serve as a member of the union board of directors until just prior to when her

reapplication was denied. It cited disparate treatment, finding that the charging party was treated differently than 12 other similarly situated applicants who were selected to serve as support providers. The district departed from past practice when it no longer permitted retired teachers to serve in the program.

The board also observed that the charging party first was given no explanation for the denial of her reapplication, then told she did not meet the three criteria for participation in the program, and finally informed that she lacked interpersonal skills, which had never been cited in her evaluations. These variations and weaknesses in the district's explanation "raise suspicions" as to the district's motive in denying her reapplication, the board reasoned.

In addition to the circumstantial evidence, the board cited statements made to the charging party by a member of the board of education that she was rejected because of her union activity. Even though the board member's statements are hearsay, they can be used to corroborate other evidence of retaliation and, as admissions of a party, are independent evidence of retaliation, the board instructed. The district had an opportunity to call the board member as a witness to explain the statements, but failed to do so.

The board also determined that the district failed to prove it would have denied the charging party's reapplication in the absence of protected activity. There was no evidence that the charging party's interpersonal skills were deficient. To the contrary, the board cited evidence that the charging party's skills were highly praised by her colleagues and "beyond reproach."

In its exceptions, the district took issue with the ALJ's remedy ordering that the charging party be reinstated with back pay to the support-provider position, given the limited-term, year-to-year nature of the assignment. The board agreed that reinstatement was not appropriate once the positions already had been filled for the current year. The board ordered that the charging party be given back pay for the 2008-09 school year and continuing through the current term. The board pointed to its broad remedial powers and the evidence of the charging party's uninterrupted service as a support provider, and her testimony that she intended to serve as a mentor teacher into her retirement years.

PERB recognized that the lengthy back pay period reflects the length of time the case was pending before the ALJ and on appeal to the board, but said that when a respondent utilizes the board's processes, it runs the risk that exhaustion of PERB administrative procedures will increase its liability.

Finally, the board found that the charging party's attorney submitted an untimely response to the district's exceptions, but excused the late filing for good cause.

Duty of Fair Representation Rulings

No DFR violation alleged in charge: CSEA

(*Walker v. California School Employees Assn. and its Chap. 724*, [No. 2220](#), 11-16-11, 4 pp. + 12 pp. board agent dec. By Member Dowdin Calvillo, with Chair Martinez and Member Huguenin.)

Holding: The charging party failed to demonstrate that the association breached its duty of fair representation.

Case summary: The charging party alleged that the association breached its duty of fair representation in a variety of ways. A board agent found untimely those allegations that a union official personally attacked the charging party, ignored assertions of misuse of funds for the released time program, influenced the union to bring false charges against her, and removed her from her position as steward.

The board agent dismissed the allegation that the association improperly notified the employer that the charging party was no longer a steward. The allegation relates to internal union affairs, the board agent concluded, and the charging party failed to demonstrate any harm or injury to the employer-employee relationship caused by the way the association had updated its roster of representatives.

The board agent also dismissed the allegation that the association caused a food service manager to send the charging party an email informing her that she was not permitted to be in the food service department unless she was investigating a grievance. Also dismissed was the charge that the association failed to provide the charging party with union representation in a grievance filed against the food service

manager who sent the email. The charging party had emailed the association that she did not want representation by a particular staffer, and the contract allowed her to represent herself.

The charge further claimed that the association failed to allow union members a platform to discuss contract provisions in a group setting prior to a ratification election. The board agent dismissed this charge, finding it concerned an internal union matter outside of PERB's jurisdiction since there was not a substantial impact on the employment relationship.

Finally, the board agent dismissed the allegation that the association harassed and discriminated against the charging party's spouse. The board agent found insufficient factual detail to demonstrate that an unfair practice had occurred, and, citing *UTLA (Hopper)* (2001) No. 1441, 149 CPER 68, cautioned that the charging party may not have had standing to assert unfair practice allegations on behalf of another.

On appeal, the board upheld the board agent's dismissal of the charges. It also noted that the charging party's appeal failed to comply with PERB Reg. 32635(a), requiring that an appeal state the specific issues of procedure, fact, law, or rationale to which the appeal is taken. The board also declined to entertain new allegations asserted for the first time on appeal.

Adverse impact of contract terms on unmarried bargaining unit members does not state DFR breach: Baldwin Park Education Assn.

(*Hayek et al v. Baldwin Park Education Assn.*, No. 2223, 11-30-11, 5 pp. + 12 pp. board agent dec. By Chair Martinez, with Members McKeag and Dowdin Calvillo.)

Holding: Because the exclusive representative enjoys a wide range of bargaining latitude, a showing that the collective bargaining agreement negotiated by the union and the employer has an unfavorable effect on some members of the bargaining unit is not sufficient to demonstrate a breach of the duty of fair representation.

Case summary: The charging parties alleged that the union breached its duty of fair representation when it negotiated a health benefits package with the Baldwin Park Unified School District that adversely affected bargaining unit members who either were unmarried or over 40 years old. They also alleged the association failed to enforce a contract term related to salary.

A board agent dismissed the charge, finding that unions are afforded a wide range of discretion in bargaining conduct and are not expected to satisfy the interests of all its members. PERB has found no breach of the duty of fair representation simply because a negotiated agreement adversely affects some members or because some members are not satisfied with the terms of the agreement, the board agent explained. The assertion that the health benefits package adversely affected 28 percent of the bargaining unit was insufficient to demonstrate a breach of the duty of fair representation without evidence of bad faith. The allegation that the association failed to enforce the contract was dismissed as untimely since the contract was superseded by another agreement outside the statute of limitations.

On appeal, the board affirmed the board agent's dismissal. PERB refused to consider additional information presented for the first time on appeal despite the charging parties' assertion that they intended to provide more information when their case was considered by the board. The board agent's warning letter invited the charging parties to amend the charge and provide additional facts, the board said, and it was incumbent on them to provide all information to the board agent at the charge-processing stage so the board agent could fully investigate the charge and decide whether to issue a complaint.

Even if the additional information was considered, the board said, the charging parties failed to allege a prima facie case. Comparisons of the costs of coverage and its adverse impact on single employees, statements from unmarried individuals describing the financial hardships they experienced under the new plan, charts showing the breakdown of members according to their marital status, member surveys, and documents showing the employer's contributions to health benefit coverage all failed to demonstrate that the union exercised its discretion in bad faith or without honest purpose, the board emphasized. Any allegations that the association's conduct discriminated on the basis of marital status or age is outside PERB's jurisdiction, the board explained.

Allegations fail to assert facts showing breach of duty of fair representation: CSEA

(*Milner v. California School Employees Assn.*, No. 2224, 11-30-11, 4 pp. + 9 pp. board agent dec. By Member Dowdin Calvillo, with Chair Martinez and Member McKeag.)

Holding: The charging party's allegations that the association failed to file a grievance contesting a change in her lunch schedule, did not pursue race-based discrimination charges against her employer, and did not file a grievance concerning a written reprimand failed to state a prima facie case of a breach of the duty of fair representation.

Case summary: The charging party alleged that the association failed to file a grievance on her behalf when her employer, Lynwood USD, changed her lunch schedule. However, a board agent dismissed this charge, finding that CSEA did file a grievance concerning the change and resolved the matter informally at the first step of the grievance procedure. The charging party's lunch schedule was reinstituted.

The charging party also alleged that the association failed to assist her with race-based harassment and discrimination claims or to take steps to end a hostile work environment. Because the charging party did not demonstrate that CSEA had a duty emanating from the collective bargaining agreement to assist her with her discrimination complaints, the board agent found the association had no duty to pursue civil rights claims on her behalf.

The charging party also alleged that she was given an "unjustified write up" by the district. The board agent dismissed this charge as well because the charging party presented no facts that she requested assistance from CSEA. Additionally, the board agent cited the association's assertion that the charging party is responsible for filing a step-one grievance and for appealing any discipline to the district's personnel commission.

On appeal, the board affirmed the board agent's dismissal of the charge. It also found the charging party's appeal merely restated facts in the original charge and failed to reference or take issue with any portion of the board agent's determination. The board also declined to consider new evidence and allegations raised for the first time on appeal.

Representation Rulings

Noon-duty playground aides do not share community of interest with classified employees: Castaic Union S.D.

(*Castaic Union School Dist. and CSEA Chap. 401*, No. Ad-384, 8-9-10, 13 pp. By Chair Dowdin Calvillo, with Member McKeag; Member Wesley dissenting.)

Holding: The association's unit modification seeking to add part-time playground monitors to its unit of classified employees is denied because the Education Code withholds from noon-duty aides who do not otherwise work for the district the status of classified employees; there is no community of interest between noon-duty aides and classified employees.

Comment: After this decision, the legislature amended Gov. Code Sec. 3540.1(e) to change the definition of "exclusive representative" and "public school employer" so that EERA covers employees of Joint Powers Agencies and those who are neither classified or certificated.

Case summary: The California School Employees Association and its Chapter 401 filed a unit modification petition with the Castaic Union School District seeking to add part-time playground monitor positions, known as noon-duty aides, to the wall-to-wall unit of classified employees represented by CSEA. The district opposed the petition, asserting that the Education Code excludes noon-duty aides from classified employment status; therefore, the district argued, the aides are not covered by EERA. The district also asserted that the noon-duty aides do not share a community of interest with its classified employees.

A board agent rejected the district's arguments and issued an administrative determination ordering noon-duty aides to be added to the classified bargaining unit.

On appeal, the board focused on Education Code Sec. 45103(b)(4), and held that noon-duty aides are excluded from the classified service.

The board next looked at EERA Sec. 3540.1(e), which defines an exclusive representative to be an employee organization “recognized or certified as the exclusive negotiating representative of certificated or classified employees in an appropriate unit of a public school employer.” Based on this “plain language,” the majority concluded that an exclusive representative may only represent a unit of certificated or classified employees and, therefore, cannot represent employees who do not fall into one of those two categories.

The board also found there were no facts in the record to support the board agent’s finding that the noon-duty aides hold a community of interest with employees in the classified unit. “The Board agent’s determination of community of interest based solely on findings in prior decisions is insufficient to support a community of interest in the present case,” the board said.

HEERA CASES

Representation Rulings

UC police sergeants are supervisors, not entitled to entry in rank-and-file bargaining unit: UC

(*Regents of the University of California and Federated University Police Officers Assn.*, No. 2217-H, 11-9-11, 4 pp. + 25 pp. ALJ dec. By Member Huguenin, with Members McKeag and Dowdin Calvillo.)

Holding: The university met its burden of demonstrating that police sergeants are supervisors within the meaning of HEERA and must be excluded from the bargaining unit of rank-and-file police officers.

Case summary: The Federated University Police Officers Association filed a unit modification petition seeking to add police sergeants to the rank-and-file unit of police officers the association represents. The university opposed the unit modification, arguing that police sergeants are supervisors and, pursuant to Sec. 3580.5, cannot be included in the same bargaining unit with rank-and-file employees.

An administrative law judge found that sergeants perform work similar to police officers, and that much of their decisionmaking derives from their greater experience rather than the exercise of independent judgment. However, the ALJ noted that sergeants perform supervisory work on a regular basis and must weigh supervisory interests against those held by the rank-and-file. University sergeants can impose discipline, have responsibility for oversight of officers’ work, are expected to identify patterns of dereliction of duty, and take corrective action. Sergeants are assigned to investigate and make factual determinations in internal affairs complaints, closely monitor probationary employees, and determine if an individual is qualified to pass probation. Sergeants evaluate officers under their charge and are expected to observe and catalog the performance of their subordinates. Making or recommending specialty assignments is within the sergeants’ authority. Accordingly, the ALJ found support for the university’s claim that sergeants exercise independent judgment in matters that relate to the job security of officers and affect their wages, raising the potential for a conflict of interest between the sergeants and the rank-and-file officers.

The ALJ also found that, while sergeants have an affinity with their subordinates because they spend the majority of their work time devoted to a common purpose, management is entitled to the loyalty of its first line of supervisors because they make decisions affecting officers’ employment relationship with the university.

On appeal, the board agreed with the ALJ’s proposed decision. It rejected the association’s claim that the ALJ disregarded the board’s ruling in *California State University* (1983) No. 351-H, 61X CPER 18. There, the board found that sergeants employed by CSU were not supervisors and granted a union’s unit modification request that added sergeants to the rank-and-file unit. The board highlighted the ALJ’s finding that the job duties of sergeants at UC and CSU are not the same, that CSU sergeants performed supervisory work only on a sporadic basis, and that they did not exercise independent judgment in the imposition of formal discipline, termination of probationary officers, and the evaluation of subordinates.

The board also rebuffed the association’s argument that dismissal of its unit modification petition denies sergeants full bargaining rights granted by HEERA, thus disenfranchising a significant number of the U.C.

police workforce. HEERA grants supervisors the right to form, join, and participate in the activities of employee organizations that represent supervisors on all matters of supervisory employee-employer relations.

MMBA CASES

Unfair Practice Rulings

Evidence shows city would have rejected charging party on probation absent protected activity: City of Alhambra.

(*Salas v. City of Alhambra*, No. 2161-M, 2-8-11, 20 pp. dec. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: The charging party's comments at a meeting about his supervisor were not protected activity; even if his remarks were protected, the city demonstrated it would have rejected him on probation absent any protected activity because of his poor work behavior.

Case summary: The charging party alleged that the city retaliated against him by rejecting him on probation after he expressed concerns about his supervisor's negative attitude toward his crew, failure to communicate with his crew, and directives to his crew to perform tasks in an unsafe manner. The board overturned the ALJ decision. The Court of Appeal denied the petition for review.

The board found that the charging party's conduct was not protected activity because his complaints at the meeting were not related to group activity. Nor was there evidence that he and other crew members had discussed his concerns about their supervisor's conduct; the charging party was not acting as the crew's spokesperson at the meeting. The board found no evidence that the charging party's complaints were an attempt to initiate group action by the other crew members. PERB concluded that the lack of support among the other crew members for the charging party's criticism of their supervisor, coupled with the charging party's animosity toward his supervisor, established that his complaints were the result of a personal dislike between the charging party and his supervisor and were not protected activity.

The charging party's brief references to safety concerns related to the public's safety, not that of the concrete crew.

Assuming the charging party exercised protected activity, the board inferred there was an unlawful motive established because the city rejected the charging party on probation fewer than eight hours after the meeting, and because of the lack of any investigation before he was terminated. The failure of the director of public works to give the charging party a reason for rejecting him on probation, however, was not indicia of unlawful motive.

The board concluded, however, that the city proved it would have rejected the charging party on probation absent any protected activity. The charging party's conduct at the meeting "precipitated" his rejection on probation, the board said, but it did not mean he was rejected because of the complaints he expressed at the meeting. The public works director discovered at that time that the charging party had left the jobsite early on two occasions, had problems getting along with other crew members, was resistive to constructive criticism, was not willing to perform quality work, and did not respect workplace rules. Thus, while the charging party's comments at the meeting played a part in the director's decision to reject him on probation, the board found that the city proved it would have rejected him even if he had not made those statements.

Unfair practice charge filed by management employee dismissed: County of Santa Barbara.

(*Terris v. County of Santa Barbara*, No. 2181-M, 5-26-11, 3 pp. + 8 pp. board agent dec. By Member McKeag, with Members Dowdin Calvillo and Huguenin.)

Holding: PERB lacks jurisdiction to entertain an unfair practice charge alleging retaliation against a management employee. To challenge an alleged improper management classification, the charging party

must use the local unit modification process.

Case summary: The charging party alleged that the county retaliated against her for exercising her protected right to seek support for an employee organization. A board agent dismissed the charge. He found that, under the county's local rules, the charging party occupied a management position and, under Gov. Code Sec. 3507.5, PERB lacks jurisdiction over unfair practice charges filed by, or concerning, employees designated as management. Consequently, the board agent concluded that the charging party lacked standing to bring the unfair practice charge.

On appeal, the board upheld the board agent's dismissal of the charge. In response to the charging party's assertion that she was wrongfully designated a management employee by the county, the board explained that challenges to employee designations must be conducted pursuant to the unit modification procedures in the local rules. She may not use the unfair practice procedure to circumvent that process, the board added.

Charge lacks sufficient allegations that demotion was because of protected activity: City and County of San Francisco.

(*Nnachi v. City and County of San Francisco*, No. Ad-391-M, 11-9-11, 3 pp. + 11 pp. board agent dec. By Member McKeag, with Members Dowdin Calvillo and Huguenin.)

Holding: The charging party failed to allege that the city demoted him in retaliation for his protected activity, and his charge was untimely. An original envelope proved he mailed his appeal timely.

Case summary: The charging party, employed by the city's juvenile probation department, alleged he was unlawfully demoted based on his race, ethnic background, and national origin.

A board agent dismissed the charge. She noted that the board's jurisdiction is limited to resolving unfair practices as defined in the collective bargaining statutes enforced by PERB, and the board does not have jurisdiction over state, federal, or constitutional guarantees.

The board agent also found the charging party did not allege that he engaged in protected activity or that he was demoted because of that activity.

The charging party lacked standing to bring an unfair practice charge alleging that the agency failed to participate in impasse procedures in good faith said the board agent, and the charging party failed to establish that the city adopted or enforced a local rule not in conformance with the MMBA.

The board agent found that the charge was filed outside the six-month statute of limitations period. In an amended charge, the charging party asserted that he filed a grievance and an appeal with the civil service commission contesting his demotion. The board agent declined to apply the equitable tolling doctrine. She found no evidence that the grievance was filed pursuant to a bilaterally agreed-on dispute resolution procedures or that the civil service commission appeal process was a bilaterally agreed-on dispute resolution procedure.

On appeal, the board affirmed the board agent's dismissal of the charge. It found good cause to accept the charging party's untimely appeal of the dismissal to the board itself. The board found evidence from the envelope returned to the charging party by the postal service that he had mailed his appeal to the board in a timely fashion and that the city was not prejudiced by the delay. The board found, however, that the arguments raised in the appeal presented allegations that could have been alleged in the original or amended charge.

Picketing at private construction sites was unlawful pressure tactic: City of San Jose.

(*City of San Jose v. Association of Building, Mechanical, and Electrical Inspectors*, No. 2141-M, 11-10-10, 18 pp. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: The Association of Building, Mechanical, and Electrical Inspectors violated the MMBA when it picketed at four private construction sites, thereby putting undue pressure on the city to accede to its

bargaining demands.

Case summary: The city filed an unfair practice charge against the association, alleging that it violated the act by picketing four private construction sites on three days. The city charged that this conduct was an unlawful pressure tactic, and thus a failure and refusal to meet and confer in good faith. An administrative law judge dismissed the complaint because the MMBA does not contain language prohibiting secondary picketing. The board reversed the ALJ's proposed decision on appeal. In December, the Court of Appeal denied the union's petition for review.

The association represents 90 building inspectors employed by the city. On three occasions in December 2006, as negotiations between the city and the association reached impasse, association members picketed in front of private construction sites. This caused most of the construction on those days to cease, as private construction workers chose not to cross the picket line.

While the MMBA does not address the legality of either strikes or picketing, the board noted that certain public strikes have been deemed illegal pressure tactics and may support a finding that a party has demonstrated a lack of good faith in the bargaining process. And, PERB said, even where the objective of a strike is lawful, the means used to carry out that objective may be unlawful.

Citing *Pittsburg USD v. CSEA* (1985) 166 Cal.App.3d 875, 65 CPER 43, and *San Marcos USD* (2003) PERB No. 1508, 158 CPER 83, PERB noted that non-disruptive informational picketing is generally regarded as protected activity. In contrast to prior situations, the picketing in San Jose enmeshed neutral third parties in the association's dispute with the city and caused substantial disruption by shutting down four construction sites unconnected with council members. The picketing was designed to put undue pressure on the city to sign a contract with the union, which it did five days after the construction site picketing commenced.

By picketing private employers, the board said, the union violated the public trust and placed the city at an unfair disadvantage because it had no control over the activities of private employers. The MMBA and other statutes administered by PERB are designed to protect the public's interest in the continued delivery of public services. Unlike the private sector, the board continued, California's public sector collective bargaining statutes do not establish a scheme of unregulated economic weapons; PERB is vested with the discretion and authority to determine whether a party has bargained in good faith and to prohibit conduct that places undue pressure disruptive of the bargaining process. Therefore, the board reasoned that the absence of a specific statutory prohibition against secondary boycotts is not dispositive.

The board rejected the union's argument that the private sector workers at the construction sites were engaged in a protected sympathy strike. The conduct of the private employees is not at issue, the board said. It is irrelevant whether their conduct was a privileged sympathy strike.

Allegations fail to state elements of retaliation or *Weingarten* claim: City and County of San Francisco.

(*Jaroslowsky v. City and County of San Francisco*, No. 2222-M, 11-23-11, 5 pp. + 11 pp. board agent dec. By Member Huguenin, with Members McKeag and Dowdin Calvillo.)

Holding: PERB lacks jurisdiction to address the charging party's age discrimination claim. Her allegations that the city violated her *Weingarten* right to union representation and retaliated against her for engaging in protected activity failed to state a prima facie case.

Case summary: The charging party alleged that the city discriminated against her because of her age, denied her the right to union representation at a meeting with the director of the planning department when she was given a letter indicating the employer's intent to terminate her employment, and retaliated against her because of her protected activity.

A board agent dismissed the charge. She informed the charging party that PERB has no jurisdiction over a claim of age discrimination. With regard to the *Weingarten* violation, the board agent found nothing in the allegations indicating that the meeting she attended with the department director was investigatory in nature or that she requested union representation. The board agent dismissed the retaliation charge, finding no assertions as to when the charging party engaged in protected activity or how the city gained

knowledge of that activity.

PERB affirmed the board agent's dismissal on appeal. It declined to address new information referencing incidents that occurred before the original charge was filed and that were presented for the first time in the appeal.

County not required to bargain over reduction in hours in light of contractual waiver: County of Ventura.

(*SEIU Loc. 721 v. County of Ventura [Office of Agricultural Commissioner]*, No. 2227-M, 12-21-11, 3 pp. + 7 pp. board agent dec. By Member McKeag, with Chair Martinez and Member Huguenin.)

Holding: The county's unilateral decision to reduce the hours of a bargaining unit employee was permissible because the plain language of the parties' MOU gives the county the right to reduce employee hours.

Case summary: The county agricultural commissioner advised Rita Graham, a planner IV, that it was reducing her hours from ten to six workdays per pay period. The employer did not inform the union of its decision, and SEIU Local 721 filed an unfair practice charge alleging that the county executed an unlawful unilateral change.

The parties' MOU authorizes the county to "relieve employees from duty because of lack of work or for other legitimate reasons." A board agent found that "a plain reading of this contract language authorizes the County to reduce the hours of bargaining unit positions." Therefore, the board agent reasoned, the union waived its right to negotiate over the reduced hours identified in the charge.

On appeal, the board affirmed the board agent's dismissal of the charge. It upheld the board agent's conclusion that the specific contract language was a clear and unmistakable waiver of the union's right to negotiate the county's unilateral reduction in hours.

The union argued that the contract section cited by the board agent can be properly interpreted only when read in connection with other sections of the MOU. Finding no good cause as to why the union did not present this evidence to the board agent at the charge processing stage, the board declined to consider the new evidence.

Association's appeal fails to specify grounds for reversal of partial dismissal: County of Riverside.

(*Riverside County Attorneys Assn. v. County of Riverside*, No. 2228-M, 12-21-11, 6 pp. By Member Huguenin, with Members McKeag and Dowdin Calvillo.)

Holding: The association failed to demonstrate why the county's decision not to create a bargaining unit consisting of employees serving in the position of deputy county counsel was a violation of the act and why the dismissal of that allegation should be overturned.

Case summary: The Riverside County Attorneys Association sought, through a card check process, to be recognized as the exclusive representative of a unit comprised of those attorneys serving as deputy county counsel or public defenders. When the association was denied recognition, it filed an unfair practice charge against the county.

The charge was partially dismissed by a board agent. The board agent dismissed the allegation that the county violated the act by refusing to create a bargaining unit consisting of county employees in the position of deputy county counsel.

The association appealed that ruling to the board. However, PERB found that the timely appeal filed by the association failed to raise specific issues of procedure, fact, law, or rationale to which the appeal was taken. Subsequent filings were untimely. The board rejected the association's assertion that good cause prevented a timely filing. Needing additional time to collect exhibits that predate the filing of the charge does not demonstrate good cause exists for the delay, the board held. No timely request for an extension

of time was made.

Duty of Fair Representation Rulings

Union's conduct did not breach duty of fair representation: SEIU Loc. 521.

(*Chow v. Service Employees International Union, Loc. 521*, [No. 2186-M](#), 6-15-11, 3 pp. + 7 pp. ALJ dec. By Member Dowdin Calvillo, with Chair Martinez and Member McKeag.)

Holding: The charging party failed to allege sufficient facts to support her claim that the union breached its duty of fair representation by failing to assist her in rectifying what she perceived as a hostile work environment.

Case summary: The charging party alleged the union breached its duty of fair representation by failing to assist her in resolving problems with her supervisor. She also alleged the union representative repeatedly failed to return her telephone calls or emails.

A board agent determined the charge failed to state a prima facie case. She noted that, after multiple communications with the union, the charging party was informed that it could not assist her further because it could not force an interview. There is no evidence demonstrating that SEIU's decision not to pursue a grievance was arbitrary or in bad faith. Merely alleging that the union failed to return every phone call is insufficient to establish an overall pattern of unlawful conduct.

On appeal, the board affirmed the board agent's dismissal. It determined that the charging party's appeal was timely filed, but declined to consider new factual allegations raised for the first time on appeal.

Union's conduct did not breach DFR: SEIU Loc. 1021.

(*Warren v. Service Employees International Union, Loc. 1021*, [No. 2215-M](#), 11-9-11, 5 pp. + 9 pp. board agent dec. By Chair Martinez, with Members McKeag and Dowdin Calvillo.)

Holding: The charging party failed to allege sufficient facts showing that the union breached its duty of fair representation when it declined to file a grievance on her behalf.

Case summary: The charging party believed she had been denied training opportunities, passed over for promotions, and was denied volunteer positions for which she was qualified. She also believed she had been unfairly evaluated by her supervisor.

The charging party contacted her union representative who determined there was no action necessary to protect the charging party's rights and that the evaluation was not a matter subject to the grievance provisions of the MOU.

The board agent dismissed the charge. She found that the union's failure to file a grievance on the charging party's behalf did not establish a breach of the duty of fair representation. The union representative considered the concerns raised by the charging party and made a reasoned judgment that these concerns were not grievable.

On appeal, the board affirmed the board agent's dismissal. It noted that the charging party did not state the specific grounds for her appeal and presented new evidence on appeal that she was aware of prior to filing the charge. The board also found the charging party's amendment to her appeal — containing the letter of a coworker with whom she had lost contact — was filed outside the 20-day time period for challenging a dismissal. PERB found no showing of good cause of what efforts she had made to find the coworker or other circumstances showing the late filing was beyond her control.

Allegations fall short of demonstrating union conduct in violation of its duty of fair representation: SEIU Loc. 1021.

(*Joshua v. SEIU Loc. 1021*, [No. 2225-M](#), 11-30-11, 3 pp. + 9 pp. board agent dec. By Member Dowdin Calvillo, with Chair Martinez and Member Huguenin.)

Holding: The charging party failed to allege sufficient facts to demonstrate that the union failed to file a contractual grievance on his behalf, that the manner in which the union processed his grievance precluded him from obtaining a remedy, or that the alleged violation of the union bylaws impacted the employer-employee relationship.

Case summary: The charging party alleged that the union breached its duty of fair representation when it failed to file grievances against two of his supervisors. A board agent dismissed this allegation, finding that the charging party did not allege that he sought to file grievances under provisions of a collective bargaining agreement or that provisions of the agreement were violated. Citing an assertion by the union, the board agent noted that the charging party was seeking to bring a claim of discrimination and harassment against another employee, a matter that would not necessarily be covered by the contract and its grievance procedure.

Also alleged by the charging party was that the union representative did not respond in a timely manner to his email messages. A delay in filing a grievance is not, standing alone, a breach of the duty of fair representation where it is not established that the union's conduct foreclosed any remedy for the charging party, the board agent instructed. Here, she found, the charging party did not allege that SEIU failed to file a grievance, that he was unable to file a grievance on his own, or that the union's conduct prevented him from obtaining a remedy.

The charging party also alleged that the union failed to comply with its bylaws regarding the responsibilities of its stewards when representing employees. The board agent stated that PERB has no jurisdiction over internal affairs of the union unless there is a substantial impact on employer-employee relations. Here, no facts alleged by the charging party revealed such an impact.

On appeal, the board affirmed the board agent's dismissal of the charge and declined to consider new factual allegations not included in the original charge. Even if considered, the board added, the charge still did not demonstrate that the charging party wanted the union to file a grievance authorized by provisions of the collective bargaining agreement rather than have a complaint filed in another forum.

TRIAL COURT ACT CASES

Unfair Practice Rulings

Employee lacks standing to raise claim that court failed to provide union with adequate notice of impending layoffs: Marin County Superior Court.

(*Haines v. Marin County Superior Court*, No. 2216-C, 11-9-11, 2 pp. + 9 pp. board agent dec. By Member Huguenin, with Members McKeag and Dowdin Calvillo.)

Holding: The charging party lacked standing to allege that the court failed to provide the union with sufficient and timely notice of its intended reduction in force. There was no showing that the charging party was subject to layoff for engaging in protected activity or that the layoff interfered with her rights under the Trial Court Act.

Case summary: The charging party was employed as a court reporter. In 2010, the court purchased electronic recording setups and notified the union representing the court reporters, Service Employees International Union, of a possible reduction in force. One day prior to the effective date of the layoffs, the employer advised the union of its intention to lay off four court reporters. The parties discussed this as well as bumping rights and distribution of the workload to remaining employees. The charging party was one of the four court reporters laid off.

The charging party alleged that the court failed to provide sufficient notice to SEIU of the need for the reduction in force, and because of the delay, the union was unable to present cost-saving alternatives that may have saved the charging party's job. She did not explain how those facts matched the Trial Court Act.

The board agent found that the charging party, as an individual employee, lacked standing to allege violations of the rights and duties that attach to the exclusive representative and the employer. Thus, to the extent that the charging party asserted an alleged failure to meet and confer, to participate in impasse in good faith, or interference with the union's right to represent its member, the board agent dismissed the

charge.

To the extent that the charging party intended to claim that she was laid off because of her protected activity, the board agent found no facts demonstrating the charging party engaged in protected activity. The board agent found no evidence that the court deviated from its negotiated standards and procedures for determining layoff order or that it singled out the charging party.

The board agent observed that while the court did not negotiate with the union before announcing its decision to implement the reduction in force, this fact did not demonstrate a nexus between the court's decision to implement the layoffs and the charging party's protected activity. Citing *IAFF Loc. 188 v. PERB* (2011) 51 Cal.4th 259, [CPER 203 online](#), the board agent noted that a public employer's decision to implement layoffs is not within the scope of representation; only the effects of a layoff are within scope. Citing the lack of any duty on the part of the court to negotiate its decision to implement layoffs, the board agent found no evidence that the reduction in force was motivated by anti-union animus.

The board agent also did not find evidence that the court interfered with the charging party's protected rights.

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

Representation Rulings

Charging party failed to demonstrate she was not management employee unprotected by Trial Court Act: Operating Engineers Loc. 3.

(*Williams v. Operating Engineers Loc. 3*, [No. 2226-C](#), 12-9-11, 4 pp. + 7 pp. board agent dec. By Chair Martinez, with Members McKeag and Dowdin Calvillo.)

Holding: The charging party failed to allege sufficient facts to demonstrate that, as a court supervisor, she was not a management employee outside the protections afforded by the Trial Court Employment Protection and Governance Act and beyond PERB's jurisdiction.

Case summary: The charging party alleged that the union breached its duty of fair representation when it failed to represent her following her termination from employment with the Superior Court of Alameda County. The charging party described herself as a court supervisor; the union asserted that the bargaining unit it represents is a management unit.

Section 71639.1(e) of the trial court act excludes from PERB's jurisdiction employees designated as management. Citing this section, a board agent dismissed the charge. Without evidence that court supervisors are not management employees, PERB has no authority to further process the unfair practice charge, wrote the board agent.

The charging party provided the personnel policies of the court that define management employees to be the court executive officer, the chief deputy and assistants, division heads, "and other positions as designated by the Court." The board agent found no information was provided by the charging party that court supervisors are not so designated as management employees and outside the coverage of the act.

On appeal, therefore, the board affirmed the dismissal of the charge. It also noted that the appeal failed to identify the specific issues to which the appeal was taken. The board also refused to consider new allegations that were not presented in the original charge.

CPER Journal Online

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.